

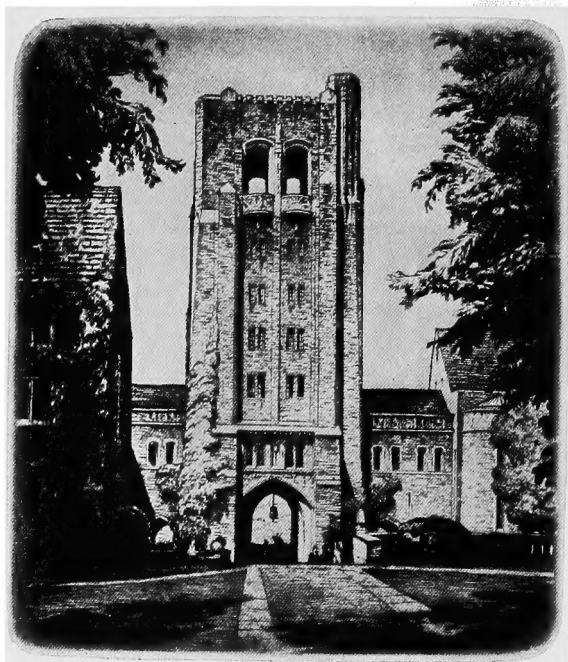


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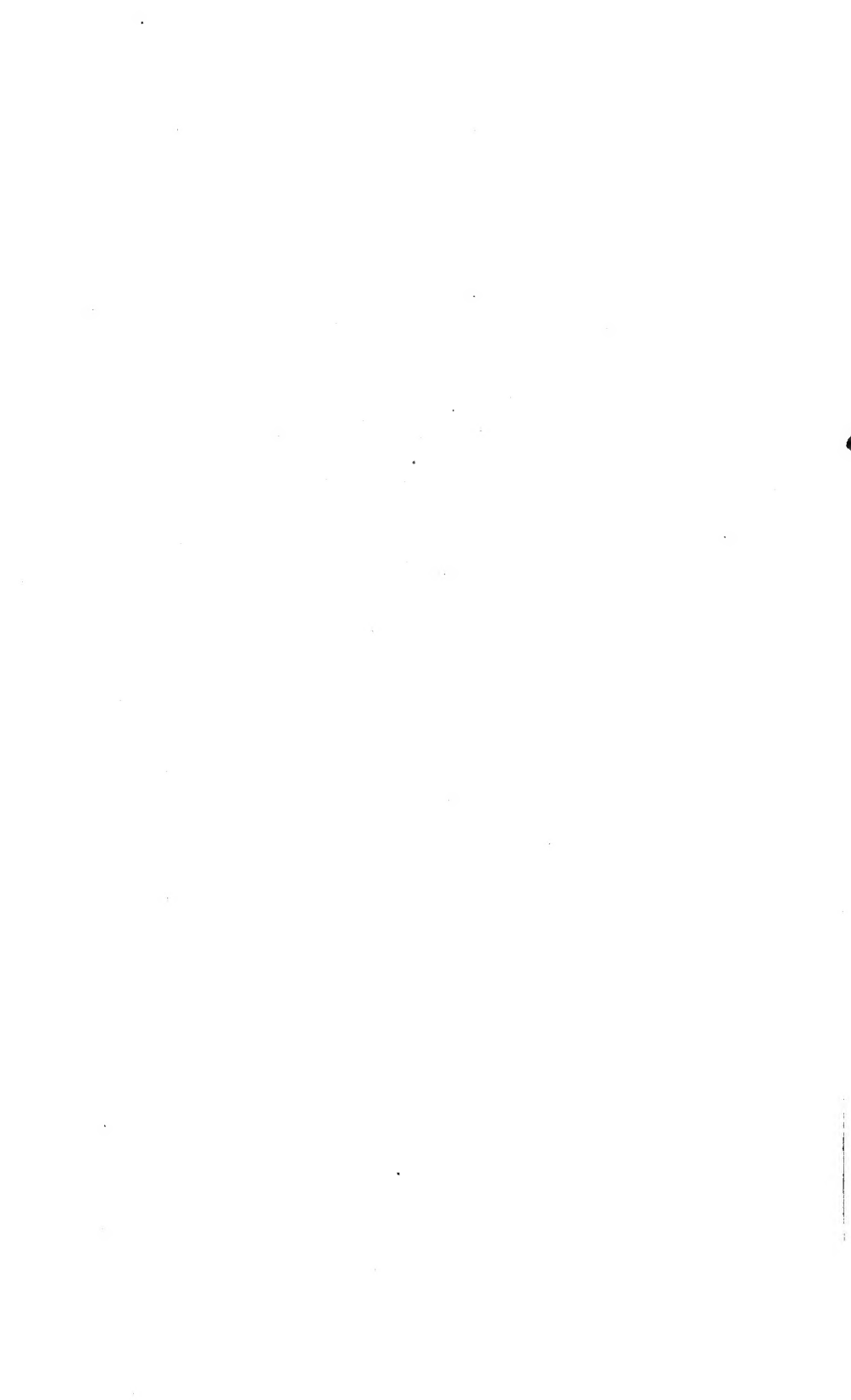
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A  
CONCISE TREATISE  
ON THE  
LAW OF WILLS

BY  
WILLIAM HERBERT PAGE

(Of the Columbus, Ohio, Bar, Professor  
of Law in the Ohio State University.)

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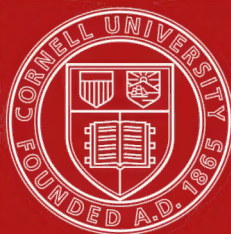
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To my friend and former instructor,  
**WILLIAM FORREST HUNTER,**  
*Dean of the College of Law of the  
Ohio State University,*  
**THIS VOLUME IS DEDICATED.**



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## PREFACE.

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The object of this volume is to set forth, in a form which is easy of comprehension for the student, and with a scope and thoroughness of statement which it is hoped will make it of value to the practicing lawyer, the law of wills, as applied by Federal and State Courts in the United States. English cases have not been ignored; subjects which are collateral to the law of wills, but necessary to its complete understanding, have been treated so as to present the subject completely and fully; the older leading cases upon the subject have been cited; but the greatest space and attention has been given to the law of wills proper, and to an exhaustive consideration of the recent adjudications upon that subject in the United States.

The law of probate and contest is discussed in connection with the law of wills, contrary to the usual custom. Questions both of substantive law and of evidence are so involved with questions of probate and contest that a complete though elementary statement of the latter subjects finally appeared to be the method of treating the subject most economical in time and space.

The law of devises and legacies is so essential to an understanding of the different methods of deducing and enforcing the intention of testator in states of fact different from those originally contemplated by him, that its presence in a text-book upon wills is not so unusual a feature as to call for comment.

The history of the law of wills is so essential to an appreciation of the present value and application of the older authorities, and to a clear understanding of the present state of the law, that an outline of the general development of the law and the particular stages in the evolution of the separate topics has proved necessary. In wills, more than in almost any other subject, development has been hastened or modified by legislation; as a result, the essential continuity of its evolution is less apparent and needs sharper emphasis.

In arrangement of topics, questions of evidence have been treated separately from questions of substantive law. Greater clearness in statement is thus obtained without sacrifice of space.

The statement of the law of wills in the space of one volume has necessitated compression of language and treatment, but it is hoped that this has not prevented that clearness of statement which is indispensable to any law book of value to student or practitioner.

WILLIAM HERBERT PAGE.

*Columbus, Ohio, February, 1901.*

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# LAW OF WILLS.

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## CHAPTER I.

### INTRODUCTION.

#### §1. The place of the will at modern law.

The common law has, in its development, built up its doctrines upon a framework composed in part largely of common law pleading and in part of such a grouping of subjects as practical convenience suggested. This method produced an outline of law whose great defect was that it contained many cross classifications; that is, that often the bases of a classification were changed during the classification itself, and that accordingly one topic which is in its nature essentially a unit is treated under several headings, while other topics are excluded from such classification entirely, and discussed incidentally as outside of the formal classification that should have embraced them. This defect of the common law has often been observed and commented on unfavorably by philosophical writers on jurisprudence. It is, however, a defect which is inevitable in a system which has gradually developed by a natural process of evolution into a system which is always following an advancing civilization in an attempt to supply the needs and wants of the people, by establishing settled rules for controlling and directing the transactions of daily life.<sup>1</sup>

<sup>1</sup> The only systems ever suggested which have been constructed in an attempt to avoid this defect have been those curiosities in the history of jurisprudence, the codes, which have occasionally been drafted by

the theoretical jurist as a substitute for existing systems. They have been quite exact in their outlines but they never have worked in practice.



The law of Wills has always been regarded at common law as a separate topic, to be considered apart from other branches of the law. This separate treatment is liable to the objection that many of the topics are necessarily treated of in the law of Real and Personal Property, the law of Procedure, the law of Persons and the like. This objection, however, is as well taken to any other title of the common law as to this one. It is a defect which can never be remedied until the whole mass of the common law is analyzed, reduced to its elements, and reconstructed in the form of a written code which shall have the weight of legislative sanction as well as the advantage of a philosophical and orderly arrangement to compensate for the partial break in the continuity of the development of our law.

The law of Wills will be discussed in this volume as it is actually treated by the courts today, including what they include and omitting what they omit.

## §2. Definitions.

*Will*.—The word “will,” in the popular meaning of the term, is a dispositive, made by a competent testator in the form prescribed by law, of property over which he has legal power of disposition, which disposition is of such nature as to take effect at the death of the testator.<sup>2</sup>

In its technical and historical sense, however, a “will” is an instrument of the type described which disposes of realty only.<sup>3</sup>

*Testament*.—An instrument which disposes of personalty only, is called a “testament”; and an instrument disposing of both realty and personalty is known as a “will and testament.”

<sup>2</sup> Bouvier's Law Dictionary, “Will;” 2 Bl. Comm. 499; Swinburne on Wills, Pt. 1, Sec. 2; Bacon's Abridg. “Wills,” A; Colton v. Colton, 127 U. S. 300.

A will may contain other provisions than that stated in the text, and may appoint an executor or guardian without making any provision for a disposition of testator's property. See Sec. 45.

<sup>3</sup> Bacon's Abridg. “Wills,” A; Coke on Littleton, Lib. II. Ch. 10, Sec. 167, note.

“But in law most commonly *ultima voluntas in scriptis* is used where lands or tenements are devised, and *testamentum* where it concerneth chattels.”

The popular meaning of "will" has so far encroached upon the technical meaning, that "will" is used indiscriminately of instruments passing realty or personalty or both. "Testament," however, is almost never used of an instrument passing realty only.

"*Testator*."—The word "testator" is very commonly used of the person making either a will or a testament.

"*Devisor*."—"Devisor" is, according to derivation, the correct term for one who makes a will, but, while used, is not common.<sup>4</sup>

"*Devisee*," on the other hand, is the word regularly used to denote one to whom realty passes by will.

"*Legatee*," is properly used to denote one to whom personalty passes by will.<sup>5</sup>

"Legatee" and "devisee" are frequently interchanged in popular usage, however.

"*Devise*" and "*bequeath*."—Of the verbs used to denote the act of making a will, "devise" is properly used of realty, and "bequeath" of personalty.

"*Devise*."—Of the nouns used to name the various forms of gift, "devise" is used of a gift of realty.

"*Legacy*."—"Legacy" is used as a gift of a sum of money.

"*Bequest*."—"Bequest" is used of a gift of personalty in general.<sup>6</sup>

None of these words have so fixed a legal meaning, however, that a gift will fail because testator does not use the words descriptive of the gift or the act of giving with technical accuracy.

A "devise" is often miscalled a "bequest,"<sup>7</sup> or "bequest" is often used to include both realty and personalty,<sup>8</sup> or is used of a gift of money alone.<sup>9</sup>

So the verb "devise" is often used to refer to personalty alone.<sup>10</sup>

<sup>4</sup> Coke on Littleton, Lib. II, Ch. 10, Sec. 17.

<sup>5</sup> Neville v. Dulaney, 89 Va. 842.

<sup>6</sup> Keating v. McAdoo, 180 Pa. St. 5.

<sup>7</sup> In re White, 125 N. Y. 544.

<sup>8</sup> Evans v. Price, 118 Ill. 593;

Allen v. White, 97 Mass. 504; Lamb v. Lamb, 131 N. Y. 227.

<sup>9</sup> White v. Mass. Institute of Technology, 171 Mass. 84.

<sup>10</sup> In re White, 125 N. Y. 544; Clark v. Clark, 46 S. Car. 230.

## CHAPTER II.

### HISTORY OF THE LAW OF WILLS AND TESTAMENTS.

#### §3. Wills in primitive nations.

The idea of a will seems to be non-existent among primitive communities of a rude type. Among such peoples, rights of private property in land do not exist, and personal property is of little value. Furthermore, the funeral rites in many of these primitive nations are occasions upon which practically all the property of the deceased is destroyed, to do honor to his spirit or to accompany him to the next world. In such a state of society there are really no property rights upon which a will can operate, and the will therefore has really no place in such a system.

#### §4. Effect of development of property rights upon the law of wills.

Where property rights become firmly established and of recognized importance in a more advanced state of society, custom indicates certain persons as the natural beneficiaries of so much of the decedent's personal property as is allowed to exist after his death.

These persons are generally those whom the sentiment of the community indicates as the most natural successors of the decedent. They are not necessarily the children of the decedent. A detailed discussion of this question belongs to sociology rather than law. As an example, it will be sufficient to say that where descent is traced through the female line, the

children of the decedent's sister may be nearer both in law and in affection than his own.<sup>1</sup>

Interests in realty remain for many ages outside the law of property entirely. Rights in realty belong to the tribe or clan as a unit. There is no individual interest of any sort recognized by the law. Progress in this direction is much slower than in the law of personalty. Finally, however, individual rights of greater or less extent are recognized in the dwelling house and surrounding yard, and ultimately in ploughland.<sup>2</sup>

As these interests become recognized by law, rules as to their descent, and the possibility of a change in this course of descent at the will of the owner, gradually grow up.

#### §5. Causes of the growing importance of the will.—Examples.

The will does not become of great practical importance until, by the development of the law of succession in different directions from the prompting of natural feeling, the law's disposition of the property of the decedent becomes sharply at variance with his real wishes. Thus, Sir Henry Maine suggests that the desire of the Roman to leave a will was due to the fact that if he died intestate his estate was divided among his unemancipated children, or failing them, among more remote relatives, to the exclusion of those children, often the most dearly loved, whom he had emancipated. In England the fixed rules of descent often gave the property to more remote heirs of the male line to the exclusion of much nearer relatives of the female line, and made inheritance from a half-brother impossible. Such a state of the law suggests that property rights have become settled under a system of law of such antiquity that it no longer coincides with the natural feeling of the times.

<sup>1</sup> Such seems to have been the rule among the ancient Germans. Tacitus *Germania*, C. 20; Pollock and Maitland, *History of the Common Law*, II, 238.

<sup>2</sup> From the organization of the feudal manor, which in some respects was a petrefaction of the pre-

existing English villages, it seems probable that the Germanic tribes who invaded England did not recognize individual ownership of any land except the dwelling-house and the ploughland. Land used for pasture and woodland belonged to the village, not to the individual.

## §6. Use of the word "will" in Greek and Roman law.

In such civilizations as those of Greece and Rome, wills were recognized by the law. The name "will" must not mislead, however. The will did not possess the same elements as ours, nor was it identical in those two systems of law. The Greek will, in many cases, at least, seems to have required the consent of the heirs for its validity. The primitive Roman will was originally a public, irrevocable act. They both resembled the English will in disposing of property after the death of the decedent in a manner different from that indicated by the law of intestate succession, but differed from it in many of the characteristic qualities of the will as it exists at English and American law. Without a careful study of the different systems of law, it is not safe to claim that the resemblance between the different types of will was any greater than that each country afforded some means, of greater or less extent, of changing the disposition of property after the death of the owner from that prescribed by law in case of intestacy.

## §7. Effect of Roman law of wills on the English law.

Long before the time that the Roman law had assumed the form in which we are most familiar with it, that of Justinian's Code, the will was recognized by their law and was in most respects strikingly like the will which is recognized by modern American and English law.

It had substantially the inherent elements which are necessary to constitute a valid will under modern systems of law, though the extrinsic formalities were different from ours.

This coincidence is in part due simply to the necessary and inevitable similarities which always occur when two nations of substantially similar civilizations, with similar rights of property recognized by law, deal with similar subject-matters. In such cases resemblance does not always arise from imitation. On the other hand, there is no doubt that the ecclesiastical law in England borrowed its law on the subject of testaments very freely and very literally from the Roman law.

To which of these two causes the similarity between the

English and the Roman law of wills is due, is a question that can not now be answered with any degree of accuracy, and can not be discussed in the limits of this subject. The trend of modern research is to recognize the Roman law, probably of earlier date and form than Justinian's Code, as a very important factor in pre-Norman English law.<sup>3</sup>

### §8. English will in pre-Norman period.

In England, prior to the Norman Conquest, during the so-called Anglo-Saxon period, the will passing both real and personal property was not unknown. The present state of our knowledge of legal history does not warrant us in saying more than that among the great it seems to have been the general rule to leave a will.<sup>4</sup>

Cnut's Laws, II, 70, seem to assume that a man who died without making a will did so, not purposely, but through negligence or because of sudden death. It is probable that the legality of the will was well established, whatever may have been the custom among the middle or lower classes as to availing themselves of the privilege.<sup>5</sup>

It has been suggested, and is quite possible, that this Anglo-Saxon will was not revocable.

"We can not think that an instrument bearing a truly testamentary character had obtained a well recognized place in the Anglo-Saxon folk-law. With hardly an exception these wills are the wills of very great people, kings, queens, king's sons, bishops, earldormen, king's thegns. In the second place, it is plain that in many cases the king's consent must be obtained

<sup>3</sup> The Germanic tribes towards the south were greatly influenced by Roman law, and so were the Celts of Britain. Exactly to what extent the Germanic tribes which invaded Britain were influenced by Roman law through either of these sources, or through the influence of the Roman law in force upon the continent, is a question that can not be answered in our present

imperfect knowledge of early English law. Internal evidence, as far as it goes, tends very strongly to show that the influence was much earlier and much greater than would be inferred from the earlier writers upon the history of English law.

<sup>4</sup> Pollock and Maitland's History of English Law, Vol. II, 318.

<sup>5</sup> Pollock and Maitland's History of English Law, Vol. 2, p. 320.

if the will is to be valid, if the [will] is to 'stand.' That consent is purchased by a handsome heriot. Often enough the [will] takes the form of a supplicatory letter addressed to the king. In the third place, an appeal is made to ecclesiastical sanctions: a bishop set his cross to the will; the torments of hell are denounced against those who infringe it. Then again, even in the eleventh century, it seems to be quite common that the [will] should be executed in duplicate or triplicate, and that one copy of it should be at once handed over to the monastery which is the principal donee, and this may make us doubt whether it is a revocable instrument."<sup>6</sup>

### §9. Divergence of history of will and testament under feudalism.

The Norman Conquest (1066 A. D.) hastened a set of changes in the social system of England, the result of which is known conveniently by the name of feudalism. The old idea of the feudal system, as a clear, definite, and complete set of institutions, which existed all over Western Europe for six centuries, has been too often refuted to need discussion here. That there were certain peculiarities of organization in Western Europe during those centuries is admitted by all. The error lies in assuming that because this organization is now known as the feudal system, it must have been the same in every country and in every century.

The feudal system paid great attention to land and the consequences arising out of its ownership, and but little attention to personal property. As a result we must distinguish between the history of the will which passes real property and that of the testament which passes personal property; and the distinction here begun will be found to run into the substantive law of wills as well as the history of the law.

Still, the name feudal system is a most convenient general term under which to group the different systems of social organization which in so many various and varying forms was found in Western Europe from in the ninth and tenth centuries

<sup>6</sup> Pollock and Maitland's History of English Law, Vol. 2, pp. 318, 319.

out of earlier beginnings on down to the fifteenth and sixteenth centuries.<sup>7</sup>

### §10. The will at common law abolished by feudalism.

The theories of land ownership which grew up under the feudal system ultimately proved fatal to the validity of the will whereby real property was devised. The reasons which the courts gave for finally holding that real property could not pass by will may roughly be given as follows:

*First.*—The underlying theory of land ownership was that land was a trust fund for raising a military force. The tenant of the higher classes was the captain or the soldier; the tenant of the lower classes was to support the soldiers by his agriculture. The natural and ordinary duration of the estate was, at the outset, for the life of the first tenant; for as it was the ability and merit of the first tenant that had been rewarded by the grant originally, it ought in the feudal view to terminate with his death. Such estate could not in the nature of things be devised.

But if as a special favor such grant survived to the heirs of the first tenant, there was still no justification for allowing such tenant to devise these lands to others than his heirs, who did not inherit the merits of the first taker.

*Second.*—The feudal system was soon made a means of extorting money from tenants of each class in favor of their respective superiors. These rights of extortion, as, for instance, wardship, the right of the superior lord to the profits of the lands of his tenants during minority, and marriage, the right of the superior lord either to auction off his ward in marriage, or to compel such ward to purchase freedom to remain unmarried, would have been as thoroughly wrecked by the will as they were afterwards by the use. As long, therefore, as the law was controlled by feudal considerations, it denied validity to the will.

*Third.*—The question of seisin in its technical sense rapidly

<sup>7</sup> Indeed, in some of the smaller German states feudalism as a political force is powerful to this day.



became paramount in land law. Land, when transferrable at all, could be transferred only by livery of seisin or by proceedings in a court of record. The will could be classed under neither of these heads, and therefore could not be recognized at law.

It may be urged that most of this reasoning is purely verbal, and that a will was not necessarily antagonistic to feudalism. This is undoubtedly true, and its truth is shown by the fact that the will did persist for some considerable time after the establishment of the feudal system.<sup>8</sup>

However, verbal reasoning prevailed, as it did so often at the common law, and by the end of the thirteenth century the common law courts had come to hold uniformly that real property could not be devised by will at the law of England.<sup>9</sup>

The reason for this rule seems to be in part the fear of undue influence by the religious men in the last hours of testator's life.<sup>10</sup>

"We are told by a plaintive monk that a few years after Glanvil's book was written some new rule was put in force at the instance of Geoffrey Fitz Peter, one of Glanvil's successors in the justiciarship, so as to invalidate a gift which William de Mandeville, Earl of Essex, had made on his death bed to Walden Abbey. The ministers of the devil had of late years established a law, which until then had never been heard of, to the effect that no one, even though he be one of the great, when he is confined to his bed by sickness, can bequeath by his last will any of the lands or testaments that he has possessed, or grant them to those men of religion whom he loves above all others." <sup>11</sup>

<sup>8</sup> Pollock and Maitland's History of English Law, Vol. 2, p. 321.

<sup>9</sup> Pollock and Maitland's History of English Law, Vol. 2, pp. 323-327.

<sup>10</sup> Glanvil, VII, 1.

<sup>11</sup> Pollock and Maitland's History of English Law, Vol. 2, p. 325, cit-

ing Monast. IV, 147, beginning: "*Novi igitur recentesque venerunt qui hanc inauditam saeculo legem a ministris zabuli noviter inventam statuere decreverunt.*" William de Mandeville died 1189.

### §11. Attempt to revive wills under statute De Donis.

After the will had lost its standing at common law, the statute De Donis was invoked to give it effect. That statute (13 Ed. I, Stat. I, C. I, Section 2, A. D. 1285) provided that the wish of the donor should be observed in grants of land according to the form of his deed of gift (*secundum formam in charta doni sui*). It was questioned at once if the insertion in the deed of the words "to him, his heirs, assigns and devisees" would not make land devisable. The courts finally answered this question in the negative, and in the thirteenth century it became settled doctrine that freehold estates in land were not devisable, whether they were common law estates, or estates under the statute De Donis.<sup>12</sup>

### §12. Exceptions to common law rule.

To this rule there were some exceptions made by local custom. In Kent, and in some boroughs and scattered manors, lands remained devisable. An estate for years, being a mere chattel interest, could be disposed of by testament; though, as this last class is not a freehold interest in lands, it is no exception to the rule already stated.<sup>13</sup>

### §13. Wills in equity.

The rise of equity in the fourteenth and fifteenth centuries produced a practical revolution in the law of wills. The old legal rules still remained nominally in full force and effect. But the owner of land could deed it to a grantee to hold to the grantor's use, or any use that he might appoint, and equity would enforce this use against the grantee.

The original grantor could appoint to this use by will. Putting it in another way, he could not devise the land, but he could devise the use, which carried with it all the beneficial results of ownership. By the early part of the fifteenth century this method of devising uses was quite common.<sup>14</sup>

<sup>12</sup> Pollock and Maitland's History of English Law, Vol. 2, p. 27. on Littleton. Lil. II, Cap. 10, Sec. 167.

<sup>13</sup> Black. Com. II, p. 374; Coke <sup>14</sup> Black. Com. II, 375.

#### §14. The Statute of Uses.

The power to devise the land by the roundabout method of deeding it to a use and devising the use was only one of the many results that flowed from the doctrine of uses. The feudal theory of land ownership was attacked by equity from every side. A great effort of the reactionary party was made through Parliament, and in 1535 the Statute of Uses (27 Hen. VIII, Ch. 10) was passed. This statute provided that the seisin should follow the use; that is, that a grant to A to the use of B should be in law a grant to B. Hence, a deed to a grantee reserving the use to the grantor did not take the legal title out of the grantor, and a deed to grantee to the use of a third person was in legal effect a deed to such third person. It became impossible under this statute to create a use separate from the legal estate, and as it was impossible in law to devise the legal estate, the abolition of uses made it once more impossible to devise lands at all.<sup>15</sup>

The sequel to the statute of uses is a most interesting example of how difficult it is to foresee the practical effect of new departures in legislation. This statute overthrew the existing law of wills, though there is nothing to make us think that such a result was intended by Parliament, while the speed with which they undid this result makes it probable that this effect of the statute of uses was unforeseen. On the other hand, it was intended by this statute to abolish equitable estates, and, as is well known, this purpose proved a practical failure. Conveyancers interposed a second trustee, deeds were made to A for the use of B in trust for C, and C's equitable estate was protected as carefully after the statute as it was before, and under the new system could be devised even more freely and easily than before.

#### §15. The Statute of Wills.

The law made a will of lands impossible for just five years. In 1540 the Statute of Wills (32 Hen. VIII, Cap. 1) was passed, to take effect July 20, 1540. This act was so loosely drawn that in 1542 and 1543 it was thought advisable for Par-

<sup>15</sup> Black. Com. II, 375.

liament to pass a statute to interpret the Statute of Wills, and accordingly the Statute of 34 and 35 Hen. VIII, Cap. 5, was passed.

The effect of these two acts was to enable all persons except feme-coverts, infants, idiots and persons of non-sane mind and memory to devise by will and testament, in writing, two-thirds of their land held by Knights's service and all lands held by socage tenure. The beneficiary could not be a corporation by the terms of these statutes.<sup>16</sup>

<sup>16</sup> Some of the leading sections of 32 Hen. VIII, Cap. 1, are as follows:

Sec. I. (4). That all and every person and persons having, or which hereafter shall have, any manors, lands, tenements or hereditaments holden in socage or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments holden of the king, our sovereign lord, by knight's service, by socage tenure in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knight's service from the twentieth day of July, in the year of our Lord God MDXL, shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, statute, or other thing heretofore had, made or used to the contrary notwithstanding.

Sec. II. And that all and every person and persons having manors, lands, tenements or hereditaments holden of our sovereign lord, his heirs or successors, in socage or of the nature of socage tenure in chief,

and having any manors, lands, tenements or hereditaments holden of any other person or persons in socage or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments holden of the king, our sovereign lord, by knight's service, nor of any other lord or person by like service, from the twentieth day of July, in the said year of our Lord God MDXL, shall have full and free liberty, power and authority to give, will, dispose and devise, as well by his last will or testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements and hereditaments, or any of them, at his free will and pleasure; any law, statute, custom or other thing heretofore had, made, or used to the contrary notwithstanding.

Sec. IV. And it is further enacted by the authority aforesaid, That all and singular person and persons having any manors, lands, tenements or hereditaments of estate of inheritance holden of the king's highness in chief by knight's service, or of the nature of knight's service in chief, from said twentieth day of July shall have full power and authority, by his last will, by writing, or otherwise by

## §16. Abolition of feudal tenures.

During the Civil War in England and the Protectorate of Cromwell (1642-1659) the feudal incidents of the ownership of real property were almost wholly disregarded. When Charles II was restored (1660) it was found impossible to revive these obsolete feudal incidents, and, accordingly, by statute, knight service was, in legal effect, reduced to free and common socage. The effect of this statute upon the law of Wills was, therefore, to enable the owner to dispose by will of all his estate held in fee simple.

Since 1660 other statutes have been passed from time to time in England and in the United States, controlling the right to make a will in many ways. From these statutes

any act or acts lawfully executed in his life, to give, dispose, will or assign two parts of the same manors, lands, tenements or hereditaments in three parts to be divided, or else so much of the said manors, lands, tenements or hereditaments as shall extend or amount to the yearly value of two parts of the same in three parts to be divided, in certainty and by special divisions, as it may be known in severalty, to and for the advancement of his wife, preferment of his children, and payment of his debts, or otherwise at his will and pleasure; any law, statute, custom or other thing to the contrary thereof notwithstanding.

Sec. VII confers power similar to Sec. IV over land holden from the king or from any other person by knight's service.

Sec. X confers powers similar to Secs. IV and VII over lands holden by knight's service of other persons than the king; and over other tenements in socage, powers similar to those given in Secs. I and II.

Sec. XI confers powers similar to Secs. IV, VII and X over lands holden of the king by knight's service; and over lands holden in socage, powers similar to those given in Secs. I, II and X.

34 and 35 Hen. VIII, Cap. 5, is entitled "The bill concerning the explanation of wills."

Some of the leading provisions are here given:

Sec. III. . . words of *estate of inheritance* by the authority of this present parliament, is and shall be declared expounded, taken and judged of estates of fee-simple only.

Sec. XIV. And it is further declared and enacted by the authority aforesaid, That wills or testaments made of any manors, lands, tenements or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person *de non sane* memory shall not be taken to be good or effectual in law.

and the rules of common law, which are still unmodified by statute, have been evolved the rules which are discussed in detail in this book.

In this chapter the history of the law of Wills is considered only to the extent to which it determines the place of wills and testaments at our law; the further history of the law of Wills which concerns itself with the separate topics discussed in detail in this book being reserved for discussion in the respective chapters devoted to each topic.

### §17. Testaments in pre-Norman times.

The testament passing personal property has a less complicated history.

In pre-Norman times the power to dispose of personal property by testament was firmly established. It is not clear whether this power applied to the whole of testator's personal property or to a part only.

### §18. Doctrine of reasonable parts.

By Glanvil's time (A. D. 1187) it was settled that the power of disposing of personal property by testament had limits in some cases. If the testator left neither wife nor children, he could dispose of all of his personal property by testament; but if he left either wife or children, he could dispose of one-half of his personal property by testament, the other half going to the surviving wife or children, as the case might be; while if he left both wife and children, he could dispose of but a third of his personal property (known as the "dead's part"). One third of his personal property (known as the "wife's part") went to his wife; the remaining third (known as "child's part" or "bairn's part") going to the children.<sup>17</sup>

There has been some dispute whether the rules above stated were the common law of England or only local customs.

The weight of authority is that they were the common law of England, and were in force in Glanvil's day over the whole of England.

<sup>17</sup> Blackstone, III, 492.

**§19. Power of testator to dispose of his entire personal property.**

This rule ceased to be the law in a great part of England, so gradually that Blackstone says that it is impossible to trace out when first this alteration began, and so thoroughly that it was possible with some show of truth to deny that it ever had been the law. It was established by the reign of Charles I (1625-1649) that the general rule in England was that testator could dispose by testament of any or all of his personal property, except where the relics of the old law still lingered, under the name of local custom, as in Yorkshire and London. These so-called local customs were one by one uprooted by Parliament in a series of repealing statutes, and finally the general statute, 1 Vict. C. 26 (1837), gave the testator the general power of disposing of the whole of his personal property.

As in the case of the will, the history of the development of law upon the various topics arising under the law of testaments will be considered under their respective chapters.

**§20. History of the law of wills and testaments in the United States.**

The English colonists who settled the Atlantic coast of what is now the United States in the seventeenth century brought with them the common law of England as modified by the Statute of Wills. Accordingly, where not expressly limited by local statute, the power of a testator to dispose of his realty, as well as his personalty, by last will and testament, has always been recognized in the courts of the United States. Not only was American law from the first held to be modified by the Statute of Wills, but the feudal system was never generally held to be a part of our law as being unsuited to our institutions.

The law of Wills in the United States is thus based upon English law, and continuous with it in such states as were founded by the English. In the South and West of the United States, however, the original European stock was not English, but French and Spanish.

In these sections, therefore, marked traces of Roman law, as modified by the French and Spanish, are to be found.

Louisiana has put into statutory form the French law, which in turn was based upon the Roman. In California and some of the territories adjoining on the southeast the law of Wills is in part of Spanish origin.

From these states statutes have been adopted in some other states. The net result may be said to be that in the greater part of the United States the law of Wills is of pure English origin, modified by modern statutes, showing some influence of Spanish and French law in some of the Southern and Western states; while in Louisiana the law of Wills is of French-Roman origin, gradually yielding in some respect to the influence of the remaining common law states.



## CHAPTER III.

### NATURE AND EXTENT OF TESTAMENTARY POWER.

#### §21. General extent of legislative control before testator's death.

The nature and extent of testamentary power must be fully understood and appreciated at the outset of the study of the subject in order to appreciate its position in our jurisprudence and the force and effect of statute law.

The right to make a will is in no sense a property right. It did not exist for realty at common law, nor at one time for more than a fraction of a testator's personalty. It is therefore not a right protected by any of the constitutional provisions whereby property is protected.<sup>1</sup>

It is purely a statutory right, subject to the control of the legislature. After real property has been acquired the legislature may add new disqualifications and limitations to testamentary power. Thus, after real property was acquired the legislature imposed the new restriction that a testator who left issue surviving him could not leave property to a charity unless by a will made at least a year before his death. This statute was held to be perfectly constitutional as to such previously acquired property.<sup>2</sup>

Even after a will has been executed the legislature may add new requirements as to form of the will, capacity of testator and the like, at any time before testator's death; and if the legislative intent is manifest that such rules are to be applied

<sup>1</sup> Patton v. Patton, 39 O. S. 590.

<sup>2</sup> Patton v. Patton, 39 O. S. 590.

to wills already executed, no constitutional restrictions stand in the way.<sup>3</sup>

Thus, when the state constitution, making devises of land to educational associations and corporations void, was adopted after the will was executed, and before testator died, it was held that such devises in the will were thereby made void.<sup>4</sup>

But unless the intention of the legislature to make the statute apply to wills already executed is manifest, the courts construe statutes, which change the law of Wills, as applying only to wills executed after the statute is passed.<sup>5</sup>

Thus, where a married woman executed a will which, when made, was invalid because there were no witnesses thereto, and subsequently the legislature provided that no witnesses should be necessary, it was held that the statute was not retroactive, and that the will was invalid.<sup>6</sup> So where a testator made a will at a time when he lacked capacity, a subsequent statute giving capacity to persons of testator's class was held not to retroact, and the will was invalid.<sup>7</sup> And a statute providing that marriage shall operate as a revocation of a will made before marriage, which will does not on its face show that

<sup>3</sup> *In re Bridger* [1894], 1 Ch. 297; [1893], 1 Ch. 44; *Hoffman v. Hoffman*, 26 Ala. 535; *Learned's Estate*, 70 Cal. 140; *Hargroves v. Redd*, 43 Ga. 142; *Perkins v. George*, 45 N. H. 453; *Wakefield v. Phelps*, 37 N. H. 295; *Loveren v. Lamphrey*, 22 N. H. 434; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Clayson's Will*, 24 Oreg. 542; 34 Pac. 358; *Long v. Zook*, 13 Pa. St. 400; *Langley v. Langley* 18 R. I. 618; 30 Atl. 465; *Elcock's Will*, 4 McC. (S. Car.) 39; *Blockman v. Gordon*, 2 Rich. Eq. (S. Car.) 43; *Henderson v. Ryan*, 27 Tex. 670; *Hamilton v. Flinn*, 21 Tex. 713.

<sup>4</sup> *Blackbourn v. Tucker*, 72 Miss. 735.

<sup>5</sup> *Iane's Appeal*, 57 Conn. 182;

*Hoffman v. Hoffman*, 26 Ala. 535; *Powell v. Powell*, 30 Ala. 697; *Gregory v. Oates*, 92 Ky. 532; *Clayson's Will*, 24 Oreg. 542; *Packer v. Packer*, 179 Pa. St. 580; *Kurtz v. Saylor*, 20 Pa. St. 205; *Camp v. Stark*, 81 Pa. St. 235; *Shinkle v. McCrock*, 17 Pa. St. 159; *Greenough v. Greenough*, 11 Pa. St. 489; *Barr v. Graybill*, 13 Pa. St. 396; *Murry v. Murry*, 6 Watts, 353; *Mullen v. McKelvy*, 5 Watts, 399; *Giddings v. Turgeon*, 58 Vt. 106.

<sup>6</sup> *Packer v. Packer*, 179 Pa. St. 580.

<sup>7</sup> *Gregory v. Oates*, 92 Ky. 532; *Burkett v. Whittemore*, 36 S. Car. 428; *Mitchell v. Kimbrough*, 98 Tenn. 535.

it was made in contemplation of marriage, is held not to be retroactive. Hence it does not apply where the marriage was contracted before the statute was passed.<sup>8</sup> But it does apply where the will was made before the statute was passed, and the marriage was contracted afterwards.<sup>9</sup> Statutory rules of construction are also held not to be retroactive.<sup>10</sup>

## §22. General extent of legislative control after testator's death.

Upon the death of testator, property rights become fixed. If his will is valid, the interest of his legatees and devisees becomes a vested property right; if his will is invalid, the vested property right accrues to his heirs and next of kin.<sup>11</sup> The legislature can not, therefore, by statute affect the validity of wills executed by testators who have died before the statute was passed. If the will was invalid under the law in force when testator died, no subsequent statute can make it valid;<sup>12</sup> while if the will is valid, no subsequent legislation can avoid it.<sup>13</sup> The legislature may, after testator's death, alter the law as to settlement of estates so as to include the estate of one already deceased.<sup>14</sup> Where, at testator's death, the devisee of a contingent remainder could not take on account of alienage, but by change of statute before the remainder vested, such disability was removed, it was held that such devisee could take, the state never having acquired title.<sup>15</sup> The law, too, may be so changed as to affect collateral and prospective rights of persons not beneficiaries nor heirs of testator. Thus, after a testator had died, leaving a legacy to a married woman, the legislature could alter the law so as to vest the legacy in the

<sup>8</sup> *Swan v. Sayles*, 165 Mass. 177.

<sup>9</sup> See Sec. 281.

<sup>10</sup> *Butler v. Parochial Fund*, 92 Hun, 96.

<sup>11</sup> *Jones v. Robinson*, 17 O. S. 171; *McCarty v. Hoffman*, 23 Pa. St. 507.

<sup>12</sup> *Remington v. Bank*, 76 Md. 546; 25 Atl. 666; *Chwatal v. Schreiner*, 148 N. Y. 683; *Hartson v. Elden*, 50 N. J. Eq. 522.

<sup>13</sup> *White v. Keller*, 68 Fed. Rep. 796; *Richter v. Bohnsack*, 144 Mo. 516; *People v. Powers*, 147 N. Y. 104.

<sup>14</sup> *Bredenburg v. Barlin*, 36 S. Car. 197 (giving surviving executor power to sell lands which the will directed to be sold).

<sup>15</sup> *McGillis v. McGillis*, 154 N. Y. 532.

married woman free from any control of her husband, if the statute were passed before the husband reduced the legacy to his possession.<sup>16</sup>

**§23. Power of testator to exclude his wife and children from a share in his estate.—General rule.**

In many states the wife has a dower interest in her husband's realty and a distributive share in his personal estate, from which he can not exclude her by will.<sup>17</sup> Apart from this provision for the benefit of the wife, the general rule is that a testator may by will exclude both wife and children from sharing in his estate by devising the whole of his property to others by a will executed in due form of law.<sup>18</sup> In Texas, at one time, a testator could deprive his surviving children of only one-fourth of his estate.<sup>19</sup> This statute was subsequently repealed and testator given full power to disinherit his children.<sup>20</sup> In Missouri, under the act of 1895, it seems that a wife who leaves no descendants can not exclude her husband from a share of one-half of her estate, subject to her debts.<sup>21</sup>

In Louisiana a second wife can take by will only one-third of her husband's estate if he left children surviving by his first

<sup>16</sup> *Trapnell v. Conklyn*, 37 W. Va. 242.

<sup>17</sup> See Sec. 137. In many states the husband has a similar interest in his wife's property. *Hays v. Seavey* (N. H.) (1900) 46 Atl. 189.

<sup>18</sup> *Mackall v. Mackall*, 135 U. S. 171; *Henry v. Hall*, 106 Ala. 84; *Knox v. Knox*, 95 Ala. 495; *In re Kaufman's Estate*, 117 Cal. 288; *Wilson's Estate*, 117 Cal. 262, 280; *Taylor v. Cox*, 153 Ill. 220; *McCommon v. McCommon*, 151 Ill. 428; *Manatt v. Scott*, 106 Io. 203; *Bennett v. Hibbert*, 88 Io. 154; *Barlow v. Waters* — Ky. —; 28 S. W. 785; *Hess's Will*, 48 Minn.

504; *In re Merriman*, 108 Mich. 454; *McFadin v. Catron*, 120 Mo. 252; *Farmer v. Farmer*, 129 Mo. 530; *Maddox v. Maddox*, 114 Mo. 35; *Couch v. Gentry*, 113 Mo. 248; *Smith v. Smith*, 48 N. J. Eq. 566; *Boylan v. Meeker*, 15 N. J. Eq. 310; *Hubbard v. Hubbard*, 7 Oreg. 42; *Nicholas v. Kershner*, 20 W. Va. 251.

<sup>19</sup> *Paschal v. Acklin*, 27 Tex. 173.

<sup>20</sup> *Henderson v. Ryan*, 27 Tex. 670; *Hamilton v. Flinn*, 21 Tex. 713.

<sup>21</sup> *Richter v. Bohnsack*, 144 Mo. 516. So in Kansas. *Nueber v. Shoel* (Kan. App.), 55 Pac. 350.

marriage.<sup>22</sup> So a testator may exclude other relatives from sharing in his estate.<sup>23</sup>

#### §24. Exclusion of wife and children in favor of mistress or illegitimate children.

In some states a gift in excess of a certain fraction of testator's property to his illegitimate children, to the exclusion of his wife or legitimate children, is forbidden by statute. Thus, in South Carolina a testator having a wife and legitimate children can not devise more than one-fourth of the clear value of his property to his mistress or illegitimate children.<sup>24</sup> No device is permitted to evade this prohibition. So when testator devised one-fourth of his property to his illegitimate child, and, in addition to this, left a legacy to his executor, with the secret understanding that it was to be used for the illegitimate child, such legacy was held void.<sup>25</sup>

In some states it is forbidden by statute for a testator to devise property to his mistress, to the exclusion of his wife or children.\* Unless there is such a statute, however, no rule of law prevents a testator from devising property to an illegitimate child in existence when the will is executed, even to the exclusion of his legitimate children.

#### §25. Exclusion of wife and children in favor of charities.

In many states it is provided by statute that a testator can not by will devise or bequeath property to a charitable corporation or charitable use unless by a will executed a specified

<sup>22</sup> Theurer's Succession, 38 La. Ann. 510.

<sup>23</sup> Cutler v. Cutler, 103 Wis. 258.

<sup>24</sup> Breithaupt v. Bauskett, 1 Rich. Eq. 465, Appx; Hull v. Hull, 2 Strob. Eq. 174; Taylor v. McRa, 3 Rich. Eq. 96; Beaty v. Richard-

son, — S. Car. —; 46 L. R. A. 517.

<sup>25</sup> Gore v. Clark, 37 S. Car. 537; 16 S. E. 614; 20 L. R. A. 465.

\*Gibson v. Dooley, 32 La. Ann. 959.

time before the death of testator.<sup>26</sup> The length of time that must in such cases intervene between the execution of the will and the death of the testator, in order to render the will valid, depends upon the local statute, and varies from thirty days to a year in the different states. In such a case the only persons who can take advantage of the invalidity of the will are those to whom the property would pass if the devise to the charity were defeated. Thus, in a recent Ohio case testator devised to the Ohio State University a certain amount, to go to his nephews if the devise should fail; provided that if his daughter should ratify the bequest to the university the said nephews should not in such case receive such bequest. Testator died within the year, leaving a daughter, who ratified the bequest. It was held that the nephews in such case could not take advantage of the invalidity of the bequest.<sup>27</sup>

The fact that the beneficiary is a corporation, authorized by its charter to take devises and legacies, does not prevent the application of these statutes as to the time that must elapse between testator's execution of the will and his death.<sup>28</sup> Under these statutes the date of the execution of the will is material. When the different acts of execution take place at the same transaction the date of execution is, of course, purely one of fact. If they take place at different occasions the date of the execution of the will is the date when the last act required by statute was performed. Thus, a testator signed his will and on a later occasion, three months afterward, acknowledged it as his will before two witnesses. The will was controlled by Pennsylvania law, by which the witnesses were required to

<sup>26</sup> *Kelley v. Welborne* (Ga.), 1900; 35 S. E. 636; *Wetter v. Habersham*, 60 Ga. 193; *Schmidt's Estate*, 15 Mont. 117; *Fairchild v. Edson*, 154 N. Y. 199; *Kavanaugh's Will*, 125 N. Y. 418, affirming 53 Hun. 1; *Trustees O. S. U. v. Folsom*, 56 O. S. 701; *Luebke's Estate*, 179 Pa. St. 447; *Knight's Estate*, 159 Pa. St. 500; *Hodnett's Estate*, 154 Pa. St. 485; *Hoffner's Estate*, 161 Pa. St. 331; *Frazier v. Church*, 147 Pa. St. 256; *Reimensnyder v.*

*Gans*, 110 Pa. St. 17; *Milwaukee Protestant Home for Aged v. Becher*, 87 Wis. 409; 45 Am. & Eng. Corp. Cas. 562.

<sup>27</sup> *Trustees v. Folsom*, 56 O. S. 701. To a like effect is *Trustees of Amherst v. Ritch*, 151 N. Y. 282; *Allen v. Stevens*, 49 N. Y. S. 431.

<sup>28</sup> *Kavanaugh's Will*, 125 N. Y. 418, affirming 53 Hun. 1; *Fairchild v. Edson*, 154 N. Y. 199, affirming 77 Hun. 298.

attest but not to subscribe. It was held that the will was executed upon the day when testator acknowledged the will, and as he died on that same day, the will was invalid.<sup>29</sup>

Another question sometimes presented under these statutes arises where two or more wills have been executed, the latest of which is executed so short a time before testator's death that it is invalid, and the devise or bequest is claimed under the earlier will. This is, of course, a question of revocation. If the second will disposes of all testator's property it revokes a prior gift, even if the same gift is given by the later will;<sup>30</sup> while a codicil purporting to "revoke" a bequest, but only changing the date of payment, was held not to revoke a gift under a prior will.<sup>31</sup> The gift, furthermore, must be to a charitable corporation, use and the like, as required by statute, in order to be invalid. Thus, a gift to the "pastor" of a designated church is not invalid if the will is executed within the time limited.<sup>32</sup>

Another restriction upon testator's excluding his wife or children from his estate in favor of a charity limits the amount of his estate which testator may devise to charity. Where such restriction is in force it allows testator to dispose of from a third to a half of his estate in this manner.<sup>33</sup> Many of the states in which restrictions like these exist limit both the amount of property which testator may bestow in charity and the time which must elapse between the execution of the will and the death of testator.<sup>34</sup> Where such restrictions are in force no evasion is allowed. Thus testator can not devise

<sup>29</sup> Gray's Estate, 147 Pa. St. 67.

<sup>30</sup> Hoffner's Estate, 161 Pa. St. 331.

<sup>31</sup> Watt's Estate, 168 Pa. St. 422. (Hence the gift was good, though the codicil was executed so near testator's death as to be invalid.)

<sup>32</sup> Hodnett's Estate, 154 Pa. St. 485.

<sup>33</sup> Bowdoin College v. Merritt, 75 Fed. 480 (based on the California Statute); Royer's Estate, 123 Cal. 614; 44 L. R. A. 364; Kelley v.

Welborne (Ga.), 1900; 35 S. E. 636; White v. McKeon, 93 Ga. 343 (which holds that §2419 limiting testator's power to one-third of his property was not in force before 1863); Healy v. Reed, 153 Mass. 137; 10 L. R. A. 766; Trustees of Amherst v. Ritch, 151 N. Y. 282; Crane's Will (N. Y.) (1899); 54 N. E. 1089.

<sup>34</sup> Kelley v. Welborne (Ga.) (1900); 35 S. E. 636.

property to an individual on secret trust for a charity when such devise exceeds the amount of property which may be thus disposed of—in this case, one-half of testator's estate.<sup>35</sup> Where these restrictions apply to religious and charitable corporations, and the like, they can not be extended to municipal corporations.<sup>36</sup> In other jurisdictions testator is entirely prohibited or greatly restricted from devising real property to any religious or charitable purposes.<sup>37</sup>

A gift of mixed realty and personalty has been held not totally void where the statute prohibited gifts of realty, but is good as far as the personalty is concerned.<sup>38</sup>

Where, under the constitution, only one acre of land may be devised to a religious corporation a devise of a larger tract was held valid where the title failed as to all but one acre.<sup>39</sup>

## §26. Perpetuities.

Another restraint imposed by law upon testamentary power is as to the length of time which may be interposed between the death of testator and the vesting of the estate devised or bequeathed. This topic logically should be presented here, but it is so interwoven with trusts that, with this reference to it here it is reserved for discussion hereafter.<sup>40</sup>

<sup>35</sup> Trustees of Amherst College v. Ritch, 151 N. Y. 282.

<sup>36</sup> Crane's Will (N. Y.) (1899); 54 N. E. 1089.

<sup>37</sup> *In re* Thompson (C. A.) L. R. 45, Ch. D. 161; *In re* Parker (1891), 1 Ch. 682; Chambers v. Higgins (Ky.) 49 S. W. 436; 20 Ky. L. Rep. 1425; Blackbourn v. Tucker, 72 Miss. 735; Barker v. Donnelly, 112 Mo. 561 (or from

bequeathing money to invest in land in England, but this does not apply to colonial wills); Canterbury v. Wyburn (P. C.) (1895); A. C. 89; 64 L. J. P. C., N. S., 36.

<sup>38</sup> *In re* Staebler, 21 Ont. App. 266.

<sup>39</sup> Barker v. Donnelly, 112 Mo. 561.

<sup>40</sup> See Sec. 625 *et seq.*



## CHAPTER IV.

### THE LAW BY WHICH A WILL IS GOVERNED.

#### §27. General principles controlling conflict.

This topic is often discussed under the name of "conflict of laws." Such title, while convenient and acceptable by long usage, is misleading; for, while there is at times such a thing as a conflict of laws, it is extremely rare, and the rules discussed in this chapter are the rules by which such conflict is prevented. A conflict of laws in the correct sense probably exists only when the rules for preventing conflicts are themselves in conflict.

When a testator is domiciled in one state at the time of his death, and leaves property situated in another state, the question of the validity and enforceability of his will requires, in the first instance, a determination as to which state's system of law is the controlling one. The answer to this question may be decisive in determining the important questions of the legal capacity of testator to make a will; the proper form of such will; whether it has been revoked or not; the meaning and construction of such will; and the legality of the purpose which it seeks to accomplish.

#### §28. General rule as to realty.

The general common law rule on this subject in the United States is that in all these points a will devising real property is governed by the law of the place where the land is situated,

or, as it is called, the *lex rei sitae*.<sup>1</sup> This general rule is practically without exception where not modified by statute, as far as concerns the capacity of the testator<sup>2</sup> or the form of the will.<sup>3</sup> Thus, where the will was executed with a number of subscribing witnesses, sufficient by the law of the state where testator was domiciled, but not sufficient by the law of the state where the land is situate, it is invalid;<sup>4</sup> and a holographic will, good by the law of testator's domicile, but not by the law of the state where the land is situated, is not sufficient to pass title to such land.<sup>5</sup> So the question of revocation is by the great weight of authority, determined by the law of the place where the land is situate.<sup>6</sup>

<sup>1</sup> *In re Piercy* (1895); 1 Ch. 83; 64 L. J. Ch. N. S. 249; *Wood v. Paine*, 66 Fed. 807; *De Vaughn v. Hutchinson*, 165 U. S. 566; *Kerr v. Moon*, 9 Wheat. (U. S.) 565; *McCormick v. Sullivan*, 10 Wheat. (U. S.), 192; *Varner v. Bevil*, 17 Ala. 286; *Dickey v. Vann*, 81 Ala. 425; *Readman v. Ferguson*, 13 App. D. C. 60; *Knight v. Wheedon*, 104 Ga. 309; 30 S. E. 794; *Frazier v. Boggs*, 37 Fla. 307; *Evansville, etc., Company v. Winsor*, 148 Ind. 682; *Lucas v. Tucker*, 17 Ind. 41; *Calloway v. Doe*, 1 Blackf. (Ind.) 372; *Rogge's Succession*, 49 La. Ann. 37; *Eyre v. Storer*, 37 N. H. 114; *Trowbridge v. Metcalf*, 39 N. Y. Supp. 241; *Bailey v. Bailey*, 8 Ohio, 239; *Meese v. Keefe*, 10 Ohio, 362; *Pepper's Estate*, 148 Pa. St. 5; *Holman v. Hopkins*, 27 Tex. 38.

<sup>2</sup> *Evansville etc. Company v. Winsor*, 148 Ind. 682; *Eyre v. Storer*, 37 N. H. 114; *Carpenter v. Bell*, 96 Tenn. 294 (married woman).

<sup>3</sup> *Goodman v. Winter*, 64 Ala. 410; *Crolley v. Clark*, 20 Fla. 849; *Frazier v. Boggs*, 37 Fla. 307; *Knight v. Wheedon*, 104 Ga. 309;

30 S. E. 794; *Lynch v. Miller*, 54 Io. 516; *Robertson v. Barbour*, 6 T. B. Mon. 524; *Cornelison v. Browning*, 10 B. Mon. 425; *Eighth's Succession*, 50 La. Ann. 524; *Potter v. Titcomb*, 22 Me. 300; *Keith v. Keith*, 97 Mo. 223; *Nelson v. Potter*, 50 N. J. L. 324; *Knopfel v. Holm*, 52 N. Y. Supp. 330; *Holman v. Hopkins*, 27 Tex. 38.

<sup>4</sup> *Crolley v. Clark*, 20 Fla. 849; *Knight v. Wheedon*, 104 Ga. 309; 30 S. E. 794; *Cornelison v. Browning*, 10 B. Mon. (Ky.) 425; *Nelson v. Potter*, 50 N. J. L. 324.

<sup>5</sup> *Lynch v. Miller*, 54 Io. 516; *Jones v. Robinson*, 17 O. S. 171.

<sup>6</sup> *Evansville etc. Company v. Winsor*, 148 Ind. 682. *De Vaughn v. Hutchinson*, 165 U. S. 566; *Jones v. Habersham*, 107 U. S. 174; *Clark's Appeal*, 70 Conn. 195; *Frazier v. Boggs*, 37 Fla. 307; *Sevier v. Douglass*, 44 La. Ann. 605; *Guaranty Trust Co. v. Maxwell*, — N. J. Eq. —; *Pratt v. Doughlass*, 38 N. J. Eq. 516; 30 Atl. 339; *White v. Howard*, 46 N. Y. 144; *Knox v. Jones*, 47 N. Y. 389; *Page's Estate*, 75 Pa. St. 87; *Atkinson v. Staigg*, 13 R. I. 725; *Harrison v. Weatherby*, 180 Ill. 418.

## §29. Law controlling in construction of will.

An important exception to the unanimity of judicial opinion on this subject is the question of the law governing the construction of the will. The weight of authority, in analogy to the other topics already considered, holds that the construction of the will is to be determined by the *lex rei sitae*. So a will devising property to "heirs" of a person is governed by the *lex rei sitae* as to the determination of whether an illegitimate child subsequently legitimated is an heir.<sup>7</sup> But a large minority of the courts hold that the construction of a will is to be governed by the *lex domicilii*, even as concerning land situated in another jurisdiction, unless it shall appear from the will that he drew it with reference to the *lex rei sitae*.<sup>8</sup> Thus a grant of land outside the state of testator's domicile to his sister-in-law and her "heirs" was held to be construed by the law of the domicile of testator. In this case the law of testator's domicile made the husband of the beneficiary her "heir," while by the law of the place where the land was situated the husband was not her "heir."<sup>9</sup>

So a devise to a person for life, and remainder to the heirs of his body, was to be construed by the law of testator's domicile. In this case testator was domiciled in Missouri, and the land was situated in Kansas. The life tenant died, leaving a son born illegitimate, whom he had recognized as his own son, but whose mother he had never married. In Kansas such child would be thereby rendered legitimate; in Missouri he would not be. The court held that the law of testator's domicile must govern, and that the illegitimate child could not take as "heir" of life tenant.<sup>10</sup> In this case it was said that the law of the domicile, *prima facie*, controlled the meaning of the words used in the will, unless the circumstances of the

<sup>7</sup> McNicoll v. Ives, 59 O. S. 401;

De Wolf v. Middleton, 18 R. I. 810.

<sup>8</sup> Keith v. Eaton, 58 Kan. 732;

Lincoln v. Perry, 149 Mass. 368;

Ford v. Ford, 80 Mich. 42; Wash-

burn v. Van Steenwyck, 32 Minn.

336; Adams v. Farley, — Miss.

—; 18 So. 390; Ford v. Ford, 70

Wis. 19; 72 Wis. 621.

<sup>9</sup> Lincoln v. Perry, 149 Mass.

368; Morris v. Bolles, 65 Conn.

45.

<sup>10</sup> Keith v. Eaton, 58 Kan. 732.

testator or the language of the will showed otherwise, or the law of the state where the will was offered for probate and record contravened such use of language.

### §30. Statutory rule as to law controlling.

The rule that a devise of land is controlled as to form, capacity of testator, and the like, by the *lex rei sitae* has often resulted in intestacy. If a testator has any knowledge of the formalities of executing a will his knowledge is generally confined to the law of his own domicile, and his will is executed in accordance with such law. It may not even be possible to obtain legal advice as to the formalities necessary, by the laws of some remote country, to the validity of a devise of land situate there.

For these reasons many states have modified the common law rule as to which law controls a will passing real property, and have made it analogous to the rule on the subject of testaments of personalty by providing that if the will of decedent is valid by the law of the jurisdiction where he was domiciled at the time of his death it shall be valid to pass land anywhere.<sup>11</sup>

### §31. General rule as to personalty.

The validity of a testament bequeathing personal property is to be determined by the law of testator's domicile at the time of his death—the *lex domicilii*.<sup>12</sup> The law thus applied is the law in force at the time of testator's death, and no subsequent change, even if valid by the law of testator's domicile,

<sup>11</sup> *Lyon v. Ogden*, 85 Me. 374; *Green v. Alden*, 92 Me. 177; 42 Atl. 358.

<sup>12</sup> *Aganoor's Trust*, 13 Rep. 677; *Goods of Brown-Sequard*, 6 Rep. 565; *Stokes v. Stokes*, 78 L. T. Rep. 50; 67 L. J. P. D. & A. N. S. 55; *Sickles v. New Orleans*, 80 Fed. 868; 26 C. C. A. 204; *Handley v. Palmer*, 91 Fed. 948; *Yore v. Cook*, 67 Ill. App. 586; *Gaines's Succes-*

*sion*, 45 La. Ann. 1237; *Crusoe v. Butler*, 36 Miss. 150; *Jenkins v. Trust Company*, 53 N. J. E. 194; 32 Atl. 208; *Rosenbaum v. Garnett*, 57 N. J. E. 186; 41 Atl. 252; *Dammert v. Osborn*, 141 N. Y. 564; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *McCune v. House*, 8 Ohio 144; *Manuel v. Manuel*, 13 O. S. 458; *Fitzsimmons v. Johnson*, 90 Tenn. 416.

will be recognized by other courts.<sup>13</sup> This rule applies to the capacity of testator and the form of the will.<sup>14</sup>

A holographic will made in New York by one domiciled in Quebec while on a short visit to New York is valid where in compliance with Quebec law.<sup>15</sup> And on the other hand, a holographic will made in Louisiana by one domiciled in Ohio while on a visit to Louisiana is invalid where not permitted by Ohio law.<sup>16</sup>

So questions of construction are controlled by the law of testator's domicile.<sup>17</sup>

When testator devised property to the heirs of a named person it was held that the law of testator's domicile and not the law of the domicile of this named person should govern.<sup>18</sup> So where a testator by will gave a legacy to a charitable institution it was held that the law of his domicile governed as to the length of time that must elapse between the execution of such will and the death of testator in order to make it a valid will, even though the legacy could have been paid only by selling land in another state.<sup>19</sup> Thus, where a state statute forbade testator to dispose by will of more than half of his property to charity, it was held that such statute had no application where a non-resident made a bequest to a corporation in that state.<sup>20</sup>

A trust of personalty created for the benefit of a married woman is governed by the law of testator's domicile.<sup>21</sup>

<sup>13</sup> *Aganoor's Trust*, 13 Rep. 677.

<sup>14</sup> *Stokes v. Stokes*, 78 L. T. Rep. 50; 67 L. J. P. D. & A. N. S. 55; *Ross v. Ross*, 25 Can. S. C. 307; *Sickles v. New Orleans*, 80 Fed. 868; 26 C. C. A. 204; *Handley v. Palmer*, 91 Fed. Rep. 948; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

<sup>15</sup> *Ross v. Ross*, 25 Can. S. C. R. 307. To the same effect is *Stokes v. Stokes*, 78 Law. T. Rep. 50; 67 L. J. P. D. and A. N. S. 55.

<sup>16</sup> *Manuel v. Manuel*, 13 O. S. 458.

<sup>17</sup> *Kain v. Gibboney*, 101 U. S. 362; *Harrison v. Nixon*, 6 Pet. (U. S.) 483; *Whitney v. Dodge*, 105 Cal.

192; *Adams v. Farley* (Miss.) 18 So. 390; *Jenkins v. Trust Company*, 53 N. J. Eq. 194; 32 Atl. 208; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186; *Osborne v. Dammert*, 140 N. Y. 30; *Dammert v. Osborne*, 141 N. Y. 564; *Crandell v. Barker*, 8 N. D. 263; *Knox v. Barker*, 8 N. D. 272.

<sup>18</sup> *Proctor v. Clark*, 154 Mass. 45; 12 L. R. A. 721.

<sup>19</sup> *Jenkins v. Trust Co.*, 53 N. J. Eq. 194; so *Carter v. Presbyterian Church*, 68 Hun, 435.

<sup>20</sup> *Healy v. Read*, 153 Mass. 197; 10 L. R. A. 766.

<sup>21</sup> *Rosenbaum v. Garrett*, 57 N. J. Eq. 186.

**§32. Effect of change of domicile.**

Where testator possessed capacity by the law of his domicile at the time he made his will, and made it in a form there valid by law, and afterwards removes into another jurisdiction, where he either does not possess capacity<sup>22</sup> or by whose law his will is not executed properly,<sup>23</sup> and retains his domicile there until his death, his will is controlled by the law of his later domicile, and is held to be invalid. So where the consent of a husband to the will made by his wife was binding where made, but not binding by the law of the wife's domicile at her death, it was held that the law of her domicile at her death controlled and he was not bound by his assent to that will.<sup>24</sup>

**§33. Distinction between realty and personalty.**

A leasehold estate is, of course, personal property, and a bequest thereof is controlled by the law of the domicile of testator.<sup>25</sup> The law of testator's domicile controls as to bequests of personalty, even where it becomes necessary to sell testator's realty to pay the legacies.<sup>26</sup>

**§34. Law controlling in conversion.**

While the law of the place where the realty is situated determines whether testator's will effects an equitable conversion of realty into personalty,<sup>27</sup> yet if it has this effect the law of testator's domicile controls as to the validity of his bequests of such property, treated by the doctrine of conversion as personalty.<sup>28</sup>

<sup>22</sup> *Shute v. Sargent*, 67 N. H. 305.

<sup>23</sup> *Nat v. Coons*, 10 Mo. 543; *McCune v. House*, 8 Ohio 144.

<sup>24</sup> *Shute v. Sargent*, 67 N. H. 305.

<sup>25</sup> *Despard v. Churchill*, 53 N. Y. 192.

<sup>26</sup> *Jenkins v. Trust Company*, 53 N. J. Eq. 194; *Carter v. Presbyterian Church*, 68 Hun, 435.

<sup>27</sup> *Clarke's Appeal*, 70 Conn. 195; *Penfield v. Tower*, 1 N. Dak. 216;

*Guaranty Trust Co. v. Maxwell*, — N. J. Eq. —; 30 Atl. 339; *White v. Howard*, 46 N. Y. 144; *Page's Estate*, 75 Pa. St. 87.

<sup>28</sup> *Lincoln v. Perry*, 149 Mass. 368; *Codman v. Krell*, 152 Mass. 214; *Proctor v. Clark*, 154 Mass. 45; *Penfield v. Towne*, 1 N. Dak. 216; *Tonnele v. Zabriskie*, 51 N. J. Eq. 557.

### §35. Law controlling in trusts.

Where a devise of land creates a trust its validity is to be determined by the law of the place where the land is situated.<sup>29</sup>

Where a bequest of personalty creates a trust its validity is primarily to be determined by the law of the domicile of testator, and not the law of the place where the property is situate.<sup>30</sup> So where a trust is valid by the law of testator's domicile it will not be rendered invalid by the fact that the trustee, the property, and many of the beneficiaries are in a state where such trust is invalid as in violation of the rule against perpetuities.<sup>31</sup>

Where the trust may be executed in testator's domicile in compliance with the law there, a trustee can not make the trust unenforceable by withdrawing with the trust funds to another state where such trust is void as in unlawful restraint of alienation.<sup>32</sup> There are, however, two qualifications to this doctrine.

First, where the personal property is situated in the jurisdiction of testator's domicile, and the testament directs that the proceeds be transmitted to another jurisdiction, and there applied to a trust, the courts of testator's domicile often give effect to such testament when the trust is lawful by the law of the jurisdiction where it is to be performed, though it could not be enforced in the jurisdiction of testator's domicile.<sup>33</sup>

<sup>29</sup> *Ford v. Ford*, 80 Mich. 42; 44 N. W. 1057.

<sup>30</sup> *Canterbury v. Wyburn* (1895) A. C. 89; 64 L. J. P. C. (N. S.) 36; *Whitney v. Dodge*, 105 Cal. 192; *Penfield v. Tower*, 1 N. Dak. 216; *Despard v. Churchill*, 53 N. Y. 192; *Osborn v. Dammert*, 140 N. Y. 30; *Dammert v. Osborn*, 141 N. Y. 564; *Cross v. U. S. Trust Co.*, 131 N. Y. 330; 15 L. R. A. 606; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186; 41 Atl. 252.

<sup>31</sup> *Cross v. U. S. Trust Co.*, 131 N. Y. 330; 15 L. R. A. 606.

<sup>32</sup> *Whitney v. Dodge*, 105 Cal. 192.

<sup>33</sup> *Hope v. Brewer*, 136 N. Y. 126; 18 L. R. A. 458, following *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Despard v. Churchill*, 53 N. Y. 192; *In re Huss*, 126 N. Y. 537, and distinguishing *Bascom v. Albertson*, 34 N. Y. 587, as being a case in which it did not appear that the trustees could take under the law of their jurisdiction.

Second, that where a will directs that specific funds be removed to another state, and there administered, the validity of such bequest is to be determined by the law of such other state,<sup>34</sup> though the general rule is that such other state will follow the *lex domicilii*.

So where a testator directs that certain funds be sent to another jurisdiction, and there delivered to a corporation not yet created, the validity of such gift is determined by the law of the jurisdiction to which such funds are to be sent.<sup>35</sup> Hence, where personalty thus bequeathed is situate in a jurisdiction other than that of testator's domicile, the court will enforce such bequests as are in conformity with the law of testator's domicile, provided they do not also conflict with the law of the state in which such property is situated. If in conflict with such law the property or the proceeds thereof will be transmitted to the executor in the state of testator's domicile for distribution under such law and the will.<sup>36</sup>

So in case of a conflict of laws as to the rule of perpetuities the law of testator's domicile governs as to trusts of personalty,<sup>37</sup> but where the trust is of realty the law of the jurisdiction where the realty is situate controls.<sup>38</sup>

### §36. Law controlling as to capacity of beneficiary to take.

In many states a limit is placed to the amount of property which can be held by a corporation incorporated under the laws of such states. Where such laws exist, and a devise is made of lands situate in one state to a corporation incorporated under the laws of another state, which corporation already holds property to the full limit allowed by the laws of the state of its creation, a question arises as to the effect of such devise. In some states it is held that as the corporation

<sup>34</sup> Sickles v. New Orleans, 80 Fed. Rep. 868; Chamberlain v. Chamberlain, 43 N. Y. 424; Jenkins v. Trust & Safe Deposit Co., 53 N. J. Eq. 186.

<sup>35</sup> Dammert v. Osborn, 140 N. Y. 30; 141 N. Y. 564.

<sup>36</sup> Dammert v. Osborn, 141 N. Y. 564.

<sup>37</sup> Whitney v. Dodge, 105 Cal. 192; Dammert v. Osborn, 140 N. Y. 30; 141 N. Y. 564.

<sup>38</sup> Ford v. Ford, 80 Mich. 42; 44 N. W. 1057.



has no power to take the property, the devise is a nullity, and the property passes to the residuary devisee or to the heirs.<sup>39</sup>

On the same theory a bequest of personalty to a "community" in a foreign country was held to depend upon the capacity of the community to take under the laws of such country.<sup>40</sup>

In other jurisdictions the devise is held to be valid, on the theory that the question of the power of the corporation to hold the land is not a question that can be raised by the heirs or devisees, but only by the state under whose laws the corporation is incorporated.<sup>41</sup>

In England the statutes of mortmain are held to be local in their effect and not to apply to wills of persons domiciled outside of England.<sup>42</sup>

### §37. Law controlling as to lapse.

Some jurisdictions hold that the question whether a given legacy has lapsed or not is to be determined by the law of the domicile of the legatee.<sup>43</sup>

<sup>39</sup> *Starkweather v. Bible Society*, 72 Ill. 50; *Congregational Society v. Hale*, 51 N. Y. Supp. 704; *McGraw's Estate*, 111 N. Y. 66; *DeCamp v. Dobbins*, 31 N. J. Eq. 671; *House of Mercy v. Davidson*, 90 Tex. 529.

"The will does not take effect until the testator's death; and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in doing so must show the authority it has to take. And if there were only a prohibition in words against holding the property would the law not be doing

a vain thing in handing it over to the corporation, which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not prohibition against holding be properly and necessarily construed as a prohibition against taking also?"

*McGraw's Estate*, 111 N. Y. 66, quoted and followed in *House of Mercy v. Davidson*, 90 Tex. 529.

<sup>40</sup> *In re Huss*, 126 N. Y. 537; 12 L. R. A. 620.

<sup>41</sup> *Jones v. Habersham*, 107 U. S. 174; *Stickney's Will*, 85 Md. 79; 35 L. R. A. 693; *Hanson v. Little Sisters of the Poor*, 79 Md. 434.

<sup>42</sup> *Canterbury v. Wyburn* (1895) App. Rep. 89; 11 Rep. 331.

<sup>43</sup> *Lowndes v. Cooch*, 87 Md. 478.

**§38. Law controlling as to election.**

The law of the domicile controls as to questions of election.<sup>44</sup>

**§39. Law controlling as to powers.**

In determining the validity of the execution of a power given by will the law of the domicile of the donor of the power controls, in the absence of statute.<sup>45</sup>

In England, by statute, a power exercisable by will is properly executed if in accordance with English law, irrespective of the law of testator's domicile.<sup>46</sup>

**§40. Law controlling contracts to make a will.**

The validity of a contract to make a designated person testator's heir is controlled by the law of the place where the land alleged to be affected by such contract is situate.<sup>47</sup>

The method of proving the contract, as affected by the Statute of Frauds, is controlled by the law of the forum.<sup>48</sup>

**§41. Rule in absence of evidence as to what law of domicile is.**

When no evidence is given as to what the law of the domicile is, the court trying the case will take judicial notice that the state of testator's domicile recognizes the common law as the basis of its system, if such be the case, and will construe the will by the common law.<sup>49</sup> If the law of the state of testator's domicile is not based upon the common law the court will, in the absence of evidence as to what such foreign law is, treat the will as controlled by the law of the forum.<sup>50</sup>

<sup>44</sup> *Bolling v. Bolling*, 88 Va. 524.

<sup>45</sup> *Tatnall v. Hankey*, 2 Moore P. C. 342; *In re Alexander*, 6 Jur. N. S. 354; *In re Baldwin*, 76 L. T. Rep. 462; 66 T. J. Ch. N. S. 524; *Sewall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. St. 345; *Cotting v. De Sartiges*, 17 R. I. 668; 16 L. R. A. 367.

<sup>46</sup> *Goods of Huber* (1896) Prob. 209.

<sup>47</sup> *Long v. Hess*, 154 Ill. 482; 27 L. R. A. 791; *Fuss v. Fuss*, 24 Wis. 256; 1 Am. Rep. 180.

<sup>48</sup> *Emery v. Burbank*, 163 Mass. 326; 39 N. E. 1026.

<sup>49</sup> *Benbow v. Moore*, 114 N. Car. 263; 19 S. E. 156.

<sup>50</sup> *Davison v. Gibson*, 56 Fed. 443.

## CHAPTER V.

### THE INHERENT ELEMENTS OF A WILL.

#### §42. Classification of elements into inherent and extrinsic.

In American and English law the Will is as distinct a legal concept as the Contract or the Deed. It possesses certain well-defined elements which characterize it and which distinguish it from other legal concepts.

For convenience in discussing them these elements may be roughly grouped into two classes, the extrinsic elements and the inherent elements. This distinction is not made by the courts, but is one to which attention should be paid, as it is a natural and not an arbitrary one.

The extrinsic elements of a will are those which may be modified without changing the fundamental idea of a will or its place in our law. They refer to the set form in which a will must by law be cast, such as signature by testator and attestation by witnesses. In the actual practice these elements are of very great importance, as they determine the validity of the particular will. A will with but one witness where the law requires two is of no force or effect. But the law could be altered so as to require two witnesses or one or more without changing the position of the will at law or its essential nature. Hence these elements are here called extrinsic. They are now in almost every jurisdiction, created and controlled by

statute. A full and complete discussion of them will be given in subsequent chapters.<sup>1</sup>

The inherent elements of a will are those which can not be altered without destroying our very idea of the will and entirely altering its place in our law. For instance, a fundamental idea of a will is that it passes no vested interest in property until the death of the testator.<sup>2</sup> If this were changed by statute and it were made the law that on due execution of a will the beneficiaries named therein at once acquired an interest in the property devised the instrument might still be called a will, but it would cease to be the kind of instrument that we now call by that name.

In connection with the general discussion of the inherent elements of a will, joint and mutual wills and contracts to make a will will be considered in the two chapters following this. Joint and mutual wills are discussed in this connection because the only question of importance arising on that subject and not included under the general law of wills is whether from the inherent nature of the will a joint or mutual will is possible. Contracts to make a will are also considered because in spite of outward differences a contract to make a will is under certain circumstances treated as a will in equity.

#### §43. Origin and classes of inherent elements.

The inherent elements of the will originate in the principles of the common law, which principles have, in some states, been put into statutory form. They are to be grouped under two general heads, in accordance with the classification and nomenclature used by the courts.

- (1) The *animus testandi*.
- (2) Revocability.

<sup>1</sup> See Chapter XII.

<sup>2</sup> President, etc., of Bowdoin

College v. Merritt, 75 Fed. 480; An-

drews v. Andrews, 122 N. Car. 352.

#### §44. *Animus testandi* not dependent on use of word "will."

The *animus testandi*, or intention of making testamentary disposition, is an expression of very wide import, and sums up a number of elements. Before analyzing these elements a short discussion of the term is necessary.

It does not necessarily mean that the word "will" or "testament" must be used in the transaction. A man may make his will *animo testandi*, though he is so ignorant of law that he thinks it is called a deed or a contract, or though he does not know what to call it. The test is not what he thinks is the legal name of the instrument which he is executing, but what the law calls it, in view of its nature, and of the real intention of the maker as deduced from the instrument and from all the facts and circumstances.<sup>3</sup>

This statement is not in accord with some obiter in some of the cases cited below, in which the view is expressed that the testator must know that the instrument is a will in order to make a valid will. However, nothing in the actual decisions is at variance with the views expressed in the text.<sup>4</sup>

So testator's opinion that the addition of a seal was necessary to the validity of the instrument does not prevent it from being a will, although testator evidently thought that it was a deed,<sup>5</sup>

<sup>3</sup> Knight v. Tripp, — Cal. —; 49 Pac. 838; Stumpfenhausen's Estate, 108 Io. 555; 79 N. W. 376; Smith v. Holden, 58 Kan. 535; Simon v. Wildt, 84 Ky. 157; *In re Lautenshlager*, 80 Mich. 285; Cawley's Appeal, 136 Pa. St. 628; Grand Fountain, U. O. T. R. v. Wilson, 96 Va. 594; 32 S. E. 48; Lauck v. Logan, 45 W. Va. 251.

"It is immaterial whether he calls it a will or a deed; the instrument will have operation according to its legal effect." Wall v. Wall, 30 Miss. 91.

"It is undoubtedly the general rule enunciated by the leading case of *Habergham v. Vincent*, 2 Ves. Ju.

231, and oft repeated that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death, and passing no present interest." *Nichols v. Emery*, 109 Cal. 323.

<sup>4</sup> *In re Wood's Estate*, 36 Cal. 75; *Toeble v. Williams*, 80 Ky. 661; *Swett v. Boardman*, 1 Mass. 257; *Waite v. Frisbie*, 48 Minn. 420; *Tabler v. Tabler*, 62 Md. 601; *Combs v. Jolly*, 3 N. J. Eq. 625; *Means v. Means*, 5 Strob. (S. Car.) 167.

<sup>5</sup> *Wuesthoff v. Germania Life Ins. Co.*, 107 N. Y. 580.

and the fact that testator thought it necessary to acknowledge and file his will and cause it to be recorded does not prevent it from being his will.<sup>6</sup>

Some slight qualification of this statement may be necessary in jurisdictions where one of the prescribed formalities of the execution of the will is publication, or a declaration by the maker to the witnesses that the instrument executed is the last will and testament. This topic is discussed under "Publication."<sup>7</sup>

The converse of this proposition is true. The word "will" is not conclusive of the nature of the instrument or of the *animus testandi*. Thus, where the instrument provides that A gives, devises and bequeaths certain real property to his sons, to have and to hold to them and their heirs forever, and recites that the instrument is given in consideration of a contract by these sons to support the grantor and his wife during their lives, and to provide for their funeral after their death, it was held not to be in law, a will, although it concluded: "I do make and publish this as my last will and testament," and was executed as a will.<sup>8</sup>

The *animus testandi*, then, does not turn on the presence or absence of the words "will" or "testament," but on the intention of the testator as shown by the nature of the instrument and the surrounding facts and circumstances.

#### §45. *Animus testandi*.—What wishes are testamentary.

The first of the ideas included in the "*animus testandi*" is that the will may deal with any or all of three things.

(a) It may deal with the property of the testator either real or personal.<sup>9</sup>

(b) It may appoint an executor to take charge of the estate

<sup>6</sup> Hawes v. Nicholas, 72 Tex. 481.

<sup>7</sup> See Secs. 225-228.

<sup>8</sup> Ward v. Ward, 20 Ky. L. R. 986; 48 S. W. 411; Swann. Ex'or v. Housman, 90 Va. 816.

<sup>9</sup> Comer v. Comer, 120 Ill. 420; Remington v. Bank, 76 Md. 546.

of the testator and deal with it according to the law and the will.<sup>10</sup>

(c) It may appoint a guardian for the minor children of testator.<sup>11</sup>

**§46. Animus testandi.—What disposition is not testamentary.**

Accordingly, the formal expression by the decedent of his wishes as to any matter not included under (a), (b) and (c) of the preceding section is not a will, because the subject matter is not testamentary in its character. Thus a formal revocation in writing of a previously made will is not itself a will,<sup>12</sup> nor is a formal expression of a desire that a certain person should take care of decedent's children where such person was not appointed guardian,<sup>13</sup> nor a request to the probate judge to excuse the executor of decedent's will from giving bond,<sup>14</sup> nor an expression of a desire for cremation as a method of burial.<sup>15</sup>

An instrument by which the maker provided that his son A should receive no share of his estate, and made no further disposition of his property, was held not to be a will and not entitled to probate.<sup>16</sup>

<sup>10</sup> *In re Hickman*, 101 Cal. 609; *In re John's Will*, 30 Ore. 494; 47 Pac. 341; *Jolliffe v. Fanning*, 10 Rich. 186.

<sup>11</sup> *Wardwell v. Wardwell*, 9 Allen. (Mass.) 518; *Stringfellow v. Somerville*, 95 Va. 701; 40 L. R. A. 623 (directing to custody and education of testatrix's child, and appointing a guardian).

<sup>12</sup> *Bayley v. Bailey*, 5 Cush. (Mass.) 245. (In this case the instrument in question was, "It is my wish that the will I made be destroyed, and my estate settled according to law." As it was duly executed in accordance with the law of testator's domicile, it was held to be a valid will. The court said, however, that if it had stopped at

the word "destroyed," it would not have been a will.)

<sup>13</sup> *Williams v. Noland*, 10 Tex. Civ. App. 629; 32 S. W. 328.

<sup>14</sup> *Baker v. Baker*, 51 O. S. 217.

<sup>15</sup> *In re Meade's Estate*, 118 Cal. 428, citing *Sutherland v. Snyder*, 84 Va. 880; *McBride v. McBride*, 26 Gratt. (Va.) 476; *In re Richardson*, 94 Cal. 63.

<sup>16</sup> *Coffman v. Coffman*, 85 Va. 459. (This case turned upon the well-recognized legal principle hereafter discussed. See Sec.—, that an heir can not be disinherited by mere negative words, no matter how strong, but only by a disposition of testator's property, which leaves nothing to descend to the heir.)

Where decedent left an instrument which divided decedent's property among her children, like a will, but which decedent had commenced with the words "This is not meant as a legal will, but as a guide," it was held that such instrument was not a will.<sup>17</sup>

Where decedent left an instrument purporting to be his last will and testament, but which was only the formal recognition of certain women therein named as his legitimate daughters, it was held not to be a will.<sup>18</sup>

Likewise the appointment of an attorney to assist the executor in settling the estate is not a testamentary act.<sup>19</sup>

And a written direction that upon the death of testatrix two deeds should be delivered to her husband was held not to be a will.<sup>20</sup>

#### §47. *Animus testandi*.—Reality of intention.

The second idea involved is that the instrument must express the wishes of the decedent in reality as well as in outward form.

If the testator lacks the mental capacity required by law to make a will, he is incapable of entertaining the intention of making a will; and an instrument in form of a will executed by such a person has no validity in law.<sup>21</sup>

So if testator executes an instrument in the form of a will while he is under undue influence he does not in reality have the intention of making a will, and the instrument thus executed is a nullity.<sup>22</sup>

Apart from the lack of capacity and undue influence the ordinary rule is that testator knows what he is doing, and executes the will *animus testandi*. A presumption therefore arises that if testator had an opportunity of knowing the con-

<sup>17</sup> *Ferguson-Davie v. Ferguson-Davie*, L. R. 15 P. & D. 109.

<sup>18</sup> *In re Williamson's Will*, 6 Ohio Dec. 505 (Prob. Ct.) Reversed by Common Pleas Court, 6 N. P. 79.

<sup>19</sup> *Ogier's Estate*, 101 Cal. 381; 35 Pac. 900.

<sup>20</sup> *Young's Estate*, 123 Cal. 337.

<sup>21</sup> See Chapter VIII.

<sup>22</sup> See Chapter IX.



tents of his will he did in fact have such knowledge, and executed the will *animo testandi*.<sup>23</sup>

It need not be shown ordinarily that testator actually read the will, or that it was read to him. His assent will be presumed.<sup>24</sup> This rule has been applied in some cases where testator was illiterate.<sup>25</sup> But in perhaps the majority of cases where the record has presented the question of the reality of testator's intention, it is held that it must be shown affirmatively that testator knew and approved of the contents of his will where he is illiterate,<sup>26</sup> or where the will is written in a foreign language,<sup>27</sup> or where testator is very weak,<sup>28</sup> or dying.<sup>29</sup>

Affirmative proof that testator knew the contents of the will has been required when the will was not in his handwriting.<sup>30</sup> So where testator was able to communicate his wishes only by means of one who was incompetent to testify it can not be shown that the instrument was executed *animo testandi*.<sup>31</sup> The presumption that a testator who had the means of knowing the contents of the instrument possesses such knowledge, and signs *animo testandi* may be rebutted.<sup>32</sup> If he signs in ignorance of the nature of the instrument he does not execute the instru-

<sup>23</sup> *Worthington v. Klemm*, 144 Mass. 167; *Brick v. Brick*, 17 Stew. 282; *Kahl v. Schober*, 8 Stew. 461; *Maxwell's Will*, 4 Hal. Ch. 251; *Day v. Day*, 2 Gr. Ch. 549; *Den v. Johnson*, 2 South. 454; *In re Crumb*, 6 Dem. 478; *Black v. Ellis*, 3 Hill, S. C. 68.

<sup>24</sup> See cases cited in preceding note.

<sup>25</sup> *Patton v. Hope*, 10 Stew. 522.

<sup>26</sup> *Day v. Day*, 2 Gr. Ch. 549; *Lyons v. Van Riper*, 11 C. E. Gr. 337; *Den v. Johnson*, 2 South. 454; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Vandever's Will*, 6 C. E. Gr. 561; *Rollwagen v. Rollwagen*, 63 N. Y. 504.

<sup>27</sup> *Mittenberger v. Mittenberger*, 78 Mo. 27; 8 Mo. App. 306.

*Contra*, *Hoshauer v. Hoshauer*, 26 Pa. St. 404; *Dickinson v. Dickinson*, 61 Pa. St. 401.

<sup>28</sup> *Day v. Day*, 2 Gr. Ch. 549.

<sup>29</sup> *Hildreth v. Marshall*, 51 N. J. Eq. 241.

<sup>30</sup> *Gerrish v. Nason*, 22 Me. 438.

<sup>31</sup> *Potts v. House*, 6 Ga. 324. (In this case the interpreter was a negro who under the law then in force could not be sworn.)

<sup>32</sup> *Moyer v. Swygart*, 125 Ill. 262. (In this case testator began a will, and provided for one son only. He intended to provide for his other children, but signed the will, saying that he would dispose of the rest of his property later. The jury found that he signed with the intention of executing the instrument as a finality, and this verdict was upheld by the courts. The record also contains evidence of undue influence and lack of capacity, however.)

ment *animo testandi*, and it is not his will.<sup>33</sup> But if he knows the nature of the instrument and its contents, a mistake as to the extent of his property does not avoid the will,<sup>34</sup> nor the accidental omission of an intended beneficiary.<sup>35</sup>

It has been laid down that if the draughtsman by mistake omitted a material clause, the will is avoided if testator signs thinking that such clause is a part of his will.<sup>36</sup> This is carrying the principle past the verge of safety, at least where testator may be presumed to be acquainted with the contents of his will. Almost any will might be overthrown, no matter what testator's actual precautions, if this principle is admitted as sound.

Where testator gave instructions for drawing his will, but before it was completed he became unconscious, the draft thus made was not his will, as the *animus testandi* was lacking to that instrument.<sup>37</sup>

The intention to make a will may be lacking where testator executes the instrument in question by mistake for another.<sup>38</sup> Where testator executes an instrument with full knowledge of its contents, but as a model or as a jest,<sup>39</sup> the intention to make a will is lacking, and the instrument is not a will.

The question is sometimes presented, where the statute requires less formality for testaments of personalty than for wills, and a testator executes an instrument passing realty and personalty, so as to comply with the requirements of the law as to testaments, but not as to wills, as to the validity of such instrument as a testament. In such cases the tendency of judi-

<sup>33</sup> *Jenness v. Hazelton*, 58 N. H. 423.

<sup>34</sup> *Jenness v. Hazelton*, 58 N. H. 423.

<sup>35</sup> *In re Forbes*, 128 N. Y. 640; 60 Hun, 171.

<sup>36</sup> *Saunders v. Stiles*, 2 Redf. 1.

<sup>37</sup> *Aurand v. Wilt*, 9 Pa. St. 54. (Under the statute then in force the attesting witnesses were not required to sign, and testator's signature might be dispensed with if he

were too weak to sign. The *animus testandi* alone was lacking.)

<sup>38</sup> *Goods of Hunt*, L. R. 3 P. & D. 250; *Hildreth v. Marshall*, 51 N. J. Eq. 241; *Baker v. Baker*, 102 Wis. 226; 78 N. W. 453.

<sup>39</sup> *Nicholls v. Nicholls*, 2 Phillim., 180; *Lister v. Smith*, 3 Sw. Tr. 282; *Sewell v. Slingluff* (obiter), 57 Md. 537; *Sweet v. Boardman*, 1 Mass. 258; *Barber's Will*, 92 Hun. 489.

cial opinion is to treat the instrument as a valid testament wherever possible if the evidence shows that the instrument was meant as a finality.<sup>40</sup>

**§48. Animus testandi.—Expression of intention in definite terms.**

The intention of testator to make a testamentary disposition of his property, or to appoint an executor or a testamentary guardian, must be expressed in such terms that the court can, without resort to conjecture, determine what was his wish.

Both the thing given and the person to whom it is given must, in testamentary dispositions of property, be set forth with sufficient certainty.<sup>41</sup>

In a recent Pennsylvania case testator put a number of valuable securities in envelopes, which he placed in a box. Upon the envelopes he wrote names of certain persons, or directions that they were to go to certain named persons. None of these were signed. On the outside of the box was a direction that it was to go to his attorney in case of his death. On another box full of silverware, jewelry, etc., he wrote "children, this is my will," and signed it. It was held that neither of these writings was testamentary in character.<sup>42</sup>

So an envelope, on one side of which was written a list of debts due the writer, and on the other side, "These notes to go to my wife," was held not to be a will, since it did not appear what notes were meant. In this case it was clear that "these notes" referred to notes once in the envelope, and not to the list of claims.<sup>43</sup>

Writing the name of testator's child on one of the shares

<sup>40</sup> *Orgain v. Irvine*, 100 Tenn. 193.

<sup>41</sup> *Handley v. Palmer*, 91 Fed. 948; *In re Richardson*, 94 Cal. 65; 15 L. R. A. 635; *Dennis v. Holsapple*, 148 Ind. 297; *Young v. Work*, 76 Miss. 829; *Shaffer's Succession*, 50 La. Ann. 601; *Lippencott v. Davis*, N. J. (1894), 28 Atl. 587; *Cope v. Cope*, 45 O. S. 464; *Gaston's*

*Estate*, 188 Pa. St. 374; *Jacoby's Estate*, 190 Pa. St. 382; *Whitesides v. Whitesides*, 28 S. Car. 325; *Pack v. Shanklin*, 43 W. Va. 304.

<sup>42</sup> *Jacoby's Estate*, 190 Pa. St. 382.

<sup>43</sup> *Shaffer's Succession*, 50 La. Ann. 601.

marked off in a diagram of testator's property, which was made a part of the will, is not a gift of such share to such child.<sup>44</sup>

Upon a piece of paper, written and signed by decedent, were the words "Want wife's relatives to have all property." It was held that this was not a valid will.<sup>45</sup>

A rough memorandum which discloses testamentary intent is good, though extrinsic evidence may be necessary to identify the beneficiaries and the subject-matter.<sup>46</sup>

To what extent the ordinary rules of construction will serve to reconcile apparently contradictory provisions and bring sense out of apparent incoherency, and to what extent extrinsic evidence is admissible to show what testator's intention really was, are questions discussed elsewhere. It is sufficient here to say that if the will, when helped by all the recognized rules of construction, and when supplemented by all the extrinsic evidence admissible, does not show any clear and definite intention of testator, either as to his entire scheme of disposition or as to each separate item, the court, however reluctant it may be, has no choice but to declare the will as a whole void for uncertainty,<sup>47</sup> and the property of testator must be distributed without regard to such instrument.

**§49. Animus testandi.—Intention that instrument shall take effect only at death of testator.**

The third of the ideas included under the term *animus testandi* is that the will can take effect only at the death of the testator. In the cases of appointment of an executor of the will, or a guardian for testator's minor children, it seems inevitable that the testator must intend that his own death is to occur before such appointment can take effect. But in the disposition of property it is as possible for testator to contemplate such disposition during his lifetime as after his death. This is one of the important distinctions between the will and the other instruments whereby title to property is conveyed.

<sup>44</sup> *Houser v. Moore*, 31 Pa. St. 346.

<sup>45</sup> *Young v. Wark*, 76 Miss. 829.

<sup>46</sup> *Gaston's Estate*, 188 Pa. St. 374.

<sup>47</sup> *Cope v. Cope*, 45 O. S. 464.

This may be considered with advantage from two points of view

1. If the instrument in dispute shows that the maker thereof contemplates that by the provisions thereof the possession and ownership of his property shall pass from him during his lifetime, it is clearly not a will, whatever else it may be.<sup>48</sup>

2. It is not conclusive of the testamentary character of the instrument that the delivery of possession of property is postponed till the death of the maker.

In order to be a will the instrument must not only postpone delivery of the property till the death of the testator, but it can not even pass a present vested right to the enjoyment of the estate at the death of the testator. Thus, a grant by A to B and his heirs reserving a life estate to A is not a will, for it passes a present right in the estate, although the enjoyment thereof may be postponed to a future time, and that time is to be the death of A.<sup>49</sup> Even if A reserve in his deed a right of revocation thereafter it is still a deed and not a will, because

<sup>48</sup> *Watson v. Watson*, 24 S. Car. 228; *St. John's Parish v. Bostwick*, 8 App. D. C. 452; *Parker v. Stephens* (Tex. Civ. App.), 39 S. W. 164; *In re Ogle's Estate*, 97 Wis. 56; 72 N. W. 389; *Lauck v. Logan*, 45 W. Va. 251; 31 S. E. 986.

<sup>49</sup> *Thompson v. Johnson*, 19 Ala. 59; *Kelly v. Richardson*, 100 Ala. 584; 13 So. 785; *Nichols v. Chandler*, 55 Ga. 369; *Comer v. Comer*, 120 Ill. 420; *Cates v. Cates*, 135 Ind. 272; *Bevins v. Phillips*, 6 Kan. App. 324; *Miller v. Holt*, 68 Mo. 584; *Townsend v. Rackham*, 143 N. Y. 516; *Meek's Appeal*, 97 Pa. St. 313; *In re Kisecker's Estate*, 190 Pa. St. 476; 42 Atl. 886; *Watson v. Watson*, 24 S. Car. 228; *Armstrong v. Armstrong*, 4 Baxt. (Tenn.) 357; *Roberts v. Coleman*, 37 W. Va. 143.

"The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and *per contra* no rights have accrued and no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory and acquires a fixed status and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status." *Nichols v. Emery*, 109 Cal. 323.

the right, though voidable, is nevertheless vested until it is avoided.<sup>50</sup>

Where the maker of the instrument clearly intends that no interest shall pass thereunder until his death the instrument is inherently testamentary in its nature.

So where a woman, who was dangerously ill and not expected to live more than a few hours, executed the following instrument: "It is my desire that the amounts herein may be distributed as follows: — — — to be paid from the rents as soon as the rents can be collected," it was held that in view of all the surrounding facts the lower court was justified in finding that this instrument was the last will and testament of the decedent and not the expression of an intention to make a gift *inter vivos*.<sup>51</sup>

So where testatrix wrote that she had "this day" given all her property to certain specified persons, reserving the use during her life, such persons to have the full use of it after her death, and she kept this paper for nearly ten years in her bible, and gave instructions just before her death that the paper should be read to her and then put away in a safe place, it was

<sup>50</sup> *President, etc. of Bowdoin College v. Merritt*, 75 Fed. 480; *Daniel v. Hill*, 52 Ala. 430; *Nichols v. Emery*, 109 Cal. 323.

Apparently *contra*, *Milnes v. Foden*, L. R. 15 P. & D. 105. But in this last case a woman about to marry settled her property in such trusts as she might thereafter, by will or revocable deed, appoint. Subsequently, in 1884, she made a will which did not expressly include such property. In 1887 and 1889 she executed two revocable deeds-poll, to take effect on her death. Under these facts therefore, *Milnes v. Foden* is distinguishable from *President, etc., of Bowdoin College v. Merritt*, *supra*, where the deed took effect at once, though possession was postponed till the donor's death.

In *Milnes v. Foden* the court said: "if there is proof either in the paper itself or from clear evidence dehors, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, that death was the event which was to give effect to it, then, whatsoever its form, it may be admitted to probate as testamentary"; and in *Stroup v. Stroup*, 140 Ind. 179, a trust deed by A to A's use for life, on his death to B's use, reserving power of sale and revocation to A, was held to be a will.

<sup>51</sup> *Smith v. Holden*, 58 Kan. 535; 50 Pac. 447; *Conrad v. Douglass*, 59 Minn. 498.

held to be a will, even though words of the present tense were used.<sup>52</sup>

In a recent Illinois case a gift, by a mother to her daughter, of all her property was held testamentary in character when made shortly before her death and in anticipation of support for the rest of her life.<sup>53</sup>

On the other hand, a declaration that specified property was a present to a person named in such declaration is not a will where it appears from the declaration that the title to the property was to pass before the death of testatrix.<sup>54</sup>

Putting the former statement in a converse form, if the instrument is clearly a will it does not pass a vested interest. For example, a husband and wife made a will devising land to their son and daughter, in pursuance of a promise from their children to support them. The son took possession of the land at once. It was held that these facts gave him no estate in the land.<sup>55</sup>

## §50. Revocability.

The idea of revocability is an essential idea of a will and follows almost as a corollary from the idea that the will passes no present interest in the property devised or bequeathed. Such property still belongs to the original owner. He has parted with no interest in it whatever by making the will. He can still sell the property or exchange it, or pledge it or give it away. Furthermore, he may revoke the will already made and make a new will, or die intestate, as he pleases.<sup>56</sup>

So essential a feature of a will is revocability that the insertion, in an instrument which is clearly a will, of a clause providing that it is not to be revoked has no effect whatever in

<sup>52</sup> Kisecker's Estate, 190 Pa. St. 476.

<sup>53</sup> Whiton v. Whiton, 179 Ill. 32.

<sup>54</sup> *In re* Smith, L. R. 45 Ch. D. 632; Reed v. Hazelton, 37 Kan. 321.

<sup>55</sup> Andrews v. Andrews, 122 N. C. 352; 29 S. E. 351.

<sup>56</sup> See Chapter XIV, Revocation.

preventing revocation.<sup>57</sup> This quality of the will is what is meant when it is said that the will is ambulatory.<sup>58</sup>

If the instrument executed is such that the maker can not revoke it, it may be a deed or a contract, but it can not be a will. And on the other hand, if the instrument is a will, it is revocable.<sup>59</sup>

### §51. Instruments lacking some inherent elements.

An instrument which unites the elements included and just discussed under the heads of "*Animus Testandi*" and "Revocability" is a will as far as the inherent elements are concerned. An instrument which possesses any number of these elements less than all is not a will

The following discussion is of the distinction between wills and other instruments with which they may be confused.

A will may be confused with a deed, a contract, an order, a power of attorney or other instrument. In cases of doubt the application of the tests of *animus testandi* and revocability will determine whether the instrument under consideration is a will or not.<sup>60</sup>

### §52. Confusion between deeds and wills.—Instruments held deeds.

An instrument in form a warranty deed, but containing a clause, "This paper to be in full force till I desire to act" or "to alt.," passes a present estate, though with a possible right of revocation, and is a covenant, to stand seized to uses, *i. e.*, a deed.<sup>61</sup>

In another case an instrument, in form a warranty deed,

<sup>57</sup> Wilkes v. Burns, 60 Md. 64.

<sup>58</sup> This is the meaning which the weight of authority attaches to the word ambulatory. Bouvier's Law Dictionary; Jarman on Wills (6th ed.) p. 18. In Pollock and Maitland's History of the Common Law, Vol. II, p. 313, the word ambulatory is said to mean that the will

is to act not only on the property owned by the testator at the time of its execution, but also on that acquired by him subsequently thereto.

<sup>59</sup> Hazelton v. Reed, 46 Kan. 73.

<sup>60</sup> See Secs. 52 to 57, inclusive.

<sup>61</sup> Watson v. Watson, 24 S. Car. 228.



contained a clause: "Conditions of this deed is such as said party of the second part that this land shall not be incumbered in any way, or this deed shall be void. The party of the first part is to hold said property his lifetime." This was held a deed.<sup>62</sup>

Where the grantor deeded his estate in trust, reserving a life estate to himself, and also reserving the power of revoking the trust deed as to some of the objects of the trust, for fifteen years, it was held a deed.<sup>63</sup>

<sup>62</sup> *Cates v. Cates*, 135 Ind. 272; *Bevins v. Phillips*, 6 Kan. App. 324; 51 Pac. 59. Instruments containing similar provisions are held to be deeds in *Rawlings v. McRoberts*, 95 Ky. 346; *Carpenter v. Hannig* (Tex. Civ. App.), 34 S. W. 774; *Leslie v. McKinney* (Tex. Civ. App.), 38 S. W. 378; *Guthrie v. Guthrie*, 105 Ga. 86; *Worley v. Daniel*, 90 Ga. 650; *Simon v. Wildt*, 84 Ky. 157; *Sharp v. Hall*, 86 Ala. 110. (A provision in an ambiguous instrument that it was in part intended "to do away with all need or necessity of taking out letters of administration" was held to be important in determining its nature.) *Beebe v. McKenzie*, 19 Ore. 296; *Brown v. Moore*, 26 S. Car. 160; *Chavez v. Chavez* (Tex.), 13 S. W. 1018; *McOnie v. Whyte*, L. R. 15 App. Cas. 156; *White v. Hopkins*, 80 Ga. 154; *Owen v. Smith*, 91 Ga. 564; *Goff v. Davenport*, 96 Ga. 423; *Ward v. Ward* (Ky.), 48 S. W. 411; 20 Ky. L. R. 986.

<sup>63</sup> *President, etc. of Bowdoin College v. Merritt*, 75 Fed. 480. Similar views are expressed in *Stewart v. Stewart*, 5 Conn. 316; *Hall v. Bragg*, 28 Ga. 330; *Ritter's Appeal*, 59 Pa. St. 9; *Millican v. Millican*, 24 Tex. 426; *Kelly v. Parker*, 181 Ill. 49; *Spencer v. Robbins*, 106 Ind. 580; *Cates v. Cates*, 135 Ind. 272. In this case it was said that

an instrument which does not pass any interest until after the death of the maker is a will; citing *Nichols v. Emery* (Cal.), 41 Pac. 1089; *Craven v. Winter*, 38 Io. 471; *Spencer v. Robbins*, 106 Ind. 580; 5 N. E. 726; *Kopp v. Gunther*, 95 Cal. 63; 30 Pac. 601; *Diefendorf v. Diefendorf*, 132 N. Y. 100; 30 N. E. 375; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40; 26 S. W. 759; *Jenkins v. Adecock*, 5 Tex. Civ. App. 466; 27 S. W. 21; *Bunch v. Nicks*, 50 Ark. 367; 7 S. W. 563; *Bromley v. Mitchell*, 155 Mass. 509; 30 N. E. 83; *Moury v. Heney*, 86 Cal. 471; 25 Pac. 17; *Book v. Book*, 104 Pa. St. 240; *McGuire v. Bank*, 42 Ala. 589; *Hall v. Burkham*, 59 Ala. 349; *Owen v. Smith*, 91 Ga. 564; 18 S. E. 527. In this case the court quoted the following: "A will recognized by this court, which seems to have the united support of the authorities, furnishes an unerring test to determine the character of the instrument. It is this: If the instrument passes a present interest, although the right to its possession and enjoyment may not occur till some future time, it is a deed or a contract; but if the instrument does not pass an interest or right till the death of the maker it is a will or testamentary paper. *University v. Barrett*, 22 Io. 60; *Craven v. Winter*

If the deed has been delivered either to the grantee or in escrow, it is held in some states that it passes a present estate, even though it contains the words "only to take effect at the death of the grantor," or their equivalent. Such words are held to be only the reservation of a life estate to the grantor, while the remainder passes to the grantee on delivery. In such states instruments of this sort are held to be deeds, not wills.<sup>64</sup>

The fact that an instrument which was intended to pass title on delivery was never delivered is no reason for regarding it as a will.<sup>65</sup>

### §53. Confusion between deeds and wills.—Instruments held wills.

Where, on the other hand, testator's intention is manifest from the whole instrument that it shall not take effect until the death of the maker and shall not pass any property right

38 Io. 471." Other cases on this point are *Boling v. Boling*, 22 Ala. 826; *Kaufman v. Ehrlich*, 94 Ga. 159; *Ward v. Ward* (Ky.), 48 S. W. 411; *Knowlson v. Fleming*, 165 Pa. St. 10; *Wilson v. Anderson*, 186 Pa. St. 531; 142 Pa. St. 149.

*Contra*, *Stroup v. Stroup*, 140 Ind. 179.

<sup>64</sup> *Kelly v. Parker*, 181 Ill. 49; *Shackleton v. Sebree*, 86 Ill. 616; *Harshbarger v. Carroll*, 163 Ill. 636; *Latimer v. Latimer*, 174 Ill. 418, citing *Vinson v. Vinson*, 4 Ill. App. 138; *Calef v. Parsons*, 48 Ill. App. 253; *Golding v. Golding*, 24 Ala. 122; *Elmore v. Mustin*, 28 Ala. 309; *Gilliam v. Mustin*, 42 Ala. 365; *Bryan v. Bradley*, 16 Conn. 474; *Cumming v. Cumming*, 3 Ga. 460; *Wall v. Wall*, 30 Miss. 91; *Bowler v. Bowler*, 176 Ill. 541. (These Illinois cases distinguish or

ignore the dictum in *Massey v. Huntington*, 118 Ill. 80.) *Wilson v. Carrico*, 140 Ind. 533, citing *Owens v. Williams*, 114 Ind. 179; *Bunch v. Nicks*, 50 Ark. 367; *Wyman v. Brown*, 50 Me. 139; *Abbott v. Holloway*, 72 Me. 298; *Stout v. Rayle*, 146 Ind. 379; *Kelley v. Shimer*, 152 Ind. 290; *Matthews v. Moses*, 21 Tex. Civ. App. 494; *Billings v. Warren*, 21 Tex. Civ. App. 77; *Ogle's Estate*, 97 Wis. 56; *Robinson v. Ingram* (N. Car.) (1900), 35 S. E. 612; *Lauck v. Logan*, 45 W. Va. 251; *Love v. Blauw* (Kan.) (1900), 59 Pac. 1059, reversing 57 Pac. 258. On this point the authorities are in conflict. See for contrary authorities the cases cited in the preceding note, and *Pinkham v. Pinkham*, 55 Neb. 729.

<sup>65</sup> *Johnson v. Johnson*, 103 Tenn. 32, 52 S. W. 814.

till that time it is held to be inherently a will, no matter what outward form it may assume.<sup>66</sup> Thus, where the maker executed the following instrument: "Know all men by these presents that I, Joseph Robinson, for the consideration of one dollar to me in hand paid, as well as my affection, do hereby assign and set over to my daughter, Elizabeth Jane Brewster, all of my property, both personal and real, to have the same after my death.

Attest:

J. S. POST,

E. McCLELLAN,

his

JOSEPH X ROBINSON,  
mark,"

such instrument was held to be a will.<sup>67</sup>

So where the instrument recited that the grantor did "hereby give, convey and confirm unto my said wife and her heirs in absolute right all my entire estate, real and personal and all manner of property I now or may hereafter own . . . reserving a life estate and enjoyment of said property to myself and for the payment of all my just debts; this deed of gift to take effect absolutely at my death and to be valid and conclusive," such instrument never having been delivered, and showing that it was not to go into effect till the maker's death, was held to be a will.<sup>68</sup>

<sup>66</sup> Mosser v. Mosser, 32 Ala. 551; Walker v. Jones, 23 Ala. 448; Leaver v. Ganss, 62 Io. 314; Pinkham v. Pinkham, 55 Neb. 729; Turner v. Scott, 51 Pa. St. 126; Naugher v. Patterson, Tex. Civ. App. 28 S. W. 582; Wren v. Coffey, 26 S. W. 42; Hester v. Young, 2 Kelly (Ga.) 31; Kinaid v. Kinaid, 1 Speer Eq. 256; Millican v. Millican, 24 Tex. 426.

<sup>67</sup> Robinson v. Brewster, 140 Ill. 649.

<sup>68</sup> Crocker v. Smith, 94 Ala. 295, citing Jordan v. Jordan, 65 Ala.

301; Dunn v. Bank, 2 Ala. 152; Trawick v. Davis, 85 Ala. 342; Griffith v. Marsh, 86 Ala. 302; Sharp v. Hall, 86 Ala. 110; Elmore v. Mustin, 28 Ala. 304; Gillham v. Mustin, 42 Ala. 365. A similar case is Williams v. Tolbert, 66 Ga. 127, citing Daniel v. Veal, 32 Ga. 589; Bass v. Bass, 52 Ga. 531, and distinguishing Nichols v. Chandler, 55 Ga. 369. So are Barnes v. Stephens, 107 Ga. 436; 33 S. E. 399; Dye v. Dye, 108 Ga. 741; De Bajligethy v. Johnson (Tex. Civ. App.) (1900), 56 S. W. 95.

An instrument, which was a deed in usual form, except for a clause providing "in no event is this instrument to go into effect till my death," was held to be a will.<sup>69</sup>

In another case the instrument was drawn in the form of a warranty deed, except that it provided that upon the death of the maker "this conveyance to be delivered to the said Elizabeth Kelley." The maker kept it in his control until his death. In view of the fact that it clearly appeared his intention that the instrument should not take effect until his death, it was held to be a will.<sup>70</sup>

Another instrument was in the usual form of a warranty deed except for the addition of the clause: "also one half of all my personal property and money left at my death shall go to the above Elizabeth Ann." The evidence showed, and the circuit court found as a fact that this instrument was never delivered, and that the maker intended it to take effect at his death and not before. Held by the supreme court to be a will.<sup>71</sup>

So where an instrument recited that "We do give and bequeath all our real and personal property of which we die possessed or seized" to certain beneficiaries, such instrument was held testamentary in its nature.<sup>72</sup>

<sup>69</sup> Donald v. Nesbit, 89 Ga. 290, citing and following Bright v. Adams, 51 Ga. 239. Similar cases are Turner v. Scott, 51 Pa. St. 126; Stroup v. Stroup, 140 Ind. 179, but an instrument almost identical in form was held a deed in Seals v. Pierce, 83 Ga. 787.

<sup>70</sup> Kelly v. Richardson, 100 Ala. 584, citing Kyle v. Perdue, 87 Ala. 423.

<sup>71</sup> *In re Lautenshlager*, 80 Mich. 285, citing Bigley v. Souvey, 45 Mich. 370; Morrell v. Dickey, 1 Johns Ch. 153; Bayley v. Bailey, 5 Cush. 245; Gage v. Gage, 12 N. H. 371; Frew v. Clarke, 80 Pa. St. 170. To the same effect is Smith v. Holden, 58 Kan. 535.

<sup>72</sup> Poore v. Poore, 55 Kan. 687.

Of course this does not mean that the instrument is always valid because it is testamentary. In many of the cases cited there was some defect in the formal requisites of the will, which made the instrument inoperative for the very reason that it was testamentary. In this case of Poore v. Poore, for instance, the instrument was not properly witnessed, and hence, though testamentary, was not a valid will. Similar instruments were held to be wills in *In re Goods of Slinn*, L. R. 15 Prob. Div. 156; Brewer v. Baxter, 41 Ga. 212; Roth v. Michalis, 125 Ill. 325; Stevenson v. Huddleson, 13 B. Mon. (Ky.) 299; Gage v. Gage, 12 N. H. 371; Watkins v. Dean, 10 Yerg. (Tenn.) 321.

Testator's intention that the instrument shall not take effect until his death is often shown from expressions in his will referring to his death as the event which was to make his dispositions of property effective. Thus, an instrument reciting "If I do not live to be 21 years of age, I give, etc.," was held to be a will.<sup>73</sup> As was an instrument in the form of a deed to take effect only "if I should die or be killed in this war."<sup>74</sup>

So, also, a trust deed of property in trust to support grantor and pay the residue of the fund to grantor's children one year after his death was held to be a will.<sup>75</sup>

A trust deed to grantor's use for his life and on his death to another, reserving power of revocation and sale to grantor, was held a will.<sup>76</sup> And a revocable trust deed appointing trusts to take effect upon the death of the grantor is held to be a will.<sup>77</sup>

In a case which is in some respects a departure from the usual rule, a deed-poll, which was witnessed by two witnesses, was admitted to probate as the last will of testatrix upon extrinsic evidence that she wished it to operate as her will.<sup>78</sup> And a deed in form which was never delivered but concerning which the maker of the instrument said that he told his children "I wanted them to have the home farm if I dropped off or anything happened" was held to be a will, and not a deed. Like other cases holding similar instruments to be wills, this last point was not necessary to the decision of the case, as the real holding was that the attempted conveyance, being without consideration and not delivered, was not valid as against the creditors of the grantor.<sup>79</sup>

<sup>73</sup> Daniel v. Hill, 52 Ala. 430.

<sup>77</sup> Milnes v. Foden, L. R. 15 P.

<sup>74</sup> Gillham v. Mustin, 42 Ala. 365.

D. 105.

<sup>75</sup> Frederick's Appeal, 52 Pa. St. 338.

<sup>78</sup> *In re Slinn*, L. R. 15 P. D. 156.

<sup>79</sup> Blackman v. Preston, 123 Ill. 381.

<sup>76</sup> Stroup v. Stroup, 140 Ind. 179.  
For contrary authorities see Sec. 52..

#### §54. Confusion between wills and contracts—Instruments held contracts.

In determining whether an instrument in doubt is a will or a contract, the same test applies as in the case of confusion between wills and deeds. The test is not the time of performance, but the time at which by the terms of the instrument a property right under the instrument attaches. If by the terms of the instrument no property right is to attach under it until testator's death, the instrument is a will; but if a property right attaches during testator's lifetime, the instrument is a contract, even though the time of performance may be postponed till the death of testator. Thus, an instrument in the following form: "One day after my death I promise to pay to the order of Nancy M. Jones two thousand dollars to be paid out of my estate. For value received without any relief from valuation or appraisement laws with 6 percent interest from date and attorney's fees" created a present liability, and hence was held to be a contract, not a will.<sup>80</sup>

In another case, where a similar instrument was under consideration, the court held it to be at least *prima facie* a contract, saying: "Its obligatory character did not depend on her (the maker's) death, but only the provision for its discharge."<sup>81</sup> And where a creditor took a note with interest payable annually during her life, interest to cease at her death, and principal never to be due, it was held a transfer of the amount owed and not testamentary.<sup>82</sup>

If an instrument possesses all the elements of a contract, the fact that the time of performance is fixed at testator's death, or within a given time thereafter, does not make it a will.<sup>83</sup>

<sup>80</sup> Price v. Jones, 105 Ind. 543.

St. 477; Miller v. College, 177 Ill.

<sup>81</sup> Kirkpatrick v. Pyle, 6 Houst. (Del.) 569.

280; 42 L. R. A. 797.

<sup>82</sup> Hinkle v. Landis, 131 Pa. St. 573. Other cases of like nature are Crider v. Shelby, 95 Fed. Rep. 212; McKinnon v. McKinnon, 56 Fed. 409; *In re Sunday's Estate*, 167 Pa. St. 30; *In re Maul's Estate*, 186 Pa.

<sup>83</sup> Miller v. College, 177 Ill. 280; 42 L. R. A. 797, affirming 71 Ill. App. 587; Hegeman v. Moon, 131 N. Y. 462; Wolfe v. Wilsey, 2 Ind. App. 549; Krell v. Codman, 154 Mass. 454; Kirkpatrick v. Pyle, 6 Houst. (Del.) 569.

**§55. Confusion between wills and contracts.—Instruments held wills.**

In accordance with the principles laid down an instrument may be valid as a will, although it is drawn in the form of a contract, if it possesses the inherent elements of a will; that is, in distinction from a contract, that by its terms the intention of the maker appears that no interest shall attach under such instrument until the death of the maker.<sup>84</sup>

An instrument was delivered as follows:

Md., Sept. 4, 1884.

“At my death my estate or my executor pay to July Ann Cover three thousand dollars.

[SEAL.]

DAVID ENGEL.”

There was but one witness to this instrument. It will be noticed that there was no promise to pay and no recital of a consideration. Held testamentary in its nature.<sup>85</sup>

Where the donor transferred certain property gratuitously by a deed and a bill of sale, it being understood that if donor died under an impending surgical operation the property should be distributed by the holders thereof in accordance with a written but unsigned memorandum for such distribution, which accompanied the said deed and bill of sale; but that if donor should recover from the operation the property should not vest, such a disposition was held to be testamentary in its nature.<sup>86</sup>

<sup>84</sup> In an early English case an instrument was held to be a will, though in the following form: “By this deed I bind myself to give to my wife, either on the death of her mother or on the sale of the Yorkshire estate,” certain property. “I do, therefore, hereby ordain that my executors, etc., consider that deed as the most solemn obligation, in confirmation of which I set my hand and seal.” *Coop v. Coop* in note to *Thorald v. Thorald*, 1 Ecc. Rep. 15.

<sup>85</sup> *Cover v. Stem*, 67 Md. 449. Since it was testamentary it was of no validity, as the law required two

witnesses at the date of the instrument. See also *obiter* in *Simon v. Wildt*, 84 Ky. 157, where the instrument purported to be “a contract and will,” and the court said “if it appears that the maker did not intend it to be operative until his death, it will be a will. A similar case, except that under the laws of Pennsylvania the will was executed in legal form, is *Frew v. Clarke*, 80 Pa. St. 170.

<sup>86</sup> *Knight v. Tripp*, 121 Cal. 671, 49 Pac. 838. As testamentary, it was invalid, as not having the formalities required by law.

An instrument which provides that if a certain orphan, a member of the family of the person executing the instrument, survives the latter, he shall receive a certain sum, is a will, and not a contract.<sup>87</sup>

So was the following instrument: "Due at my death to H. J. the sum of two thousand five hundred dollars from the general fund of my estate as a gift."<sup>88</sup>

Bonds executed and kept under the control of the maker to be delivered at his death are testamentary,<sup>89</sup> and an instrument evidently testamentary in its nature was held to be a will, even though it began "I agree to will."<sup>90</sup>

An instrument which set forth that the maker intended to give a certain property "to support her if she should be the longest lived, say \$300 and notes now due her; and it is distinctly understood that this obligation is not to be sold, nor assigned, nor no attempt to collect it in my lifetime, without my consent," and which was supplemented by two provisions, "I now add \$50 more," and "I now add \$100 more," was held to be testamentary.<sup>91</sup> But an instrument somewhat similar in form but which does not show an intent to take effect only upon the death of the maker has been held not to be a will.<sup>92</sup>

An instrument may be in part a will and in part a contract.<sup>93</sup>

## §56. Confusion between wills and orders.

In case of doubt whether an instrument in the form of an order or a note of instructions to third persons is not really a will, the test is the same as in the case of deeds and contracts. If the interest created is to begin as a vested interest during testator's lifetime, the instrument is an order, even if the beneficial results of such interests are postponed until the death of the maker; but if the interest thereby created is not to begin till the death of the maker, the instrument is a will.

<sup>87</sup> *Swann v. Housman*, 90 Va. 816.

<sup>88</sup> *Johnson v. Yancey*, 20 Ga. 707.

<sup>89</sup> *Carey v. Dennis*, 13 Md. 1.

<sup>90</sup> *Longer's Estate*, 108 Io. 34; 78 N. W. 834.

<sup>91</sup> *Pelley v. Earles* (Ky.), (1900),

55 S. W. 550. This instrument was endorsed as an "obligation" by its maker.

<sup>92</sup> *Scott's Estate* (Cal.) (1900), 60 Pac. 627.

<sup>93</sup> *Reed v. Hazelton*, 37 Kan. 321.



The owner of some government bonds wrote to the bankers who had such bonds in custody: "Gents: of the 7<sup>30</sup> government bonds of mine in your hands, I hereby assign to my wife H. C. \$6,000, she to draw the interest of the same, you keeping possession of the same . . . My wife to draw the interest till her death, to have no control of the principal so far as disposing of them is concerned—the bonds at her death to revert to my heirs. The above assignment to take effect at my death, I controlling them in the meantime." This letter was signed by the writer. It was held to be testamentary in its nature, as it was not to go into effect till the writer's death; hence it needed the statutory formalities to be valid.<sup>94</sup>

In another case the holder of a benefit certificate indorsed upon the certificate a statement that at her death her claim should go to her two children named therein, or to a certain person as executrix for said children. This instrument was held to be testamentary in character, and hence defective, as lacking statutory formalities.<sup>95</sup>

So a depositor in a savings bank had a right under the by-laws of the bank to enter upon the bank-book the name of the "person or persons to whom, in event of her absence or death, the money shall be paid if not otherwise disposed of." She told the officer of the bank to enter the name of Mary Remington under such heading; he did so, and with another of the bank officials witnessed the appointment in writing. It was held that this act was in its nature testamentary, therefore invalid since the depositor did not sign the appointment.<sup>96</sup> Or a depositor may deposit in the savings bank in the name of himself and some other person or the survivor of them. The

<sup>94</sup> *Comer v. Comer*, 120 Ill. 420.

<sup>95</sup> *Grand Fountain of U. C., etc., v. Wilson*, 96 Va. 594; 32 S. E. 48. So in an assignment of a life insurance policy to take effect after the death of assignor. *Schad's Appeal*, 88 Pa. St. 111.

<sup>96</sup> *Remington v. Bank*, 76 Md. 546. Similar cases are *Knight v. Tripp*, 121 Cal. 674; *Murdock v. Bridges*, 91 Me. 124; *Flanagan v. Nash*, 185 Pa. St. 41.

courts do not agree as to whether such an act is testamentary or not.<sup>97</sup>

On principle it is hard to see wherein it is properly testamentary, if a present interest in the fund vests on deposit, and the fund is subject to the order of either or of both. Undoubtedly an attempt to keep full control of the fund in the lifetime of the owner, indicating only to whom the balance remaining at his death should be paid, is testamentary; but the two cases are distinguishable.

A transfer of a bond to one for life, and on his death to another, which passes a present vested interest is not testamentary in its nature.<sup>98</sup>

### §57. Will in form of power of attorney.

An instrument drawn in the form of a power of attorney appointing an executor is testamentary in character.<sup>99</sup>

### §58. Informal wills.

The foregoing list of writings with which a will may be confused is not exclusive. A will may assume the outward form of any instrument. This topic was formerly more important

<sup>97</sup> In *Norway Savings Bank v. Merriam*, 88 Me. 146, 33 Atl. 840, such a disposition was treated as testamentary, and therefore invalid unless executed with the formalities required by the Wills Act, citing *Augusta Savings Bank v. Fogg*, 82 Me. 538; *Sherman v. New Bedford Savings Bank*, 138 Mass. 581; *Smith v. Speer*, 34 N. J. Eq. 336; *Towle v. Wood*, 60 N. H. 434. In *Metropolitan Savings Bank v. Murphy*, 82 Md. 314, a similar deposit was held not to be testamentary in its nature, but a valid contract analogous to an equitable assignment, distinguishing *Dougherty v. Moore*, 71 Md. 248.

<sup>98</sup> *Martin v. Martin*, 170 Ill. 639.

<sup>99</sup> *Tusch v. Savings Bank*, 48 N. Y. Supp. 221; *Rose v. Quick*, 30 Pa. St. 225. Other cases distinguishing a will from other instruments are: *Mosser v. Mosser*, 32 Ala. 551; *In re Skerret's Estate*, 67 Cal. 585; *Seals v. Pierce*, 83 Ga. 787; *Massey v. Huntington*, 118 Ill. 80; *Cas-tor v. Jones*, 86 Ind. 289; *Leathers v. Greenacre*, 53 Me. 561; *Edwards v. Smith*, 35 Miss. 197; *Towle v. Wood*, 60 N. H. 434; *Lines v. Lines*, 142 Pa. St. 149; *Frew v. Clarke*, 80 Pa. St. 170; *Babb v. Harrison*, 9 Rich. Eq. (S. Car.) 111; *Watkins v. Dean*, 10 Yerg. (Tenn.) 321; *Reagan v. Stanley*, 11 Lea. (Tenn.) 316.

than it is now, as the old law required but little extrinsic formality in testaments passing personal property. This was the law in England prior to 1837. It was often difficult to determine whether a writing was a will, or merely an expression of a present intention to make a will in the future. At modern law, by statute, a will to be valid must have certain extrinsic formalities, such as a signature and attestation by witnesses. Unless a paper possess these formalities, it is not now a practical question in the law of wills whether it is testamentary or not. There are certain jurisdictions, however, that do not require these formalities.<sup>100</sup> Among them are Pennsylvania, where the attestation by witnesses need not appear upon the paper, and such jurisdictions as California, where the holographic will is recognized, that is, the will in the handwriting of the testator, which, under the statutes of certain states, needs no witnesses. In such jurisdictions it is still important to distinguish between the will and the expression of intention to make a certain will thereafter.

The rule is that no set form of expression is required. All that is necessary to make an instrument testamentary is that it should show, when read in connection with surrounding facts and circumstances, a testamentary intention.

A discussion of particular examples of the distinction between the informal will and the expression of an intention to make a will in the future properly belongs under the head of "Construction," but will be dealt with here to save repetition in a subsequent chapter.

A deed of property had never been delivered, and a letter from the grantor to the grantee contained a reference to the deed: "We all know that life is uncertain and we don't know the moment that we may be called away. . . I therefore want you to know that you are provided for under any circumstances." This was held to be testamentary and therefore valid as a holographic will.<sup>101</sup>

The following was written on the back of a business letter:

<sup>100</sup> See Chap. XIII, Nuncupative and Holographic Wills.

<sup>101</sup> Skerrett's Estate, 67 Cal. 585.

"Ann, after my death you are to have forty thousand dollars; this you are to have will or no will; take care of this until my death." It was directed "To Eliza Ann Byers." It was held to be testamentary, and, as it complied with the statutes then in force in Maryland, a valid will.<sup>102</sup>

The following indorsement on a promissory note was made by payee: "If I am not living at the time this note is paid, I order the contents to be paid to X." This was held to be a testamentary instrument.<sup>103</sup>

An envelope was indorsed, "Dear Bella, this is for you to open." Inside was a promissory note for two thousand dollars and this paper: "Lewiston Oct. 2, 1879. My wish is for you to draw this 2,000 for your use should I die sudden. Elizabeth Fosselman." This was held to be a will.<sup>104</sup>

The following writing: "High James Rogers do give to John Jackson, Sr. my property known as penargyle Hotel and the land adjoining in Penargyle Northampton County Pa. James Rogers," was written by Rogers shortly before his death and placed in an envelope addressed to John Jackson. It was held to be a will.<sup>105</sup>

So the following informal instrument was held to be a will: "March the 4 will my Properti to my wief my death John Sullivan." <sup>106</sup>

A memorandum on the back of a gas bill began: "It is my wish," then followed a list of names, and after each name a schedule of property. This was held to be a valid will, it being possible to identify the persons and the property.<sup>107</sup>

So entries in a diary may amount to a will.<sup>108</sup>

An instrument which describes a tract of land and provides

<sup>102</sup> Byers v. Hoppe, 61 Md. 206;  
48 Am. Rep. 89.

<sup>103</sup> Hunt v. Hunt, 4 N. H. 434.

<sup>104</sup> Fosselman v. Elder, 98 Pa.  
St. 159.

<sup>105</sup> Fozer v. Jackson, 164 Pa. St.

<sup>106</sup> Sullivan's Estate, 130 Pa. St.  
342.

<sup>107</sup> *In re* Gaston's Estate, 188 Pa.  
St. 374.

<sup>108</sup> Reagan v. Stanley, 11 Lea. 316.

"I have requested my executors to give a clear deed for the property after my death" to A, was held a valid will.<sup>109</sup>

A letter may be a valid will, if it shows a present intent to dispose of the property of the writer at his death.<sup>110</sup> But an acknowledgment of a claim, while it may be valid as evidence of such claim, is not a will.<sup>111</sup> Thus a letter containing the following: "You can put in your claim against my estate for \$500 which I hereby acknowledge owing you," was held not to be testamentary in its nature.<sup>112</sup>

And a letter not written in contemplation of death which contained these words: "My health is probably ruined and I want to anticipate possibilities. You and your children get everything," was held not to be testamentary, but simply a statement as to the sort of will that the writer intended to make.<sup>113</sup>

### §59. Precatory words.

Since a testator is not obliged to use any set form of words, it follows that he may put his intention in the form of a request or a recommendation. As long as it is a statement in legal form of his wish concerning the disposition of his property, the appointment of an executor of his estate or a guardian of

<sup>109</sup> Webster v. Lowe (Ky.) (1899), 53 S. W. 1030. Compare Young's Estate, 123 Cal. 337, where there was no description of the property to be conveyed, and such provision failed. Other cases on this point are Mitchell v. Donahue, 100 Cal. 202; Jackson v. Jackson, 6 Dana (Ky.) 257; Kelliher v. Kernan, 60 Md. 440; Leathers v. Greenacre, 53 Me. 561; Barney v. Hayes, 11 Mont. 571; Belcher's Will, 66 N. Car. 51; Brown v. Eaton, 91 N. Car. 26;

Cowley v. Knapp, 42 N. J. L. 297; Knox's Estate, 131 Pa. St. 220; Scott's Estate, 147 Pa. St. 89; Fouche's Estate, 147 Pa. St. 395; Reagan v. Stanley, 11 Lea. (Tenn.) 316.

<sup>110</sup> Cowley v. Knapp, 42 N. J. L. 297.

<sup>111</sup> O'Neil's Estate, 73 Minn. 266.

<sup>112</sup> O'Neil's Estate, 73 Minn. 266; 76 N. W. 27.

<sup>113</sup> Richardson's Estate, 94 Cal. 63. See Sec. 48.

his children, it will be treated as his will. There is no dispute about this rule of law.<sup>114</sup>

There is, however considerable practical difficulty in determining in a given case whether the words used are dispositive or merely precatory. This is a question of construction and is given here solely for convenience. The test is this: does the testator mean by his language to control the disposition of his property? If so, it is his will, no matter how mildly the wish is expressed. Or does he simply indicate what he regards as a wise disposition, leaving however to the person taking the legal title to the property full discretion to dispose thereof. If so, it is not his will.<sup>115</sup> Thus a statement "I wish X to have, etc.," is treated as a will;<sup>116</sup> while a statement that a certain instrument disposing of property was not intended "as a legal will but as a guide" shows that the instrument was not a will;<sup>117</sup> and a gift to A providing that she is to give B a certain sum "at her Pleasure if (she) feel dispose to do so, but it is not obligatory," was held to leave the gift to B entirely in A's discretion.<sup>118</sup>

Words which are milder than commands or positive dispositions of testator's property are known as precatory words. This term is not an extremely technical one. Indeed, the word precatory is used quite impartially of words which though mild in form are held to be dispositive, and of words which are held not to be dispositive but to constitute suggestions merely to be

<sup>114</sup> *Cock v. Cooke*, 1 Prob. & Div. 241; *Abend v. Endowment Fund Commission*, 174 Ill. 96 affirming 74 Ill. App. 654; *Ingraham v. Ingraham*, 169 Ill. 432; *Black v. Herring*, 79 Md. 146; *Murphy v. Carlin*, 113 Mo. 112; *Cox v. Wills*, 49 N. J. Eq. 130, 573; *Forster v. Winfield*, 142 N. Y. 327; *Knox's Appeal*, 131 Pa. St. 220; *Oyster v. Knull*, 137 Pa. St. 448.

<sup>115</sup> *In re Williams* 1897, 2 Ch. Div. 12; *In re Hamilton*, 1895, 2 Ch. Div. 370; 12 Rep. 355; *Coulson v. Alpaugh*, 163 Ill. 298; *Randall v. Randall*, 135 Ill. 398; *Pellizzaro v.*

*Reppart*, 83 Io. 497; *Mitchell v. Mitchell*, 143 Ind. 113; *Halsey v. Convention of P. E. Church*, 75 Md. 275; *Aldrich v. Aldrich*, 172 Mass. 101; *Durant v. Smith*, 159 Mass. 229; *Fairchild v. Edson*, 154 N. Y. 199; *Whelen's Estate*, 175 Pa. St. 23.

<sup>116</sup> *Cock v. Cook*, L. R. 1 P. & D. 241. *In re Gaston's Estate*, 188 Pa. St. 374; 41 Atl. 529.

<sup>117</sup> *Ferguson-Davie v. Ferguson-Davie*, L. R. 15 P. & D. 109.

<sup>118</sup> *Eberhardt v. Parolin*, 49 N. J. Eq. 570.

carried out at the discretion of the person to whom they are addressed.<sup>119</sup>

### §60. Contingent wills.—What wills are included.

The subject of contingent wills is one which might be classed under construction, as many of the cases involve the question whether the will is contingent or not; or under restraints on testamentary power, as many of the cases involve the question whether the law will permit such dispositions. But the question of testamentary intent is also involved. It is often a question whether under the circumstances the testator intended the instrument as a disposition of his property or not. This being the case, a fragmentary treatment of this subject, though perhaps more logical than the present method, seems so unsatisfactory that at this point a discussion of contingent wills in detail is given.

A will is said to be contingent when the testator has, in such will, named some future event as a condition precedent to his will's taking effect, or upon whose happening the will never can take effect.<sup>120</sup> This contingency, furthermore, is one which relates to the whole will. A contingency which has effect only to defeat certain bequests is not of the sort that we are considering here.<sup>121</sup>

### §61. Validity of contingent wills.

The validity of conditional wills depends upon the time when the condition is to be performed. There are three periods of time designated by testators for this contingency to occur, which will be discussed in order, namely: (1) during testator's life, (2) after his death before probate, and (3) after probate.

(1) If the condition is to be performed before the death of the testator, full effect is given to the condition,

<sup>119</sup> For the subject of Precatory Words Creating Trusts see Secs. 611, 612. <sup>121</sup> For such contingencies see Chap. XXXI.

<sup>120</sup> *Damon v. Damon*, 8 Allen (Mass.) 192.

and the will is treated as in force or not, according to the performance or non-performance of the condition.<sup>122</sup> Thus a will made by A to be in force if she should die before B is held not to be A's will where A died before B.<sup>123</sup>

(2) Where the contingency occurs after the death of the testator, but before probate, its validity seems to be established by the general rules of law, though the adjudicated cases are few. Thus a provision that a codicil to a will should go into effect on approval by testator's wife was given full effect, and as she declined to approve the codicil, it was refused probate.<sup>124</sup>

(3) Where the contingency is delayed till after the probate, the court can not declare the instrument to be the last will and testament of deceased, for that would ignore his intention, which plainly is that the instrument is to be his will only on the happening of the named event. Nor can the question of the validity of the will be postponed until the happening of an event which may be delayed for years. The policy of our laws requires a prompt settlement of the estates of decedents. While the authorities on this point are few, they hold, in accordance with the views here stated, that if the will is not by its terms clearly and absolutely by the will of decedent when offered for probate, it should never be given effect.<sup>125</sup>

<sup>122</sup> *In re Cuno*, L. R. 43 Ch. D. 12; *Tarver v. Tarver*, 9 Pet. (U. S.) 174; *Dougherty v. Dougherty*, 4 Met. (Ky.) 25; *Likefield v. Likefield*, 82 Ky. 589; *Magee v. McNeil*, 41 Miss. 17; *Robnett v. Ashlock*, 49 Mo. 171; *Morrow's Appeal*, 116 Pa. St. 440.

<sup>123</sup> *In re Cuno*, L. R. 43 Ch. D. 12.

<sup>124</sup> *Dudley v. Weinhart*, 93 (Ky.), 402; 20 S. W. 308; 14 Ky. Law Rep. 434; *Ingersoll's Estate*, 167 Pa. St. 536. An analogy to the rule allowing conditions to be imposed

which were to be performed after the death of testator and before probate, upon which the validity of the will depended, is found in the common law rule as to the validity of the will of a married woman. The validity of such a will was contingent upon the consent of the husband which might be given or withheld at any time before probate.

<sup>125</sup> 1 *Jarman on Wills*, 17; *Goods of Cooper, Dea. and Sw.* 9; *Goods of Smith*, L. R. 1 P. & D. 717.



## §62. Examples of contingent wills.

A question often presented in the discussion of this subject is, whether the language of a given will is conditional or whether, without imposing a condition, it recites the circumstances which induce testator to make his will. This is another instance of construction, but is for convenience given here. It must be conceded at the outset that the courts are not harmonious in their views of similar expressions used in different wills.

*English Cases.*—Thus where the testator wrote "Should anything unfortunately happen to me while abroad, I wish, etc.," it was held to be a conditional will; and as the testator had returned from abroad, the will was of no effect.<sup>126</sup> So also, where the will contained the clause "If I die before I return from Ireland."<sup>127</sup>

*American Cases.*—A testator wrote "I am going to town with my drill and am not feeling good, and in case I should not get back, etc." He went to town, became ill, was brought home and soon died. It was held that the will was conditional and hence avoided by the return of the testator.<sup>128</sup> Where a Kentucky testator wrote "as I intend starting in a few days for the State of Missouri, and should anything happen that I should not return alive," it was held a conditional will.<sup>129</sup> So was a will made by a Missouri testator, "I this day start for Kentucky; I may never get back. If it should be my misfortune, etc.,"<sup>130</sup> and a will "If I never get back home I leave you everything I have in the world."<sup>131</sup>

<sup>126</sup> Goods of Porter, L. R. 2 P. & D. 22, and cases cited there.

<sup>127</sup> Parsons v. Lanoe, 1 Ves. Sr. 189; Amb. 557.

<sup>128</sup> Morrow's Appeal, 116 Pa. St. 440. A similar case is Magee v. McNeil, 41 Miss. 17.

<sup>129</sup> Dougherty v. Dougherty, 4 Met. (Ky.) 25.

<sup>130</sup> Robnett v. Ashlock, 49 Mo. 171.

<sup>131</sup> Maxwell v. Maxwell, 3 Met. (Ky.) 101; Likefield v. Likefield, 82 Ky. 589.

("If anything happens to me that I die away from home, my wife to have everything.")

### §63. Examples of wills held not contingent.

In cases, many of which are closely analogous to those just cited, similar language has been held to be a statement of the reasons which induced testator to make his will. Hence these wills are valid even though the event spoken of has occurred in such a way that the will, if conditional, would be avoided.

*English Cases.*—A will contained the words: "Being physically weak in health, have obtained permission to cease from all duty for a few days . . . in the event of my death occurring during such time. . . ." It was held not to be a conditional will.<sup>132</sup> So there was a similar holding where the will contained the words "in case of my death by the way"<sup>133</sup> or "in case of any fatal accident happening to me, being about to travel by railway."<sup>134</sup>

*American Cases.*—A will was held not to be conditional where it contained the words "Being about to take a long journey and knowing the uncertainty of life";<sup>135</sup> or where it was expressed "Should anything happen to me before I reach St. Louis."<sup>136</sup> The most extreme of the American cases is the following, in which a provision, "If I get drowned this morning, March 7, 1872, I bequeath, etc," was held not to be a condition, but a narration of the facts which led testator to make his will at that time.<sup>137</sup>

### §64. Contingency applying to only part of will.

It sometimes happens that the contingency applies to one or more clauses of the will. They are to be valid or not according to the outcome of the event; the rest of the will is absolute. Thus a testator began his first bequest "First, if by casualty or otherwise I should lose my life during this voyage, I give," etc.

<sup>132</sup> *Goods of Martin*, L. R. 1 P. & D. 380.

<sup>133</sup> *In re Mayd*, 6 P. D. 17.

<sup>134</sup> *In re Dobson*, L. R. 1 P. & D. 88.

<sup>135</sup> *Tarver v. Tarver*, 9 Pet. (U. S.) 174.

<sup>136</sup> *Ex parte Lindsay*, 2 Bradf. (N. Y.) 204.

<sup>137</sup> *French v. French*, 14 W. Va. 458.

The subsequent bequests contained no mention of any conditions. It was held that the first bequest only was conditional.<sup>138</sup> In such cases the will is, of course, unaffected as a whole by the failure of specific bequests.<sup>139</sup>

So the conditional appointment of an executor followed by an unconditional bequest, leaves the bequest unaffected by the condition.<sup>140</sup> The courts prefer to construe a will as having contingent bequests rather than as being contingent as a whole.<sup>141</sup>

<sup>138</sup> *Damon v. Damon*, 8 Allen 36; 66 L. J. P. D. & A.; N. S. 29; (Mass.) 192. A similar case is 75 Law T. Rep. 520.

*Massie v. Griffin*, 2 Met. (Ky.) 364.

<sup>139</sup> *Damon v. Damon*, 8 Allen (Mass.) 192. See Sec. 674.

<sup>141</sup> *Damon v. Damon*, 8 Allen (Mass.) 192; *Ex parte Lindsay*, 2 Bradf. (N. Y.) 204.

<sup>140</sup> *Halford v. Halford* [1897] P.

## CHAPTER VI.

### JOINT AND MUTUAL WILLS.

#### §65. Wills not included under this chapter.

In order to define clearly the topic treated of in this chapter, it is necessary to begin with the negative proposition that certain types of will must not be confused with joint and mutual wills (and are not discussed in this chapter). Of these types which might be confused with joint and mutual wills, the most common are the following:

1. A will which is signed by some person in addition to testator, but which disposes only of the property of the testator, and expresses only his wishes, is neither a joint nor a mutual will. It differs in no way from an ordinary will of the common type, and the additional signature is treated as surplusage.<sup>1</sup>

2. Where two or more testators prepare and execute separate wills and do not in so doing act in pursuance of any contract existing between them such wills are neither joint wills nor mutual wills. The fact that the wills were executed at the same time and that the provisions of the wills show that the

<sup>1</sup> *In re Smith*, L. R. 15 P. D. 2; *Mosser v. Mosser*, 32 Ala. 551; *Rogers*, Appellant, 11 Me. (2 Fairf.) 303; *Chaney v. Missionary Soc.*, 28 Ill. App. 621; *Allen v. Allen*, 28 Kan. 18; *Smith v. Holden*, 58 Kan. 535; 50 Pac. 447; *Kunnen v. Zurline*, 2 C. S. C. R. (Ohio) 440. In these cases the wife

signed the will of the husband, below his signature, probably under an erroneous view of the law, thinking such signature necessary to validate the instrument. So in *Byles v. Cox*, 74 Law T. Rep. 222, a witness by inadvertence signed above testator.

testators had a common purpose and were inspired by similar motives will not make the wills joint or mutual. They will be treated as the respective wills of the several testators.<sup>2</sup>

### §66. Wills included under this chapter.—Classification.

The types of wills which are here discussed are comparatively easy to separate one from the other. The names of these types are unfortunately not so clearly established. The courts have been in recent years comparatively harmonious in applying principles of the law to these types of will, but they have not been harmonious in applying names to them.

The simplest and crudest method of classifying wills on this basis is as to outward form. If the common intention is expressed in one instrument which is signed and executed by both the testators, the will may be called a joint will;<sup>3</sup> while if the testators have executed two separate instruments to manifest their common intention, the will may be called a mutual will;<sup>4</sup> and if this common intention is that the property of the one dying first shall go to the survivor, it may be termed a mutual or reciprocal will.<sup>5</sup> This classification is not adequate, as it is based purely on the form in which the testamentary intention may be expressed, but it is often adopted by the courts. As to the substance of these wills the following classification may be suggested:

1. The will by which the one dying first leaves his property to the survivor or survivors, whether this is done by one will executed by all the testators or by separate wills executed separately.<sup>6</sup> Some of the courts have termed this a double

<sup>2</sup> *Edson v. Parsons*, 155 N. Y. 555; 50 N. E. 265; affirming 32 N. Y. S. 1026; 85 Hun, 263.

<sup>3</sup> *In re Davis' Will*, 120 N. Car. 9; 26 S. E. 636; *Betts v. Harper*, 39 O. S. 639; *Wyche v. Clapp*, 43 Texas 514.

<sup>4</sup> *Edson v. Parsons*, 155 N. Y. 555, *supra*.

<sup>5</sup> *In re Diez's Will*, 50 N. Y. 88; *March v. Huyter*, 50 Tex. 243.

<sup>6</sup> For cases where intention is expressed in one will. *Schumaker*

*v. Schmidt*, 44 Ala. 454; *Lewis v. Scofield*, 26 Conn. 452; *Evans v. Smith*, 28 Ga. 98; *Black v. Richards*, 95 Ind. 184; *In re Diez's Will*, 50 N. Y. 88; *March v. Huyter*, 50 Tex. 243. For case where intention is expressed in separate wills. *Edson v. Parsons*, 155 N. Y. 555; 50 N. E. 265; affirming 32 N. Y. S. 1026; 85 Hun, 263. The expression of judicial opinion in this case is undoubtedly an *obiter*, but a very clear and weighty *obiter*.

will,<sup>7</sup> and other courts, while applying the same legal principles, refuse to recognize such will as even a mutual will, but prefer to style it the separate will of each.<sup>8</sup> When such an intention manifests itself in separate wills they are sometimes spoken of as concurrent or reciprocal wills.<sup>9</sup>

2. The will by which the testators, in separate clauses, dispose of their several interests in the execution of a common intention.<sup>10</sup>

3. The will by which the testators jointly devise their joint interests to third persons or by which they treat their separate property as a common fund out of which they provide for third persons. A will of this kind is often termed a joint will.<sup>11</sup>

4. The will which is a composite of the foregoing types; that is, which provides in part for third persons and in part provides for the survivor.<sup>12</sup>

5. The will which differs from the third class only in that it specifically directs that it shall not take effect till the death of the survivor of the testators.<sup>13</sup>

<sup>7</sup> *Evans v. Smith*, 28 Ga. 98; *Cawley's Estate*, 136 Pa. St. 628. In the latter case the will was as follows: "I, A. B, should I be the first to die, and I, C. D., should I be the first to die, give, devise and bequeath, and to the survivor of either of us" all the estate of the decedent.

<sup>8</sup> *In Schumaker v. Schmidt*, 44 Ala. 454 the will was as follows: "In event of the death of either one of us the survivor shall, after such death, pay all the expenses of sickness and burial and whatever expenses of the estate may be due by proof. Second, the survivor shall enter into the possession of the estate of the other and shall hold it for his own sole use and benefit." The court said: "The will under consideration, though made by two, is not a joint will because by its terms it can only be the will of him who dies first. Though classed under the general denomination of mutual wills, it is not in fact such,

because by its terms it can be the will only of him who dies first. It is therefore the separate will of the first decedent." Similar views are expressed in *Lewis v. Scofield*, 26 Conn. 452.

<sup>9</sup> *Coleman's Estate*, 185 Pa. St. 437; *Gordon v. Whitlock*, 92 Va. 723.

<sup>10</sup> *In re Davis' Will*, 120 N. Car. 9; *Appeal of Hodges*, 26 S. E. 636. (In this case the exact facts do not appear on the record.) *Ex parte Day*, 1 Bradf. (N. Y.) 476.

<sup>11</sup> *In re Raine*, 1 Sw. & Tr. 144; *Hill v. Harding*, 92 Ky. 76; *Keith v. Miller*, 174 Ill. 64; 51 N. E. 151; *Betts v. Harper*, 39 O. S. 639; *Wyche v. Clapp*, 43 Tex. 544.

<sup>12</sup> *Bank v. Bliss*, 67 Conn. 317; 35 Atl. 255; *Black v. Richards*, 95 Ind. 184.

<sup>13</sup> *Hershey v. Clark*, 35 Ark. 17; 37 Am. Rep. 1; *Bank v. Bliss*, 67 Conn. 317; 35 Atl. 255.

### §67. Validity of joint and mutual wills.

The early view of text-book writers was that, as a general proposition, joint and mutual wills were alike invalid.<sup>14</sup> This view was based upon the language of some early English decisions,<sup>15</sup> and found justification in the early American decisions.<sup>16</sup> The only favor shown was to the type of will known as the mutual or reciprocal will.<sup>17</sup>

The early English cases which were invoked to support the doctrine of the invalidity of joint and mutual wills were *Earl of Darlington v. Pulteny*, 1 Cowp. 260, and *Hobson v. Blackburn*, 1 Add. 277. In each of these cases were *obiter dicta*, which undoubtedly seem to treat such wills as invalid, but which really have no such meaning when applied to the facts of the particular cases. In *Earl of Darlington v. Pulteny*, 1 Cowp. 260, the question was whether a power to two persons to limit an estate by deed could be executed by the will of the survivor. The court held that such a power could not so be executed, as the act was to be performed jointly, and it was not possible for a will to be joint in the sense that it took effect as to the wishes of each testator only at his death. *Hobson v. Blackburn* decided nothing more than that a mutual will might be revoked by either of the testators as to his own estate by a later will. The modern view is that, as a general proposition, joint and mutual wills are valid.<sup>18</sup>

<sup>14</sup> Williams on Executors, pp. 9, 104.

<sup>15</sup> *Earl of Darlington v. Pulteny*, 1 Cowp. 260; *Hobson v. Blackburn*, 1 Add. 274; 2 Eccl. Rep. 116.

<sup>16</sup> *Clayton v. Liverman*, 2 Dev. & B. (N. Car.), 558; *Walker v. Walker*, 14 O. S. 157; 82 Am. Dec. 474.

<sup>17</sup> In *Lewis v. Scofield*, 26 Conn. 452, the court said:

"Although in point of form it is a joint will, executed by two, yet as it disposes only of the estate of the one who may first die, its legal operation, if valid, is the same as if each had made a separate will,

disposing of the estate of each to her sister in case of her surviving her."

<sup>18</sup> *Schumaker v. Schmidt*, 44 Ala. 454; *Lewis v. Scofield*, 26 Conn. 452; *Evans v. Smith*, 28 Ga. 98; *Black v. Richards*, 95 Ind. 184; *Breathitt v. Whittaker*, 8 B. Mon. (Ky.) 530; *Hill v. Harding*, 92 Ky. 76; *In re Davis's Will*, 120 N. Car. 9; *In re Diez's Will*, 50 N. Y. 88; *Ex parte Day*, 1 Bradf. (N. Y.) 476; *Betts v. Harper*, 39 O. S. 641; *Cawley's Estate*, 136 Pa. St. 628; *Wyche v. Clapp*, 43 Tex. 544; *March v. Huyter*, 50 Tex. 243.

The early English cases have been re-discussed, with the result that modern courts have declared that the early text-book writers and American courts misunderstood them,<sup>19</sup> and the early American cases holding such wills invalid have been overruled.<sup>20</sup>

In jurisdictions where a married woman may make a will, husband and wife may make a joint will.<sup>21</sup>

The single instance in which modern courts are still inclined to treat wills of these classes as invalid is the type of will in which the testators have joined in one instrument in a complete scheme for the disposition of their joint property, or of their separate property treated as a joint fund, and have fixed the death of the survivor as the time for such will to take effect.<sup>22</sup>

<sup>19</sup> *In re Davis's Will*, 120 N. Car. 9; 26 S. E. 636.

<sup>20</sup> *In Clayton v. Liverman*, 2 Dev. & B. (N. Car.), 558, the majority of the court held that a joint or mutual will was not recognized by our law, resting upon *Hobson v. Blackburn*, 1 Add. 274; 2 Eccl. Rep. 116, as construed by the majority. Daniel, J., dissented, holding that the majority of the court misapprehended *Hobson v. Blackburn*. In the case *In re Davis's Will*, 120 N. Car. 9; 26 S. E. 636, the court held that the dissenting opinion of Daniels, J., was right, both as to its view of the law and as to its construction of *Hobson v. Blackburn*, and accordingly the opinion of the majority in *Clayton v. Liverman* was overruled.

*Walker v. Walker*, 14 O. S. 157, holding that joint wills are invalid, has never been formally overruled; but the later case of *Betts v. Harper*, 39 O. S. 641; 48 Am. Rep. 477, was decided upon a similar state of facts and upheld the validity of the joint will. In it the

court referred to *Walker v. Walker* as decided upon the theory that the instrument in question in that case was really a contract enforceable in equity and not a will to be probated.

<sup>21</sup> *March v. Huyter*, 50 Tex. 243.

<sup>22</sup> *Hershy v. Clark*, 35 Ark. 17; 37 Am. Rep. 1; *State Bank v. Bliss*, 67 Conn. 317; 35 Atl. 255.

In *Bank v. Bliss* the court said:

"The will is partly a joint and partly a mutual one. Each testatrix executed it as the will of both and in order to accomplish a common purpose. Its form would indicate that it was originally drafted as a joint will only, and that the reciprocal provisions and contingent residuary gift to their next of kin found in the classes numbered from 5 to 8 were subsequently inserted. A will strictly mutual is, in legal effect, nothing but the individual will of that one of the testators who may die first. *Lewis v. Scofield*, 26 Conn. 452. To give such a construction to the will now under consideration would do



### §68. When admissible to probate.

There is no dispute as to the admissibility to probate of wills of the first and second types, by which (a) the survivor is to take the property of the one dying first, or (b) by which separate interests are disposed of in separate clauses. Such wills are to be admitted to probate, if in other respects regular, upon the death of the first testator, as his will.<sup>23</sup>

As to wills of the third type—those by which the testators jointly devise their joint interests to third persons, or treat their separate property as a common fund out of which they provide for third persons—there has been more diversity of opinion. The great weight of authority is that the will of this type is to be probated on the death of each testator as the separate will of decedent,<sup>24</sup> and that, as said before, if this can not be done, the instrument should be refused probate as a will altogether.<sup>25</sup> This last rule seems to rest upon sound policy. The funeral expenses and debts of the decedent should be paid as soon as is practicable, and the estate settled. To delay such payment until the death of some one other than

violence to its terms. It purports to be a joint act. It creates a common fund, out of which the debts of each and her funeral expenses are to be met, and legacies to third parties paid; and it provides against its probate until both makers are dead, after making each the residuary legatee of the other. This scheme is one which it is impossible to carry out, and its various parts are so related to each other that they must stand or fall together."

<sup>23</sup> *Schumaker v. Schmidt*, 44 Ala. 454; *Lewis v. Scofield*, 26 Conn. 452; *In re Diez's Will*, 50 N. Y. 88; *March v. Huyter*, 50 Tex. 243.

<sup>24</sup> *Evans v. Smith*, 28 Ga. 98; *Hill v. Harding*, 92 Ky. 74; *Keith v. Miller*, 174 Ill. 64; *In re Davis's Will*, 120 N. Car. 9; *Betts v. Har-*

*per*, 39 O. S. 639; *Wyche v. Clapp*, 43 Tex. 544.

In *Wyche v. Clapp*, *supra*, the court said:

"The weight of authority is that they (*i. e.*, joint or mutual wills) may be admitted to probate on the decease of either of the parties as his will if otherwise unobjectionable. But from the very nature of such an instrument it can not operate or have effect as the joint or mutual will of the parties if one of them survives, for during such time, if it is a will, it is subject to revocation."

<sup>25</sup> *Hershy v. Clark*, 35 Ark. 17; 37 Am. Rep. 1; *Bank v. Bliss*, 67 Conn. 317; 35 Atl. 255.

Wills of this form are really wills of the fifth type.

testator—an event which may not occur for years—would make the prompt and orderly settlement of decedent's estate impossible.

It must, however, be admitted that there are some early cases which recognize the validity of the joint will, in which it is intimated that such will could not be probated until the death of both testators.<sup>26</sup>

### §69. Revocability of joint and mutual wills.

The weight of authority is to the effect that joint and mutual wills are as revocable *as wills* as other wills are.<sup>27</sup> Thus, a will executed by two parties disposing of their separate property to the survivor for life is revocable by either at his option,<sup>28</sup> and so is a joint will.<sup>29</sup>

If the joint or mutual will is not made in pursuance of any contract, the right of testator to revoke it is beyond question. If made in pursuance of a contract between testators, such will stands on the same footing as any will made in pursuance of a contract, not a joint or mutual will; that is, the will itself may be revoked, but the contract in pursuance of which the will was made may be enforced in an action at law for damages, or in a suit in equity to have those taking the legal title after the death of the promisor held as trustees.<sup>30</sup>

In cases which do not distinguish clearly between the will itself and the right of action on the contract by virtue of which the will was made, language is used which seems to say

<sup>26</sup> *In re Raine*, 1 Sw. & Tr. 144.

<sup>27</sup> *Walpole v. Orford*, 3 Ves. Jr. 402; *Schumaker v. Schmidt*, 44 Ala. 454; *Hill v. Harding*, 92 Ky. 74; *Cawley's Appeal*, 136 Pa. St. 628; 10 L. R. A. 93; *Wyche v. Clapp*, 43 Tex. 544.

<sup>28</sup> *Cawley's Appeal*, 136 Pa. St. 628; 10 L. R. A. 93.

<sup>29</sup> *Hill v. Harding*, 92 Ky. 74.

In an early Kentucky case (*Breathitt v. Whitaker*, 8 B. Mon. 533) it was said that only all could revoke a joint will. In this case, however, the act of one was claimed as a revocation, and this act consisted in tearing the will and carefully sewing it together.

<sup>30</sup> See Secs. 70, 76, 78, 79 and 80.

that the will is revocable during the lifetime of both parties, but becomes irrevocable upon the death of either, and that the revocation during the lifetime of both must be upon notice by the party revoking.<sup>31</sup>

In a leading English case a will was executed by both husband and wife and disposed of their property. After the death of the husband the wife had the will probated, and then executed a new will. The court said, in speaking of the revocation of this will: "I can not be of the opinion that either could during their joint lives do it secretly; or that after the death of either it could be done by the survivor by another will. It is a contract between the parties which can not be rescinded but by both."<sup>32</sup> Analysis of these cases shows that they really decide only that there was a right of action upon the contract to make a will.

The difficulties presented by the joint will of the type that treats the property of both testators as a common fund are great, and the adjudicated cases give but little indication as to their solution. We may ignore the point made, that the Statute of Wills refers entirely to a will executed by one only; for, as has been well said, the Statute of Conveyances refers entirely to conveyances by one only, but no doubt has ever been entertained of the validity of a joint deed. The difficulties are deeper than this. One of the greatest of them is the method of settling the estate of the first decedent. Inasmuch as the will disposes of the property of both testators, the legacies and

<sup>31</sup> *Durfour v. Pereira*, 1 Dick. 419.

In *Walpole v. Orford*, 3 Ves. Jr. 402 (416), *Durfour v. Pereira* is spoken of as a case of a contract to make a will enforceable in equity, and as decided entirely upon that theory.

The cases of *Denyssen v. Mostert*, L. R. 4 P. C. 236, and *Dias v. De Livera*, 5 App. 123, are cited on this point. These cases depend on

the Roman Dutch law, not on the English Common Law, and hold that a mutual will between husband and wife is revocable during the lifetime of both without notice; but that after one dies and the other receives the benefits of the will, it then becomes irrevocable as to the survivor.

<sup>32</sup> *Durfour v. Pereira*, 1 Dick. 419.

devises can not be paid entirely out of the estate of the decedent; but what proportion of them to pay, what distinction, if any, between specific and pecuniary legacies, and what effect the possible ultimate insolvency of the estate of the surviving testator should have are questions which will sooner or later be presented for judicial consideration wherever such type of will is treated as valid.

## CHAPTER VII.

### THE CONTRACT TO MAKE A WILL.

#### §70. Validity of contracts to bequeath or devise and revocability of wills made thereunder.

Revocability, as we have already seen, is an essential feature of a will. No instrument which passes a present interest is a will, even though the enjoyment of the property in which such interest is given is postponed till the death of the donor. But the testator may during his lifetime, for a valuable consideration, agree to bequeath or devise his property to certain persons or for certain purposes.

Such contracts have repeatedly come before the courts for adjudication and have been held valid and enforceable as contracts;<sup>1</sup> though the original policy of upholding them has been

<sup>1</sup> Jones v. Martin, 3 Austr. 882; Walpole v. Orford, 3 Ves. Jr. 402; Townsend v. Vanderwerker, 160 U. S. 171; Bolman v. Overall, 80 Ala. 451; Manning v. Pippen, 86 Ala. 357; Owens v. McNally, 113 Cal. 444; Crofut v. Layton, 68 Conn. 91; Keith v. Miller, 174 Ill. 64; Cavinness v. Rushton, 101 Ind. 500; Gardard v. Yeager, (Ind.) 1900; 56 N. E. 237; Allbright v. Hannah, 103 Io. 98; Bird v. Pope, 73 Mich. 483; Wright v. Wright, 99 Mich. 170; Kleeburg v. Schrader (Minn.), 72 N. W. 59; 69 Minn. 136; Nowack v. Berger, 133 Mo. 24; Teats v.

Flanders, 118 Mo. 660; Healey v. Simpson, 113 Mo. 340; Leach v. McFadden, 110 Mo. 584; Anderson v. Schockley, 82 Mo. 250; Burns v. Smith, 21 Mont. 251; 53 Pac. 742; Young v. Young, 51 N. J. Eq. 491; Hart v. Hart, 57 N. J. E. 543; N. J. 42 Atl. 153; Edson v. Parsons, 155 N. Y. 555; Phipps v. Hope, 16 O. S. 586; Hoffner's Estate, 161 Pa. St. 331; Rivers v. Rivers, 3 Desaus (S. Car.), 190; Gardner v. Gardner, 49 S. Car. 62; Green v. Broyles, 3 Hump. (Tenn.), 167; Brinton v. Van Cott, 8 Utah, 480.

questioned *in obiter dicta*.<sup>2</sup> The enforceability of a contract to make a will does not, of course, prevent the will itself from being revocable. If it were irrevocable it would not be a will.<sup>3</sup> The will itself, though made in pursuance of a contract to make a will is, as far as the Probate tribunals are concerned, as revocable as any other will;<sup>4</sup> and whatever remedy may be given must be by an action at law against testator's estate for damages for breach of contract, or a suit in equity to have the heirs and next of kin, or the beneficiaries under the will, if testator has left another will, declared trustees for the promisee.\* Thus the marriage of testator will operate as a revocation of a prior will made in pursuance of a contract.<sup>5</sup>

A contrary view was entertained in a New York case, where an injunction was allowed against probating a will revoking an earlier will made in pursuance of a contract.<sup>6</sup> But where the will is a part of the contract it can not be revoked as far as such contract is concerned. Thus, where a mortgage and a will were executed simultaneously, and the will fixed the date of payment of the debt secured by the mortgage, it was held that the will could not be revoked so as to change the date of payment of such debt.<sup>7</sup>

<sup>2</sup> "Whatsoever may be thought of the policy which permits a person to irrevocably direct the disposition of his property after his death without putting his intentions in the shape required by the Statute of Wills, it can not be questioned that instances of glaringly fraudulent conduct in obtaining services or property by the inducement of such unfulfilled promises have led to a series of decisions in England and in this country in which courts have taken hold of and remedied such instances of fraud by seizing the property of the promisor and devoting it to the relief of the defrauded party." *Duvale v. Duvale*, 54 N. J. Eq. 581.

<sup>3</sup> See Sec. 50.

<sup>4</sup> *Sloniger v. Sloniger*, 161 Ill. 270; *Gloucester's Will*, 32 N. Y. S. R. 901; 11 N. Y. Supp. 899.

\*See Secs. 78 and 79.

<sup>5</sup> *Sloniger v. Sloniger*, 161 Ill. 270.

<sup>6</sup> *Cobb v. Hanford*, 88 Hun, 21.

"It is not contended but that Mrs. Cobb could have herself been enjoined from executing the second will." *Cobb v. Hanford*, 88 Hun, 21.

<sup>7</sup> *Keagle v. Pessell*, 91 Mich. 618 (to hasten payment to estate); *Smith v. Smith*, 135 Pa. St. 48 (to hasten payment to estate).

### §71. Necessity of all the elements of a valid contract.

While such contracts are enforceable as valid contracts, they do not stand upon an especially favored footing. In order to be enforceable they must have all the essential elements of any valid contract. That the promisor must be competent in point of capacity is an elementary proposition which may be left with a general reference to any of the standard works on contracts. But the questions of consideration and certainty are presented in these contracts in peculiar aspects, and need special discussion with reference thereto.

### §72. Consideration.

A consideration is, of course, essential; without one, contracts of this class can not be enforced.<sup>8</sup> The most common forms of consideration in these contracts are services rendered for the promisor, in consideration of which he promises, by way of compensation, to devise or bequeath certain property to the person rendering the services. Such promise is based upon valuable consideration, and is enforceable.<sup>9</sup>

Of the services to be rendered a very common form is that of personal services in supporting and caring for the aged.<sup>10</sup> Another common form of consideration is the surrender of a child to be adopted and brought up by the promisor as his own child, he promising to leave her property at his death. The weight of authority is that this is such a consideration as will, in law, support the promise to devise the property to the child.<sup>11</sup>

<sup>8</sup> Moore v. Stephens, 97 Ind. 271; Wallace v. Rappleye, 103 Ill. 229; Woods v. Evans, 113 Ill. 186; Pleasanton's Estate, 6 Pa. Dist. Rep. 5; 19 Pa. Co. Ct. Rep. 205.

<sup>9</sup> Emory v. Darling, 50 O. S. 160; Snyder v. Castor, 4 Yeates (Pa.) 353; Thompson v. Stevens, 71 Pa. St. 161.

<sup>10</sup> Brady v. Smith, 28 N. Y. S. 776; 8 Misc. Rep. 465; Emery

v. Babcock, 163 Mass. 326; Healey v. Simpson, 113 Mo. 340; Drake v. Lanning, 49 N. J. Eq. 452; Emory v. Darling, 50 O. S. 160.

<sup>11</sup> Bengé v. Hiatt, 82 Ky. 666; 56 Am. Rep. 912; Healey v. Simpson, 113 Mo. 340; Burns v. Smith, 21 Mont. 251; 53 Pac. 742.

But in Woods v. Evans, 113 Ill. 186, it was held that the surrender of the child together with the ser-

Where the child has rendered services to the person adopting it, the courts are almost unanimous in holding that a consideration for the promise to leave property exists,<sup>12</sup> although, as the cases cited in the notes indicate, there is some divergence of judicial opinion.

A promise by one to make a certain disposition of property by will on consideration that another person would likewise make a specified disposition of his property by will, has been held to be supported by a valid consideration.<sup>13</sup>

A promise of a widow who inherited her husband's property to provide in her will for the payment of services rendered to her deceased husband in consideration of promisee's forbearing to litigate the claim, was held to be supported by a valid consideration, namely, the forbearance of the owner of the claim to sue the husband's estate thereon.<sup>14</sup> And the transfer of the legal title of real estate to the promisor is a sufficient consideration to support a promise by promisor to devise such real estate.<sup>15</sup> But the abandonment of efforts to get testator to add a codicil to his will is no consideration for a contract to make a specific devise.<sup>16</sup> Since a contract to make a will is as enforceable as any, it follows that the promise in consideration of which the will is made is itself enforceable against the promisor, where the will is made in consideration of such promise. Accordingly, a contract between a beneficiary and a testator, by which the beneficiary agrees, in consideration of the gift

vices rendered by the child, did not constitute a consideration for the promise to devise property; and in *Wallace v. Rappleye*, 103 Ill. 229, the surrender of an illegitimate child to her father was held not to be a consideration.

<sup>12</sup> *Roberts v. Hall*, 1 Ont. Rep. 388; *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Heath v. Heath*, 18 Misc. Rep. (N. Y.) 521; *Emery v. Darling*, 50 O. S. 160.

<sup>13</sup> *Dufour v. Pereira*, 1 Dick, 419;

*Walpole v. Orford*, 3 Ves. Jr. 402; 2 Harg. 304; *Croft v. Layton*, 68 Conn. 91; 35 Atl. 783; *Edson v. Parsons*, 155 N. Y. 555; 50 N. E. 265, affirming s. c. 85 Hun, 263; 32 N. Y. S. 1036.

<sup>14</sup> *Purviance v. Purviance* (Ind.), 42 N. E. 364; 14 Ind. App. 269.

<sup>15</sup> *In re Hoffer's Estate*, 161 Pa. St. 331; 29 Atl. 33; *Riley v. Allen*, 54 N. J. Eq. 495; 35 Atl. 654; *Duvale v. Duvale*, 54 N. J. Eq. 581; 39 Atl. 687; 40 Atl. 440;

<sup>16</sup> *Lennig's Estate*, 182 Pa. St. 485; 38 L. R. A. 378.



to him by will, to pay money to another, or to do some other thing for the benefit of that other is enforceable at law, on action brought by the person to whom the property was to be given by the terms of the contract.<sup>17</sup> A common form of such contract is a promise made to testator on consideration of his refraining from altering a will already made.<sup>18</sup>

A., one of the three devisees to whom testator gave the residuum of his estate, promised testator, in consideration of his abstaining from making a contemplated change in his will, that A. would attend to having his wishes fulfilled by paying to the intended beneficiary an amount equivalent to the intended gift. On A.'s failure to keep her promise after the death of testator it was held that A. was personally liable on the promise, but for only one-third of the amount promised.<sup>19</sup> The promisor can not avoid the contract on the ground that it works a revocation of the will by parol, or that it creates a parol trust.<sup>20</sup>

The conduct of the promisor in breaking the contract entered into after receiving the devise or legacy, which was given in consideration therefor, is sometimes spoken of as fraud. While clearly dishonorable, it is, however, not fraud, since there has been no misstatement of any material fact. It is nothing more than a breach of contract. It is, accordingly, held that a will thus obtained, if valid otherwise, can not be set aside for such a breach of contract.<sup>21</sup> If the other elements of fraud and undue influence are present the will may be thereby rendered invalid.

Thus, a will made by a married woman as a result of the

<sup>17</sup> *Lawrence v. Oglesby*, 178 Ill. 122; 75 Ill. App. 669; *Yearance v. Powell*, 55 N. J. Eq. 577; *Hoffner's Estate*, 161 Pa. St. 331; *Brooke's Estate*, 109 Pa. St. 188; *Hodnett's Estate*, 154 Pa. St. 485; *Gaullagher v. Gaullagher*, 5 Watts 200; *Hoge v. Hoge*, 1 Watts, 163.

<sup>18</sup> *Lawrence v. Oglesby*, 178 Ill. 122; *Yearance v. Powell*, 55 N. J. 577.

<sup>19</sup> *Yearance v. Powell*, 55 N. J. Eq. 577.

<sup>20</sup> *Lawrence v. Oglesby*, 178 Ill. 122, affirming 75 Ill. App. 669.

<sup>21</sup> *Weathers v. McFarland*, 97 Ga. 266; (a promise by a husband to pay to testatrix's child \$250, if testatrix would leave the husband her entire property).

repeated entreaties of her sons, and of the promise of her husband to provide in his will for a grandchild whom testatrix omitted on that ground, was treated as void on account of undue influence and fraud, the husband being insolvent, and his promise never kept.<sup>22</sup>

A promise to make a will based on an illegal consideration, such as unlawful sexual intercourse, is, of course, unenforceable.<sup>23</sup>

### §73. Certainty.

A contract to make a will must, in order to be enforceable, "be clearly proved and be certain and unambiguous in all its terms."<sup>24</sup> In no other class of contracts are parties so likely to fail to come to a definite agreement as in this class; and in no class of cases do the courts look upon the contract to be enforced with greater jealousy.<sup>25</sup> The failure to arrive at a definite agreement may arise out of the fact that the promisor does not intend to commit himself to any definite course of action. A mere expression of intention to make a certain disposition of property is of course not valid as a contract; still less are vague offers.<sup>26</sup>

A contract to bring up a child, educate it and make it the "heir" of promisor has been held to be unenforceable in Ken-

<sup>22</sup> *Gordon v. Burris*, 153 (Mo.), 223 (1899), 54 S. W. 546. (But in this case there was other evidence of undue influence. The finding was not based entirely on the fraud of the husband.)

<sup>23</sup> *Drennan v. Douglass*, 102 Ill. 341.

<sup>24</sup> *Sloniger v. Sloniger*, 161 Ill. 270, quoting *Rock Island & Peoria Ry. Co. v. Dimick*, 144 Ill. 628.

<sup>25</sup> *Sloniger v. Sloniger*, 161 Ill. 270; *Shaw v. Schoonover*, 130 Ill. 448; *Woods v. Evans*, 113 Ill. 186.

<sup>26</sup> Where an uncle wrote to his

nephew in Germany: "If you want to come you have to do your rights of the kid, and I am going to do the rights of the father. If you treat like my kid you shall be my heir, but not before I am dead. If you treat me, which you will have to do well, then I am going to treat you right," it was held that this did not amount to an absolute promise to make the nephew his heir and devisee if he would come from Germany and live with his uncle. *Wilmer v. Borer*, 4 Kan. App. 109.

tucky.<sup>27</sup> And an ante-nuptial contract, by which the husband agrees to adopt his wife's children by a former marriage as his "heirs" has been held not to be a promise to make a devise of the husband's property to them, but to leave the husband with the same power of excluding them from a share in his Illinois realty that he would have had of excluding his own children.<sup>28</sup> A similar contract has been held valid and enforceable in Missouri.<sup>29</sup> Or the promisor may definitely intend to make some testamentary disposition of his property in favor of promisee, but he does not decide what provision he will make. Thus, he may agree to leave promisee "as much as any relation he had on earth,"<sup>30</sup> or that while promisor lived promisee should have a good home, and at his death she should be provided for so that she should never want as long as she lived;<sup>31</sup> or that he will provide for the adopted child as he does for his own children, and his will makes his own children residuary legatees. These agreements are too indefinite to be enforced.<sup>32</sup>

An agreement in writing to leave by will to an employee as much as he would lose by declining an offer of a partnership in a competing firm, in consideration of his declining such offer and remaining in the employ of promisor was held to be too indefinite for enforcement in law or in equity.<sup>33</sup> But a promise to leave promisee so much property "that she need not to work,"<sup>34</sup> or to leave her "independently rich,"<sup>35</sup> or to

<sup>27</sup> *Brewer v. Hieronymous* (Ky.) (no official report), 41 S. W. 310, following *Davis v. Jones*, 94 Ky. 320, citing *Willoughby v. Motley*, 83 Ky. 297; *Power v. Hafley*, 85 Ky. 671, and distinguishing *Benge v. Hiatt*, 82 Ky. 666; 6 Ky. Law Rep. 714, where the contract was to bring up the child and devise specific property to it.

<sup>28</sup> *Long v. Hess*, 154 Ill. 482; 27 L. R. A. 791.

<sup>29</sup> *Nowack v. Berger*, 133 Mo. 24; *So Gary v. James*, 4 Desaus. (S. Car.) 185.

<sup>30</sup> *Graham v. Graham*, 34 Pa. St. 475.

<sup>31</sup> *Wall's Appeal*, 111 Pa. St. 460.

<sup>32</sup> *Walker v. Boughner*, 18 Ont. Rep. 448.

<sup>33</sup> *Rusell v. Agar*, 121 Cal. 396; 53 Pac. 926, decided under Civ. Code, Section 3390, citing *Graham v. Graham*, 34 Pa. St. 475, and distinguishing *Bayliss v. Pricture*, 24 Wis. 651.

<sup>34</sup> *Thompson v. Tucker Osborne*, 111 Mich. 470; 69 N. W. 730; *Thompson v. Stevens*, 71 Pa. St. 161.

<sup>35</sup> *Cottrell's Estate*, 2 W. N. C. (Pa.) 83.

make her "his heir,"<sup>36</sup> or to leave promisee all the property that promisor owned at his death;<sup>37</sup> or to leave promisee "a child's share" in the estate of promisor, where promisor was at the date of the contract and always remained childless;<sup>38</sup> or to make "adequate compensation,"<sup>39</sup> have been held to be definite enough to maintain an action upon.

A contract to bequeath so much of an annuity as should remain unexpended at the death of the annuitant is enforceable, although the amount is uncertain.<sup>40</sup>

#### §74. The Statute of Frauds.

When the contract to compensate by will is oral, the question arises as to the admissibility of parol evidence to establish the existence and terms of such contract.

Contracts to make wills are contracts which may be performed within one year from the date thereof. Accordingly, such contracts are not upon this ground within the Statute of Frauds, but may be proved by parol evidence.<sup>41</sup> But when the contract is to devise specific real property, the section of the Statute of Frauds which requires agreements for the sale of land to be in writing applies, and the contract can not be proved by parol.<sup>42</sup> The same rule applies when the contract

<sup>36</sup> Gary v. James, 4 Desaus (S. Car.), 185.

<sup>37</sup> Healey v. Simpson, 113 Mo. 340; Brady v. Smith, 28 N. Y. S. 776; 8 Misc. Rep. 465; Van Duyne v. Vreeland, 12 N. J. Eq. 142; Drake v. Lanning, 49 N. J. Eq. 452; Kleeburg v. Schrader, 69 Minn. 136; 72 N. W. 59.

<sup>38</sup> Barnes v. Smith, 21 Mont. 251; 53 Pac. 742; or where promisor had children; Norris v. Clark, 3 Weekly Law Bull. 994.

<sup>39</sup> Rivers v. Rivers, 3 Desaus (S. Car.), 190.

<sup>40</sup> Garard v. Yeager (Ind.), 1900; 56 N. E. 237.

<sup>41</sup> Ridley v. Ridley, 34 Beav. 478; Fenton v. Emblers, 3 Burr. 1278;

Bell v. Hewitt, 24 Ind. 280; Wellington v. Apthorp, 145 Mass. 69; Updike v. Ten Broeck, 32 N. J. L. 105; Quackenbush v. Ehle, 5 Barb. (N. Y.), 469; Kent v. Kent, 62 N. Y. 560; 20 Am. Rep. 502; Jilson v. Gilbert, 26 Wis. 637; 7 Am. Rep. 100.

*Contra*, Izard v. Middleton, 1 Desaus (S. Car.), 116.

<sup>42</sup> Walpole v. Orford, 3 Ves. 402; Harder v. Harder, 2 Sandf. Ch. 17; Manning v. Phippen, 86 Ala. 357; 11 Am. St. Rep. 46; Baxter v. Kitch, 37 Ind. 554; Wallace v. Long, 105 Ind. 522; 55 Ind. 222; Orth v. Orth, 145 Ind. 184; Ham v. Goodrich, 37 N. H. 185; Smith v. Smith, 23 N. J. L. 208; 78 Am. Dec. 49;

is one to leave all the property, both real and personal, to promisee.<sup>43</sup>

In jurisdictions where the Statute of Frauds requires contract for the sale of personal property exceeding a certain amount to be in writing, a contract to bequeath personal property exceeding the value fixed by statute must be evidenced by writing.<sup>44</sup> It is held, however, that when in pursuance of a contract to make a will, promisor does make such will, this is a writing sufficient to satisfy the requirements of the statute.<sup>45</sup>

### §75. Part performance.

It is well recognized as an elementary principle of law that part performance of an oral contract for the sale of real estate may be sufficient to take the case out of the Statute of Frauds.<sup>46</sup>

As invoked in contracts to devise, the part performance generally relied upon is the surrender of the custody of the child and the benefit of her society and services. The courts sharply disagree as to whether these acts amount to such part performance as will take the case out of the statute.

Some jurisdictions relax the rule and hold that this is sufficient part performance.<sup>47</sup> Other jurisdictions apply the rule more strictly and hold that such acts do not amount to part performance, on the theory that in order to amount to part

*Lisk v. Sherman*, 25 Barb. (N. Y.), 433; *Harder v. Harder*, 2 Sandf. cl. (N. Y.), 17; *Swash v. Sharpstein*, 14 Wash. 426.

So of a contract not to make a will but to allow realty to descend. *Dicken v. McKinley*, 163 Ill. 318.

<sup>43</sup> *Shahan v. Swan*, 48 O. S. 25; *Hopple v. Hopple*, 3 Ohio C. C. 102.

<sup>44</sup> *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222; *Orth v. Orth*, 145 Ind. 184; 145 Ind. 206.

<sup>45</sup> *Whiton v. Whiton*, 179 Ill. 32; *Bruce v. Moon* (S. Car.) (1900), 25 S. E. 415.

*Contra*, *Hale v. Hale*, 90 Va. 728.

<sup>46</sup> *Alexander v. Alexander*, 150 Mo. 579.

<sup>47</sup> *Roberts v. Hall*, 1 Ont. Rep. 388; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101; *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270; *Davidson v. Davidson*, 13 N. J. Eq. 246; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Heath v. Heath*, 18 Misc. Rep. (N. Y.), 521; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.), 279; *Brinton v. Van Cott*, 8 Utah, 480; 33 Par. 218.

performance the acts must be clearly referable to some contract with reference to the real property in question, and that the adoption of a child by due forms of law, or the act of taking it into the family, would not necessarily refer to any contract on the subject of real estate.<sup>48</sup>

Where the contract alleged was that promisor would give to a specified child a share in his estate equal to that which an heir would inherit, on consideration that the mother of the child would marry him and would surrender the custody and control of the child to him, the marriage, followed by such surrender, was held to be sufficient part performance to take the case out of the Statute of Frauds.<sup>50</sup>

A surrender of possession of the real property in the lifetime of the promisor, followed by the erection of valuable improvements thereon by the promisee, is sufficient as part performance to take the case out of the operation of the Statute of Frauds.<sup>51</sup> Surrender of possession of real property alone has been held to amount to part performance.<sup>52</sup> And an oral contract between a number of owners of realty in common that each will either devise his share to the survivors or let it pass by descent, and that the survivor shall either devise it or let it pass by descent to a certain named person, the only child of the only one of said owners in common, who was married, is taken out of the Statute of Frauds by part performance, where, by compliance on the part of all the other owners in common,

<sup>48</sup> *Campbell v. McKerricher*, 6 Ont. Rep. 85; *Pond v. Sheean*, 132 Ill. 312; *Dicken v. McKinley*, 163 Ill. 318; *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222; *Shahan v. Swan*, 48 O. S. 25.

But a formal adoption in the Probate Court where a petition was signed by the parents of the child as well as by the adopting parents was held to be a sufficient memorandum in *Swartz v. Steel*, 8 Ohio C. C. 154.

*Contra*, that adoption is a sufficient part performance. *Sutton v.*

*Hayden*, 62 Mo. 101; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; 12 N. J. Eq. 143; *Ewing v. Richards*, 7 Weekly Law Bull. 183.

<sup>50</sup> *Nowack v. Berger*, 133 Mo. 24.

<sup>51</sup> *Allbright v. Hannah*, 103 Io. 98; 72 N. W. 421.

<sup>52</sup> *Campbell v. McKerricher*, 6 Ont. R. 85; *Brown v. Sutton*, 129 U. S. 238; *Lee v. Carter*, 52, Ind. 342; *Mauck v. Melton*, 64 Ind. 414; *Dicken v. McKinley*, 163 Ill. 318; *Fuchs v. Fuchs*, 48 Mo. App. 18; *Smith v. Pierce*, 65 Vt. 200; 25 Atl. 1092.

the realty has vested in severalty in the last survivor, and the child named in the contract can enforce it.<sup>53</sup>

A transfer of property to testator below its real value and the performance of personal services for testator in his own home by his children who went to live with him in order to render such services amount to such part performance as take the case out of the Statute of Frauds.<sup>54</sup>

### §76. What is a breach of such contract.

When the promisor dies, not leaving a will valid in all respects, and conforming to the agreement, the contract is broken, and in a proper case equity will give relief; or if the facts which demand and justify equitable relief are absent, the party has a right of action at law. The breach of contract in such case exists independent of the motive of the promisor for such breach. He may have intended to comply with the contract and have omitted to make the will through negligence;<sup>55</sup> or he may have believed in good faith that the will which he has made in violation of the contract is better for the interests of all concerned than the will which he had agreed to make,<sup>56</sup> or he may have attempted in good faith to execute his will and failed to comply with the rules of law as to execution;<sup>57</sup> or his death may follow his will so closely that the devise, *e. g.*, to a charity, may fail;<sup>58</sup> or he may believe that he has performed his contract in another manner.<sup>59</sup> In all such cases the contract is broken by his death without the will contracted for. His motive may be important to show that he regarded

<sup>53</sup> *Murphey v. Whitney*, 140 N. Y. 541.

<sup>54</sup> *Svanburg v. Fosseen*, 75 Minn. 350; 43 L. R. A. 427; 78 N. W. 4.

<sup>55</sup> *Weingaertner v. Pabst*, 115 Ill. 412.

<sup>56</sup> *Riley v. Allen*, 54 N. J. Eq. 495. In this case the devise was made not to promisee, but to her children, in order to keep promisee's husband from wasting it.

<sup>57</sup> *Burns v. Smith*, 21 Mont. 251; 53 Pac. 742; *Green v. Orgain*, — Tenn. 46 S. W. 477.

<sup>58</sup> *In re Hoffner's Estate*, 161 Pa. St. 331; 29 Atl. 33.

<sup>59</sup> *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742. In this case the promisor made no will, because he believed that an attempted adoption of promisee complied with the law, and that it was therefore unnecessary to make a will.

the contract as still in force, but it can not prevent the existence of the breach of contract.

### §77. Construction and performance.

As said already, these contracts must be sufficiently definite and certain to enable the courts to ascertain their terms clearly, and to decide what would amount to a breach. The rules of construction of such contracts are substantially the same as for any other contracts. Thus, where the promisor agreed to lease to promisee all her estate remaining at her death it was held to include property subsequently acquired by promisor by inheritance, although such inheritance was not contemplated by either party to the contract at the time of entering into it.<sup>60</sup> And where promisor agreed to refund certain money to his daughter if she did not "heir" a particular portion of his land at his death, it was held that the meaning of this contract was that she should receive his entire estate in such land; and accordingly when her father devised a life estate in such land to her with remainder over to the testator's other children if she died without issue he did not perform his agreement.<sup>61</sup> And where C and his only son and K and his only son were about to form a corporation, and as part of the contract they mutually agreed not to sell their stock, but that C and his son should by natural wills bequeath their respective holdings to each other, and K and his son should do likewise, and C left his stock to his son on condition that he would pay to C's widow \$500 per annum, it was held that such contract was valid, and that C had not performed it.<sup>62</sup> In order to entitle promisee to recover upon the contract it is necessary that he perform all the conditions precedent on his part to be performed.<sup>63</sup> Thus where a promise was made by a father to devise land to his son in consideration of the son's living on the land and supporting and taking care of his father the son's

<sup>60</sup> Kleeburg v. Schrader, 69 Minn. 136; 72 N. W. 59.

<sup>61</sup> Parrott v. Graves (Ky), 32 S. W. 605.

<sup>62</sup> Crofut v. Layton, 68 Conn. 91; 35 Atl. 783.

<sup>63</sup> Weingartner v. Pabst, 115 Ill. 412.



heirs have no right to specific performance of the contract if he left the land during his father's life in violation of his agreement and entered the army, where he lost his life.<sup>64</sup> But this rule must not be taken to exclude the right and power of the promisor to waive any of such conditions which are beneficial to him, provided enough are left in force to amount to a consideration. Where promisor agreed to leave a girl whom he meant to adopt such part of his estate as she would inherit if she were his own child in consideration of her living with him as a dutiful child, the fact that she was at times disobedient and once ran away was not such failure of performance on her part as to defeat her rights under the contract when it appeared that promisor had forgiven her, gone after her to induce her to come home with him, and had treated her as his own child for years afterwards.<sup>65</sup>

#### §78. Remedies for breach of contract at law.

Where the promisor has bound himself by a valid contract to devise certain property and has failed to perform his contract the promisee may maintain an action at law against the personal representatives of the decedent promisor.<sup>66</sup>

The promisee has a choice between two theories of his case. He may sue on the contract. In such case the measure of damages will be the value of the property which by the terms of the contract was to have been devised or bequeathed to him.<sup>67</sup> Or he may apparently treat the contract as rescinded and sue on *quantum meruit* for the reasonable value of his services.<sup>68</sup> When the contract is made by parol and falls within the terms of the Statute of Frauds the promisee can

<sup>64</sup> Cox v. Cox, 26 Gratt (Va.), 305.

<sup>65</sup> Burns v. Smith, 21 Mont. 251; 53 Pac. 742.

<sup>66</sup> Purviance v. Shultz, 16 Ind. App. 94; 44 N. E. 766; Lisle v. Tribble, 92 Ky. 304; Clark v. Cordry, 69 Mo. App. 6; Logan v. McGinnis, 12 Pa. St. 27.

<sup>67</sup> Benge v. Hiatt, 82 Ky. 666; 56 Am. Rep. 912; Porter v. Dunn 131 N. Y. 314; Graham v. Graham, 34 Pa. St. 475.

<sup>68</sup> Hudson v. Hudson, 87 Ga. 678; Purviance v. Shultz, 16 Ind. App. 94; 44 N. E. 766; Laird v. Laird, 115 Mich. 352; 73 N. W. 382; Green v. Orgain (Tenn.), 46 S. W. 477.

not, of course, maintain an action upon the contract in the absence of part performance, but he can recover for the services rendered, rights surrendered or other original consideration for such contract.<sup>69</sup> The view of more modern authorities is that in such cases the measure of damages is the value of the original consideration for the contract to bequeath or devise.<sup>70</sup>

There is, however, a conflict of authority on this point, and one line of cases takes the view that the terms of compensation fixed by the contract may be introduced in evidence to the jury to show what the parties understood a reasonable compensation to be.<sup>71</sup> Where this rule is adopted the Statute of Frauds is practically annulled.

Where the promisor has left property by will which in part satisfies the terms of the contract the promisee may accept such partial performance of the contract and maintain his action against the estate for the balance.<sup>72</sup>

### §79. Remedy for breach of contract in equity.

Where the promisor, who has entered into a valid contract to devise or bequeath property, dies without having performed such contract equity will give relief. This is usually spoken of as Specific Performance or Relief in the Nature of Specific Performance. Of course specific performance is impossible in such a case. The real nature of the proceeding is to have the heirs, devisees or personal representatives of the deceased declared to be trustees in respect to the property covered by the contract, to which they take the legal title for the

<sup>69</sup> *Hudson v. Hudson*, 87 Ga. 678; *Jack v. McKee*, 9 Pa. St. 235.

<sup>70</sup> *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222, overruling *Frost v. Tarr*, 53 Ind. 390; *Purviance v. Shultz*, 16 Ind. App. 94; *Succession of McNamara*, 48 La. Ann. 45; 18 So. 908; *Ham v. Goodrich*, 37 N. H. 185; *Erben v. Lorillard*, 19 N.

Y. 299; *Hertzog v. Hertzog*, 34 Pa. St. 418.

<sup>71</sup> *Hopkins v. Lee*, 6 Wheat. (U. S.), 109; *Hudson v. Hudson*, 87 Ga. 678; *Jack v. McKee*, 9 Pa. St. 235; *McDowell v. Oyer*, 21 Pa. St. 417.

<sup>72</sup> *Porter v. Dunn*, 131 N. Y. 314.

benefit of the promisee as to *cestui que trust*.<sup>73</sup> Or, where specific performance is impracticable, the promisee may have reconveyance of any property with which he has parted to promisor on the faith of the contract.<sup>74</sup> Where the testator has conveyed the land in his lifetime by voluntary conveyance to one having knowledge of his contract to devise it such deed may be set aside upon application of the promisee.<sup>75</sup>

Where the promisor recognizes the contract as binding, and merely omits to make a will equity will not assume, in a suit brought during the life of the promisor, that he will violate his contract. The contract has not in fact been violated, for the testator has the whole of his life in which to perform it. Therefore, under such circumstances equity will not compel promisor to make a specific will.<sup>76</sup> But where the testator

<sup>73</sup>Gregor v. Kemp, 3 Swanst. 404; Jones v. Martin, 5 Ves. Jr. 266; Randall v. Willis, 5 Ves. Jr. 262; Fortescue v. Hennah, 19 Ves. Jr. 67; Logan v. Wienholt, 7 Bligh. N. R. 1; Brown v. Sutton, 129 U. S. 238; Townsend v. Vanderwerker, 160 U. S. 171; Jaffee v. Jacobson, 48 Fed. 21; Bolman v. Overall, 80 Ala. 451; 60 Am. Rep. 107; Owens v. McNally, 113 Cal. 444; Maddox v. Rowe, 23 Ga. 431; 68 Amer. Dec. 535; Allbright v. Hannah, 103 Io. 98; 72 N. W. 421; Whiton v. Whiton, 179 Ill. 32; 76 Ill. App. 553; Lisle v. Tribble, 92 Ky. 304; Carmichael v. Carmichael, 72 Mich. 76; Bird v. Pope, 73 Mich. 483; Haines v. Haines, 6 Md. 435; Mundorff v. Kilbourn, 4 Md. 459; Hiatt v. Williams, 72 Mo. 214; 37 Am. Rep. 438; Wright v. Tinsley, 30 Mo. 389; Healey v. Simpson, 113 Mo. 340; Sutton v. Hayden, 62 Mo. 101; Sharkey v. McDermott, 91 Mo. 647; Leyson v. Davis, 17 Mont. 220; 42 Pac. 775; Burns v. Smith, 21 Mont. 251; 53 Pac. 742; Van Dyne v. Vreeland, 12 N. J. Eq. 142; 11 N. J. Eq. 370; Davison v.

Davison, 13 N. J. Eq. 246; Johnson v. Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Pflugar v. Pultz, 43 N. J. Eq. 440; 11 Atl. 123; Duval v. Duval, 54 N. J. Eq. 581; 40 Atl. 440; Riley v. Allen, 54 N. J. Eq. 495; Parsell v. Stryker, 41 N. Y. 480; Emory v. Darling, 50 O. S. 160; Norris v. Clark, 3 W. L. B. 994; *In re Hoffner's Estate*, 161 Pa. St. 331; 29 Atl. 33; Brinker v. Brinker, 7 Pa. 53; Gary v. James, 4 De Saus, 185; McKeegan v. O'Neil, 22 S. Car. 454; Fogle v. P. E. Church of St. Michael, 48 S. Car. 86; 26 S. E. 99; Brinton v. Van Cott, 8 Utah, 480; 33 Pac. 218; Smith v. Pierce, 65 Vt. 200.

<sup>74</sup>Riley v. Allen, 54 N. J. Eq. 495; 35 Atl. 654.

<sup>75</sup>Kastell v. Hilman, 53 N. J. Eq. 49.

<sup>76</sup>Maud v. Maud, 33 O. S. 147. See the remarks of the court in Bolman v. Overall, 80 Ala. 451; 60 Am. Rep. 107, which, though merely dicta, appear to be assumed generally as a correct statement of the law.

in his lifetime repudiates the contract and declares or manifests his intention not to be bound by it, equity may, on bill in the nature of *quia timet*, declare the property to be held in trust for promisee, his enjoyment to begin according to the terms of the contract.<sup>77</sup>

The general principles of equity which control specific performance apply in a contract to make a will. We have seen that no relief will be given for breach of a gratuitous promise to devise, either in law or in equity. But equity may, for certain reasons, refuse specific performance of a contract upon which an action at law would lie, leaving the parties to their rights at law. The contract, in order to obtain specific performance (so called), must be clear and certain.<sup>78</sup> Thus a promise to devise to promisee the use of promisor's home for life, the title to go to some undetermined member of promisor's family, was held too indefinite.<sup>79</sup> So was a promise to devise one hundred acres of land without specifying what land or how valuable;<sup>80</sup> or a promise to give promisee as much as he could make by entering into a partnership with a competitor of promisor.<sup>81</sup> In all these cases equity refuses relief, and leaves the promisee to his action at law upon a *quantum meruit*.

The contract must be a fair and reasonable one to induce equity to grant relief. A contract by which one binds himself to devise all his property to his illegitimate children to the exclusion of his legitimate children,<sup>82</sup> or one by which an uncle binds himself to devise all his property to his niece to the exclusion of his wife, even where he is unmarried at the time of making the contract,<sup>83</sup> is one so unfair and un-

<sup>77</sup> *Duval v. Duval*, 54 N. J. Eq. 581; 40 Atl. 440, citing and following *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Parsell v. Stryker*, 41 N. Y. 480.

<sup>78</sup> *Mundorff v. Kilbourn*, 4 Md. 459; *Shakespeare v. Markham*, 72 N. Y. 400, affirming 10 Hun, 311; *Lisk v. Sherman*, 25 Bab. (N. Y.), 433; *Sprinkle v. Hayworth*, 26 Gratt (Va.), 384.

<sup>79</sup> *Stanton v. Miller*, 58 N. Y. 192.

<sup>80</sup> *Sherman v. Kitsmiller*, 17 S. & R. (Pa.), 45.

<sup>81</sup> *Russell v. Agar*, 121 Cal. 396; 53 Pac. 926.

<sup>82</sup> *Wallace v. Rappleye*, 103 Ill. 229.

<sup>83</sup> *Owens v. McNally*, 113 Cal. 444; 45 Pac. 710.

conscionable that equity will not grant relief, but will leave the parties to such rights as they may have at law.

Where the consideration for the promise to devise is one incapable of estimation in money, as where one person has devoted a great amount of time in giving his society to, and rendering personal services to another, according to the weight of authority, equity will grant relief for the breach of such contract.<sup>84</sup>

Where the contract has become impossible of literal performance, equity will not attempt to compel parties to perform an impossibility, but will grant such relief as the facts make just and expedient. Thus, a testator had promised his daughter that if she would deed certain real property to him, he would leave to her and her husband the income of \$25,000 apiece during their natural lives. The daughter made the conveyance, but the testator by will disposed of his property for the benefit of the minor children of his daughter. The testator's estate did not amount to \$50,000, and the specific performance of his agreement was impossible. Held, that in such case the daughter was entitled to a rescission of the con-

<sup>84</sup> *Sutton v. Hayden*, 62 Mo. 101; *Emory v. Darling*, 50 O. S. 160.

In *Sutton v. Hayden* the court said in speaking of the value of services:

"The law furnishes no standard by which the value of such services can be estimated, and Equity can only make an approximation in that direction by decreeing the specific execution of the contract."

And in *Emory v. Darling*, *supra*, the court said:

"It is suggested that the proper remedy would have been an action for the value of the services. No reason can be given for this that would not apply to any contract for a conveyance of land. Besides,

the authorities are uniform in saying that specific performance is the proper remedy. The consideration that moved Miss Powell to make the promise was a desire for the society of her sister. The value of the society of one sister to another is incapable of measurement in money. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279. Hence the only appropriate remedy is the one that has been awarded."

*Emory v. Darling* is thus in one point opposed to *Owens v. McNally*, 113 Cal. 444, in which case it was held that the only relief to be given was the estimation of the money value of the society and services of the promisee.

tract and a reconveyance of the real property deeded by her to her father.<sup>85</sup>

Where the contract was one to make a certain devise, or if promisor should fail to make this devise, to refund certain rents, equity will not decree specific performance, as the promisor had his choice between the two alternatives, and if the promisee sues for the rents, he has a complete remedy at law.<sup>86</sup>

The remedy of specific performance must be sought in a court of equity. It can not be administered by the probate court in a direct proceeding for that purpose.<sup>87</sup>

### §80. Election of remedies.

The promisee may waive his rights under the contract to devise property, as we have already said in discussing his remedies at law. It follows that having once elected to treat the contract as no longer in force, he can not afterward seek to enforce it; still less can he pursue both remedies at once. Filing a claim for the value of the services which were the consideration for the contract to devise is such an election that the contract can no longer be enforced.<sup>88</sup>

### §81. Evidence.

The evidence by which the existence of a contract to devise is to be proved is governed by the same rules as in other contracts. The only especial peculiarity is that neither party as a rule is able to testify in such actions, the promisor being dead and the promisee being prohibited from testifying as to transactions with the promisor in his lifetime. The testimony of those not parties to the contract must, therefore, as a rule, be exclusively relied on. The evidence of two competent witnesses may be sufficient.<sup>89</sup>

<sup>85</sup> *Riley v. Allen*, 54 N. J. Ch. 495; 35 Atl. 654, citing *Johnson v. Hubbell*, 10 N. J. Eq. 332.

<sup>86</sup> *Barrett v. Geisinger*, 179 Ill. 240.

<sup>87</sup> *Svanburg v. Fosseen*, 75 Minn. 350; 78 N. W. 4; 43 L. R. A. 427.

<sup>88</sup> *Broun v. Garten*, 89 Io. 373; *Laird v. Laird*, 115 Mich. 352; 73 N. W. 382.

<sup>89</sup> *Newton v. Field*, 98 (Ky.), 186; 32 S. W. 623.

The alleged beneficiary is not a competent witness to testify to the existence of a contract to make such beneficiary the heir of the promisor, the transaction being with a decedent.<sup>90</sup>

Where the contract was in writing, but has been lost or destroyed, the mother of the promisee may testify to the terms of the agreement; and where it appears from the testimony that the promisor had agreed in writing that he would leave to the promisee a child's share of his estate, and where other disinterested witnesses testify that promisor spoke of promisee as his daughter, and as such was in the habit of introducing her to his friends; that she was married at his house and with his consent; that at the birth of her child he congratulated himself on being a grandfather; and that in an auto-biographical article he spoke of her adoption, such evidence was held sufficient to support a judgment in favor of a promisee, even though the draftsman of the written contract could not remember what the contract contained with reference to the promisor's provision for her after his death.<sup>91</sup>

And where the evidence is conflicting, proof that the will was made in pursuance of the contract, and that thereupon opposition to the foreclosure of a mortgage owned by the promisor was withdrawn (which was claimed as consideration for the promise to make the will), was held to turn the preponderance in favor of the promisee.<sup>92</sup>

In the last example there was evidence tending to show the existence of a definite contract to make a will. It must be distinguished from the cases where the only evidence is that the will was made, and that the act alleged as a consideration was done. Such evidence does not establish the existence of a contract. Thus, evidence that on the same day two sisters made similar wills does not of itself show that this was done in pursuance of a contract by which each was to make her will in consideration of the other's so doing.<sup>93</sup>

<sup>90</sup> *Renz v. Drury*, 57 Kan. 84; (and under the Kansas Statute the husband of such alleged beneficiary is not competent).

<sup>91</sup> *Burns v. Smith*, 21 Mont. 251; 53 Pac. 742.

<sup>92</sup> *Gardner v. Gardner*, 49 S. Car. 62; 26 S. E. 1001.

<sup>93</sup> *Edson v. Parsons*, 155 N. Y. 555; 50 N. E. 265, affirming *s. c.* 32 N. Y. S. 1036; 85 Hun, 263.

Also evidence that the alleged promisor had referred to the alleged promisee as her adopted daughter, and had stated to others that it was her intention to leave her property to her adopted daughter, is not sufficient to establish the existence of a contract to make her will.<sup>94</sup>

As to pleading and evidence in such cases see also.<sup>95</sup>

### §82. Parties.

In an action to enforce specific performance (so-called) of a contract to make a will, the proper plaintiff is the promisee; the proper defendants are those who have the adverse interest in the property with reference to which the trust is sought to be enforced. Where property has been devised to a sole devisee he is the only necessary party; the executor and the heirs not being necessary to the determination of such action.<sup>96</sup>

### §83. Time at which statute of limitations begins to run.

As before stated no right of action accrues during the lifetime of the testator. His death is the time at which a right of action first accrues, and the time therefore from which the period of limitations is to be reckoned.<sup>97</sup>

<sup>94</sup> *Teats v. Flanders*, 118 Mo. 660. In this case it must be noticed that the surrounding facts did not bear out plaintiff's claim of a promise upon consideration. Plaintiff, the alleged promisee, lived with the alleged promisor only three years. She received apparently ample compensation for two of these three years. During the last sixteen years of the life of the alleged promisor she was alone, and in need of care, but she received none from complainant. The evidence failed

to show both the terms of the agreement and the consideration therefor.

<sup>95</sup> *Purviance v. Purviance*, 14 Ind. App. 269; 42 N. E. 364; *Waddell v. Waddell*, 43 S. W. 46 (Tenn. Ch. App.).

<sup>96</sup> *Fogle v. Church, etc.*, 48 S. Car. 86.

<sup>97</sup> *Jones v. Perkins*, 76 Fed. 82; *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. —; *Avery v. Moore*, 34 Ill. App. 115.



## CHAPTER VIII.

### CAPACITY TO MAKE A WILL.

#### §84. History of the law of testamentary capacity.

In the sixteenth and seventeenth centuries capacity to make a will was controlled by a different system of law from that regulating capacity to make a testament. As the testament was left to the ecclesiastical courts, the rules of ecclesiastical law governed the capacity of the testator. Wills were regarded rather as conveyances of land, under the Statute of Wills, and the capacity of one to make a will was controlled by the statute, and by the principles of common law.<sup>1</sup>

On some points these two systems coincided, on others they were widely divergent.

The progress of modern legislation has gradually brought these two systems of law together, and at present, in most jurisdictions, the same rules of capacity apply to wills and testaments alike. In a few jurisdictions some minor points still separate the two.

#### §85. Time at which capacity must exist.

The most convenient method of discussing this subject is to regard capacity to make a will as the normal type, and to discuss the cases of incapacity as exceptions thereto. While not strictly logical, this method is as accurate in its results as any.

<sup>1</sup>Blackstone's Comm. B. R. 2, pp. 375, 497; Coke on Littleton, 89, Sec. 123, note.

Before discussing these disqualifications in detail we must remember that in every case the question is, whether the testator was duly qualified or not at the time of the execution of the will.<sup>2</sup>

If he was qualified at that time and afterwards becomes disqualified, this has no effect upon the validity of the will;<sup>3</sup> excepting such cases as coverture, whereby the will of the woman is revoked by the operation of law. If the testator was not qualified at the time of making his will, and afterwards becomes qualified, this will not give validity to his will.<sup>4</sup> This does not, of course, mean that he may not afterwards republish the will. As we shall see in the chapter on republication, a re-execution, which is practically and legally the same in effect as making a new will, is now necessary to constitute re-publication.<sup>5</sup>

## §86. Outlawry and attainder.

Some of the disqualifications recognized by the old law have become obsolete. An outlaw was disqualified from making a testament of personalty, as his interests in his personalty were determined by his outlawry.<sup>6</sup>

Under the doctrine of attainder, a convicted felon had no interests in property which he could dispose of by will.

Under modern constitutions, attainder is abolished with all its consequences; and unless specifically forbidden by statute, a convict may make a will. It is in some states, however, provided by statute that a convict can not make a valid will.<sup>7</sup>

<sup>2</sup> Clerke v. Cartwright, 1 Phillim. Ecc. R. 90; Sturdevant's Appeal, 71 Conn. 392; Harp v. Parr, 168 Ill. 459; Denning v. Butcher, 91 Io. 425; Etter v. Armstrong, 46 Ind. 97; Gregory v. Oates, 92 Ky. 532; 18 S. W. 231; Shailer v. Bumstead, 99 Mass. 112; *In re Merriman*, 108 Mich. 454; Von de Veld v. Judy, 143 Mo. 348; Reichenbach v. Rudach, 127 Pa. St. 564; Kerr v. Luns-

ford, 31 W. Va. 659; Martin v. Thayer, 37 W. Va. 38.

<sup>3</sup> See cases cited in preceding note.

<sup>4</sup> See cases cited in preceding note and Osgood v. Breed, 12 Mass. 525; Burkett v. Whittemore, 36 S. Car. 428.

<sup>5</sup> See Ch. XVI, Republication.

<sup>6</sup> Vin. Ab. Devises, 19 Noy's Comp. La. 99.

<sup>7</sup> Kenyon v. Saunders, 18 R. I. 590.

### §87. Alienage.

At common law an alien could not devise his realty in derogation of the rights of the state;<sup>8</sup> but a denizen could devise freehold realty acquired before letters of denization were issued to him.<sup>9</sup> In most states, all restriction upon the property rights of aliens has been abolished by statute.<sup>10</sup>

### §88. Nonage.

By the ecclesiastical law it was definitely settled after some debate that males of fourteen years and over and females of twelve years and over could make testaments disposing of personalty.<sup>11</sup>

By the Wills Act of 22 Hen. VIII, c. 1, and 34 Hen. VIII, c. 5, it was indirectly provided that infants could not make wills devising real estate, by excepting them from the provisions of the act which authorized wills of real property.<sup>12</sup> The modern American statutes are generally based on the Wills Acts of Henry VIII in this respect, and provide that persons must be of full age in order to have the capacity to make a will or testament. What "full age" is, depends upon the provisions of local statutes upon that subject, which are impliedly adopted by reference thereto in the Wills Acts. In many jurisdictions full age is twenty-one for males and females.<sup>13</sup> In others it is twenty-one for males and eighteen for females.<sup>14</sup>

Some few jurisdictions allow "wills of personalty," that is, testaments, to be made at an earlier age than wills passing

<sup>8</sup> Geere v. Stone, 47 L. T. 434.

<sup>9</sup> Fourdin v. Gowdey, 3 Myl. & K. 383; 3 L. J. Ch. 171.

<sup>10</sup> To save repetition the discussion of the common law restrictions upon the ownership of property by aliens as affecting the law of wills is reserved for the chapter. See Secs. 150, 151.

<sup>11</sup> Black. Comm. Bk. 2, No. 497; Bacon's Abr. Wills (B.), p. 481;

Hyde v. Hyde, Pre. Ch. 316; Bishop v. Sharp, 2 Vern. 469; (*Ex parte* Holyland, 11 Ves. 10; 8 R. R. 67).

<sup>12</sup> Black. Comm. Bk. 2 No. 375; Vin. Ab. 20; Bacon's Abr. (B), p. 481; See Wills Act, Sec. 15, note.

<sup>13</sup> Luper v. Wertz, 19 Ore. 122.

<sup>14</sup> Harrison v. Moore, 64 Conn. 344.

realty.<sup>15</sup> So in a case where the proceeds of the sale of land were devised to a boy between eighteen and twenty-one, and the boy died, having disposed of these proceeds by his last will and testament, it was held that the validity of the second bequest turned upon the question whether under the first will the proceeds arising from the sale of the real estate were to be treated as real or personal property, and such proceeds being held to be personal property, the second bequest was held to be valid, as in Alabama a testator of eighteen may dispose of personalty.<sup>16</sup>

As in every state there are statutes upon this subject, they must be carefully consulted whenever the question arises. Whatever age is fixed by statute as necessary for testamentary capacity, the person in question possesses testamentary capacity on the day before the birthday upon which he arrives at the age in question.<sup>17</sup>

### §89. Coverture at common law.—Testaments.

Under the common law, which was followed on this point in the ecclesiastical courts, a married woman could not make a testament passing personal property without the consent of her husband.<sup>18</sup> In fact, under the common law she might and probably would have no personal property to pass, if her husband chose to exert all his legal rights over the personal property which was hers at marriage.<sup>19</sup> Upon her marriage her personal property, in possession, became her husband's at once, except her paraphernalia; while he had the power to reduce her personal property in action to his possession, and by so doing to make it his own.

<sup>15</sup> *Luper v. Wertz*, 19 Ore. 122.

<sup>16</sup> *Allen v. Watts*, 98 Ala. 384.

<sup>17</sup> *Bacon's Abr. Wills (B)*, p. 481;  
*Ex parte Holyland*, 11 Ves. 11; 8 R. R. 67.

<sup>18</sup> *Burton v. Holly*, 18 Ala. 408;  
*Anderson v. Miller*, 6 J. J. Marsh. (Ky), 569; *Morse v. Thompson*, 4 Cush. (Mass.), 562; *Marston v. Norton*, 5 N. H. 205; *Burkett v.*

*Whittemore*, 36 S. Car. 428; *Dillard v. Dillard's Exr's*, 78 Va. 208; 21 S. E. 669.

"She is under a civil disqualification arising from want of free agency and not from want of judgment." *Marston v. Norton*, 5 N. H. 205.

<sup>19</sup> *Black. Com. Bk. I*, pp. 442-445; *Bishop v. Blair*, 36 Ala. 80 *Allen v. Hooper*, 50 Me. 371.

Even under the common law a married woman could under certain circumstances exercise the powers of a *feme sole* in ordinary business matters. These circumstances generally involved the absolute or temporary disqualification of the husband to act for himself and wife. Thus if he were civilly dead,<sup>20</sup> or had abjured the realm,<sup>21</sup> or were a convicted felon,<sup>22</sup> the wife would be empowered to act for herself. Under such circumstances she was empowered by law to dispose of her property by will or testament.

A married woman might, furthermore, hold property in a representative capacity; over this, of course, her husband could exercise no control; and of such property she could, therefore, make a valid testament.<sup>23</sup>

A married woman might make a testament of personalty with the consent of her husband.<sup>24</sup> To validate her will such consent must not be a general consent to make any will, but a specific consent to make the particular will in question.<sup>25</sup> This consent was not irrevocable when given. The husband might revoke such consent at any time up to the death of the wife, and probably up to the time that the will was offered for probate. If he then acquiesced in such testament and allowed it to be probated, he was bound thereby and could not afterwards retract.<sup>26</sup> Further, if he acquiesced in the will after the death of the wife, and induced the executor to act thereunder, he could not refuse his assent at probate,<sup>27</sup> and in one case it was held

<sup>20</sup> *Cutter v. Butler*, 25 N. H. 343.

<sup>21</sup> *Countess of Portland v. Producers*, 2 Vern. 104 (banished by act of Parliament); *Atlee v. Hook*, 23 L. J. Ch. 776; *Newsome v. Bowyer* (transported), 3 P. Wms. 37.

<sup>22</sup> *Goods of Coward*, 4 Sw. & Tr. 46; 34 L. J. P. 120; 11 Jur. (N. S.) 569; 13 L. T. 210; *Newsome v. Bowyer*, 3 P. Wms. 37.

<sup>23</sup> *Tucker v. Inman*, 4 M. & G. 1049; *Lee v. Bennett*, 31 Miss. 119; *West v. West*, 3 Rand. (Va.) 373.

<sup>24</sup> *Viner's Abr. Devises*, Secs. 8-10; *Marlborough v. Godolphin*, 2

Ves. 60; *Stevens v. Bagwell*, 15 Ves. 139; *Marston v. Norton*, 5 N. H. 205; *Reed v. Blaisdell*, 16 N. H. 194.

<sup>25</sup> *Rex v. Betteworth*, 2 Stra. 891; 44 L. J. Ch. 345; *Willock v. Noble*, L. R. 7 H. L. 580; 32 L. T. 419; 23 W. R. 809; *Cutter v. Butler*, 25 N. H. 343; *Kurtz v. Saylor*, 20 Pa. St. 205.

<sup>26</sup> *Brook v. Turner*, 2 Mod. 170; *Ex parte Fane*, 16 Sim. 406; (*In re Trustees' Relief Act*).

<sup>27</sup> *Brook v. Turner*, 2 Mod. 170.

that the husband could not refuse his assent to probate where he had expressly assented to the will in writing.<sup>28</sup>

The general rule that the husband could refuse assent to his wife's will at the probate thereof and thus keep it from taking effect, unless he had by his own acts renounced this right, was clearly established; but it was a matter of doubt as to the nature of the acts of the husband by which he renounced this right.

The consent of the husband was effectual as waiver of his interests, but not of others. When the husband consented to his wife's will, but died before his wife, it was held that unless her will were republished it was of no effect against her next of kin.<sup>29</sup>

This common law rule has been enacted by statute in some jurisdictions and enlarged so that a married woman may make either a will or a testament if her husband consents. This consent is usually required to be in writing.<sup>30</sup>

It has been held, where by statute his "written consent" to his wife's will was necessary to its validity, that his signature to a petition for his appointment as his wife's executor, and his offering bond, did not amount to a written consent to such will.<sup>31</sup>

A decree of court giving a married woman power to devise and dispose of her estate as if she were a *feme sole* does not make a previously executed will valid without republication.<sup>32</sup>

## §90. Coverture at common law.—Wills.

The original Statute of Wills, 22 Hen. VIII, c. 1, conferred testamentary capacity in such general terms that married women were apparently included. It was, however, doubtful if,

<sup>28</sup> Maas v. Sheffield, 10 Jur. 417.

<sup>29</sup> Bacon's Abr. Wills, Sec. 482; Stevens v. Bagwell, 15 Ves. Jr. 139; Cassell v. Vernon, 5 Mason, 332; Bradish v. Gibbs, 3 Johns. Ch. 523; Anderson v. Miller, 6 J. J. Marsh. 569; Smelie v. Reynolds, 2 De Saus 66 Grimke v. Grimke, 1 De Saus 366.

<sup>30</sup> Gregory v. Oates, 92 Ky. 532; Hughes v. Faulkner (Ky.) (1900), 56 S. W. 642; Tyler v. Wheeler, 160 Mass. 206.

<sup>31</sup> Tyler v. Wheeler, 160 Mass. 206.

<sup>32</sup> Gregory v. Oates, 92 Ky. 532; 18 S. W. 231.

under the common law theory of the absolute merger of her identity in law with that of her husband, such testamentary power could be exercised. This question was promptly settled by the statute 34 Hen. VIII, c. 5, which expressly excepted married women from the class of those authorized to make a will.<sup>33</sup>

Under the Wills Act, therefore, a married woman could not make a will of lands even with her husband's consent.<sup>34</sup> Even her will devising her realty to her husband was a nullity.<sup>35</sup>

### §91. Capacity of married woman under powers.

The common law did not deny to a married woman the right to execute a power conferred upon her, even when such power involved the right to invest another with the title to realty. It followed that if by the terms of such power it could be executed by will, a married woman could make a will appointing the beneficiary of such power.<sup>36</sup> This power, while usually provided for by ante-nuptial agreement, may be conferred by deed during coverture.<sup>37</sup> This power of testamentary disposition extended not only to the principal, but also to savings out of the income of realty.<sup>38</sup>

<sup>33</sup> Black. Com. Bk. 2, p. 497. This amendment was said to be entirely unnecessary and 'idle.' Sir George Caverlye's Estate, 3 Dyer, 354a.

<sup>34</sup> Bacon's Abr. Wills, B p. 481; Fitch v. Brainerd, 2 Day, 163; Ploud. 526; Picquet v. Swan, 4 Mason, 443; Osgood v. Breed, 12 Mass. 525; Marston v. Norton, 5 N. H. 205; Bradish v. Gibbs, 3 Johns. Ch. 523.

<sup>35</sup> Fitch v. Brainerd, 2 Day, 163.

<sup>36</sup> Pride v. Bubb, 41 L. J. Ch. 105; L. R. 7 Ch. 64; 25 L. T. 890; 20 W. R. 220; Ross v. Ewer, 3 Atk.

156; Hawkins v. Kemp, 3 East, 410; Hughes v. Wells, 13 E. L. S. Eq. 389; *In re* Hornbuckle, L. R. 15 P. D. 149; Anderson v. Miller, 6 J. J. Marsh. (Ky.) 573; Osgood v. Breed, 12 Mass. 525; Schley v. McCeney, 36 Md. 266; Wagner v. Ellis, 7 Pa. St. 411; Dunn's Appeal, 85 Pa. St. 94; Thorndike v. Reynolds, 22 Gratt. (Va.) 21.

<sup>37</sup> Pride v. Bubb, 41 L. J. Ch. 105; L. R. 7 Ch. 64; 25 L. T. 890; 20 W. R. 220.

<sup>38</sup> Humphreys v. Richards, 25 L. J. Ch. 442; 2 Jur. (N. S.) 432; 4 W. R. 432.

## §92. Capacity of married woman in equity.

In equity a married woman's capacity to make a will disposing of the property which equity recognized as hers was well established, though the limitations to such capacity were not definitely settled.

The chief differences between the testamentary capacity of a married woman in equity and at common law were as to (a) powers of disposing of her own property by will, reserved to her by agreement with her husband; and (b) the power of disposing of her separate estate by will. If by contract before marriage, or after marriage if upon a new consideration, the woman reserved power to dispose of her separate property by will, equity would enforce such contract. No deed to trustees was necessary.<sup>39</sup>

When property was settled upon a married woman free from the control of her husband, equity recognized the woman as the owner of such separate estate, with all the incidents of ordinary ownership, including the right to dispose of it by will.<sup>40</sup>

Under the rules of equity separate property of a married woman acquired after the execution of the will, as well as that owned at the time of the execution of the will, may be devised.<sup>41</sup>

In some jurisdictions the power to dispose of the equitable separate property by will need not be expressly conferred in the instrument granting the estate.<sup>42</sup>

<sup>39</sup> Hall v. Waterhouse, 5 Giff, 64; 11 Jur. (N. S.) 361; 12 L. T. 297; 13 W. R. 633; Johnson v. Johnson, Ky. ('94), 24 S. W. 628.

<sup>40</sup> Fettiplace v. Gorges, 1 Ves. Jr. 46; 1 R. R. 79; Rich v. Cockell, 9 Ves. Jr. 369; Peacock v. Monk, 2 Ves. 190; Hall v. Waterhouse, 5 Giff. 64; 11 Jur. (N. S.) 361; 12 L. T. 297; 13 W. R. 633.

<sup>41</sup> Charlemont v. Spencer, 11 L. R. Jr. 490.

<sup>42</sup> White v. Dillon, Wall. Lyon, 302; Fettiplace v. Gorges, 1 Ves. Jr. 46; 1 R. R. 79; Rich v. Cockell,

9 Ves. 369; Peacock v. Monk, 2 Ves. 190; Hearle v. Greenbank, 3 Atk. (709); 1 Ves. 303; Hall v. Waterhouse, 5 Giff. 64; 6 N. R. 20; 11 Jur. (N. S.) 361; 12 L. T. 297; 13 W. R. 633; Taylor v. Meads, 4 D. G. J. & S. 597; 5 N. R. 348; 34 L. J. Ch. 203; 11 Jur. (N. S.) 166; 12 L. T. 6; 13 W. R. 394; Emmert v. Hays, 89 Ill. 11; Kelly v. Alred, 65 Miss. 495; Cutter v. Butler, 25 N. H. 343; Barnes v. Irwin, 2 Doll. (Pa.) 199; 1 Am. Dec. 278.



In other jurisdictions it has been held that a married woman can exercise over her separate realty only such testamentary power as is expressly conferred by the instrument creating the estate.<sup>43</sup>

### §93. Capacity of married woman under modern statutes.

These rules of the capacity of a married woman have been discussed in a very elementary way, because they are now largely obsolete. Legislation, during the past century, has swept them away in almost all jurisdictions. This change has been accomplished by statutes of three different types.

1. In some states the Wills Acts have given testamentary capacity to "any person" having certain requisite qualifications, without excepting married women, and the courts have held that such statutes conferred testamentary capacity, holding that the courts could not make an exception which the legislature had declined to make. Thus in Ohio under a statute substantially the same as the original Wills Act of Henry VIII it was held that a married woman of full age, being a "female person of the age of eighteen years and upward," could make a will.<sup>44</sup> It must be conceded, however, that by the weight of authority a married woman is impliedly excepted from the operation of the Wills Acts, and that the use of general language does not, in most jurisdictions, operate to include married women.<sup>45</sup>

<sup>43</sup> *West v. West*, 3 Rand. (Va.), 373.

<sup>44</sup> *Allen v. Little*, 5 Ohio, 65. To the same effect is the holding that the words 'any person' in the Wills Act includes a married woman. *Bennett v. Hutchinson*, 11 Kan. 398.

In *Noble v. Enos*, 19 Ind. 72, is an obiter to the same effect. As the legislature had passed a declaratory act to the effect that the Wills Act should be so construed as to include married women, which declaratory act had taken effect before the cause of action arose, this remark is merely an obiter and can be taken

to offset a contrary obiter in *Reese v. Cochran*, 10 Ind. 195.

<sup>45</sup> *Osgood v. Breed*, 12 Mass. 525. The Massachusetts statute gave the power of devising to 'any person lawfully seized of lands,' and the Supreme Court held that this provision could not apply to a married woman, as she was seized jointly with her husband, in her right.

The New Hampshire statute was a copy of the Massachusetts, and was construed in the same way in *Marston v. Norton*, 5 N. H. 205. A similar holding is found in *Baker v. Chastang*, 18 Ala. 417.

2. In other jurisdictions the separate estate of a married woman has been so extended by statute as to give her far more power of disposing of her property than she possessed in equity, and in many states to give her practically complete testamentary power over her own property.<sup>46</sup> In other states, however, the scope of the separate property acts is simply to secure a married woman's separate property to her own use free from the claims of her husband or his creditors. In these jurisdictions, therefore, a statute securing separate property to a married woman is held not to confer testamentary capacity.<sup>47</sup>

3. The second type of statute has been largely superseded by the third. By this testamentary power is specifically conferred upon married women: and she may dispose of her property by will as if she were a *feme sole*.<sup>48</sup>

Under the English Married Woman's Act of 1882 only property owned by the married woman while under coverture could be devised by her,<sup>49</sup> and if she acquired property after she had made her will and before the death of her husband, such property would not pass unless the will were republished after the death of the husband.<sup>50</sup> These statutes were not usually retroactive. Hence a will made before the statute conferred capacity was not made valid by such statute, unless republished afterwards.<sup>51</sup> But the English Married Woman's Property

<sup>46</sup> *Emmert v. Hays*, 89 Ill. 11; *Kelly v. Alred*, 45 Miss. 495; *Sanborn v. Batchelder*, 51 N. H. 426; *Wakefield v. Phelps*, 37 N. H. 295; *Rathbone v. Hamilton*, 4 App. D. C. 475. (But gifts from the husband to the wife can not, in the District of Columbia, be devised by her under such statute.)

<sup>47</sup> *Cain v. Bunkley*, 35 Miss. 119; *Compton v. Pierson*, 28 N. J. Eq. 229.

*Contra*, *Mosser v. Mosser*, 32 Ala. 551.

<sup>48</sup> *In re Price*, 54 L. J. Ch. 509; 28 Ch. D. 709; 52 L. T. 430; 33 W. R. 20; *In re Young*, 54 L. J. Ch. 1065; 28 Ch. D. 705; 52 L. T. 754; 33 W. R. 729; *Emmert v. Hays*, 89 Ill. 1; *Scott v. Harkness* (Ida.)

(1899), 59 Pac. 556; *Sanborn v. Batchelder*, 51 N. H. 426; *Burkett v. Whittemore*, 36 S. Car. 428; *Dillard v. Dillard's Ex'rs.*, 78 Va. 208; 21 S. E. 669; *Kiracofe v. Kiracofe*, 93 Va. 591.

<sup>49</sup> *In re Price*, 54 L. J. Ch. 509; 28 Ch. D. 709; 52 L. T. 430; 33 W. R. 20; *In re Young*, 54 L. J. Ch. 1065; 28 Ch. D. 705; 52 L. T. 754; 33 W. R. 729.

<sup>50</sup> *Willock v. Noble*, 44 L. J. Ch. 345; L. R. 7 H. L. 580; 32 L. T. 419; 23 W. R. 809.

<sup>51</sup> *Gregory v. Oates*, 92 Ky. 532; *Burkett v. Whittemore*, 36 S. Car. 428.

*Contra*, as to property acquired afterwards under the statute. *In re Bowen* (1892), 2 Ch. 291.

Act of 1893 was retroactive in the popular sense, since it made valid all wills of married women who died after the passage of the act, whether their wills were valid before or not, independent of any subsequent republication.<sup>52</sup>

Where the statute conferring testamentary power upon married women prescribes the extrinsic elements of wills made by them, such form of will is the only one which a married woman can make.<sup>53</sup>

**§94. Lack of mental capacity.—Is perfect sanity a requisite of testamentary capacity?**

By the provisions of the Wills Act which merely declare the common law rules, a person, to have testamentary capacity, must be of sound mind, or, as it is put with more redundancy, of sound and disposing mind and memory.

What constitutes mental capacity to make a will is a subject upon which the courts have in the past differed somewhat in their decisions, and as is usual still more in their dicta. The attempt has been made again and again to select some arbitrary test of mental capacity by which to gauge testamentary capacity. We shall see in a discussion of the specific forms of mental disease and weakness some of the tests that have been attempted. But the new combinations of fact presented by later cases have invariably caused the courts to recede from the tests thus arbitrarily selected as unjust and unreasonable.

The simplest test ever proposed for determining testamentary capacity is that in order to possess testamentary capacity a testator must be perfectly sane. If this test were adopted it is evident that all inquiry into the degree of insanity and its effect upon testator's will would be precluded. This is, therefore, the first of these various tests to discuss in detail.

The early view of the English courts was that a testator

<sup>52</sup> *In re Wylie* (1895), 2 Ch. 116.

<sup>53</sup> *Scott v. Harkness* (Ida.) (1899), 59 Pac. 556. Hence, where the statute prescribes that a married woman may dispose of her sep-

arate estate by a will attested by witnesses, she can not make a valid, holographic will without witnesses; though a man or unmarried woman may make such a will.

need not be perfectly sane in order to possess sufficient testamentary capacity. Thus one afflicted with insane delusions might make a will if the insane delusions were not of a sort to affect his disposition of his estate.<sup>54</sup> Subsequently the English courts seemed disposed to recede from this position, and to take the narrow view, that in order to possess sufficient mental capacity to make a will one must be perfectly sane.<sup>55</sup> "If disease be once shown to exist in the mind of the testator, it matters not that the disease is discoverable only when the mind is addressed to a certain subject to the exclusion of all others, the testator must be pronounced incapable," is the often quoted form in which the rule has been stated.<sup>56</sup>

The view now entertained by English courts seems to be the same as their original view, namely, that one who is not perfectly sane may make a valid will; that is, that testamentary mental capacity is not the same thing as perfect sanity.<sup>57</sup>

The American courts have from the outset held to the proposition that a person not perfectly sane might possess sufficient mental capacity to make a will.<sup>58</sup>

In Indiana under the statute no one of "unsound mind" can make a will,<sup>59</sup> and it was at one time apparently held that any unsoundness of mind, even though it had no effect whatever

<sup>54</sup> *Dew v. Clark*, 5 Russ. 163; 6 L. J. (O. S.) Ch. 186.

<sup>55</sup> *Waring v. Waring*, 6 Moore P. C. 341; 12 Jur. 947; *Smith v. Tebbitt* L. R., 1 P. 398; 16 L. T. 841; *Dyce v. Troup*, Deane Ecc. Rep. 22.

<sup>56</sup> *Smith v. Tebbitt*, L. R. 1 P. 398; 16 L. T. 841; 16 W. R. 18; 36 L. J. P. 97.

<sup>57</sup> *Banks v. Goodfellow*, 39 L. J. Q. B. 237; 22 L. T. 813; L. R. 5 Q. B. 549; *Smee v. Smee*, L. R. 5, P. D. 84; 49 L. J. P. 8; 28 W. R. 703; 44 J. P. 220; *Goods of Bailey*, 2 Sw. & Tr. 156; 31 L. J. P. 178; 7 Jvr. (N. S.) 712; 4 L. T. 477; *Murfett v. Smith*, 12 P. D. 116; 57 L. T. 498; 51 J. P. 374.

<sup>58</sup> *St. Joseph's Convent v. Garner*,

66 Ark. 623; 53 S. W. 298; *Durham v. Smith*, 120 Ind. 463; *Nieman v. Schnitker*, 181 Ill. 400; *Hudson v. Hugan*, 56 Kan. 152; *Bulger v. Ross*, 98 Ala. 267; *Gardner v. Lambach*, 47 Ga. 133; *Wallis v. Luh-ring*, 134 Ind. 447; 144 Ind. 463; *Blough v. Parry*, 40 N. E. 70; *Williams v. Williams*, 90 Ky. 28; *Benoist v. Murrin*, 58 Mo. 307; *Couch v. Gentry*, 113 Mo. 248; *Clapp v. Fullerton*, 34 N. Y. 190; *Pidcock v. Potter*, 68 Pa. St. 342; *Schreiner v. Schreiner*, 178 Pa. St. 57, and see cases cited under Sec. 104 *et seq.* *Martin v. Thayer*, 37 W. Va. 38.

<sup>59</sup> *Noble v. Enos*, 19 Ind. 72.

upon the will, destroyed testamentary capacity.<sup>60</sup> This view has since been abandoned, and it is now held that unsoundness in the statute means unsoundness according to the standard of the law on the subject of wills. *Willett v. Porter* is distinguished and *Eggers v. Eggers* is expressly overruled in the cases cited.<sup>61</sup>

Hence, the mere fact that testator's mind was so affected as to cause him to attempt suicide, in which he ultimately was successful, is not inconsistent with testamentary capacity.<sup>62</sup>

Accordingly it is error to charge in a contest that in order to make a will a testator must have a sound mind; that is "a mind wholly free from error."<sup>63</sup>

So, also, it is error to charge that "unsoundness of mind embraces every species of mental incapacity from raging mania to that delicate and extreme feebleness of mind which degenerates into unconsciousness"; since this includes cases of sickness, and "weak but sufficient minds."<sup>64</sup>

Even where the statute makes use of the expression "unsound mind" in pointing out who may not make a will, this term is held to have its common law meaning.<sup>65</sup>

## §95. Is criminal responsibility a test of testamentary capacity?

While some few courts have suggested that the standard for testamentary capacity should be measured by that for criminal capacity, the great weight of authority is to the effect that as from the nature of the two, no comparison between

<sup>60</sup> *Willett v. Porter*, 42 Ind. 250; *Eggers v. Eggers*, 57 Ind. 461.

<sup>61</sup> *Burkhart v. Gladdish*, 123 Ind. 337; *Blough v. Parry*, 144 Ind. 463, citing *Turner v. Cook*, 36 Ind. 129; *Herbert v. Berrier*, 81 Ind. 1; *Bower v. Bower*, 142 Ind. 194; *Wallis v. Lühring*, 134 Ind. 447.

"It is not to be denied that a person may be possessed of delusions, and yet be capable of making a will." *Burkhart v. Gladdish*, 123 Ind. 337.

<sup>62</sup> *Koegel v. Egner*, 54 N. J. Eq. 623; *Goods of Bailey*, 2 Sw. & Tr. 156; 31 L. J. P. 178; 7 Jur. (N. S.) 712; 4 L. T. 477.

<sup>63</sup> *Schreiner v. Schreiner*, 178 Pa. St. 57. But in *Duffield v. Morris*, 2 Harr. (Del.) 375, a charge that "a sound mind is a mind wholly free from delusion" was given.

<sup>64</sup> *Nieman v. Schnitker*, 181 Ill. 400.

<sup>65</sup> *Young v. Miller*, 145 Ind. 652; *Blough v. Parry*, 144 Ind. 463.

them is possible. It is not correct to say that either requires a greater degree of capacity than the other. Criminal capacity involves primarily the ability to distinguish right from wrong; while testamentary capacity involves ability to understand the estate to be disposed of, the proper objects of bounty, and the nature of the testamentary act. No test can reduce these to a common standard. For instance, a person may be afflicted with an insane delusion, which suggests a certain state of facts to him. In reliance upon this belief he may perform an act, which if committed by one in full possession of his senses, would be a crime; but which, by reason of the insane delusion as to the existence of specific facts, is no crime. Yet this same person may be fully competent to make a will. The insane delusion under which he suffers may not in any way affect his knowledge of his estate, those having natural claims upon him, and the nature of the testamentary act which he is about to perform.

As a result of these considerations very few courts have attempted to compare criminal and testamentary capacity. In one case where such attempt was made it was said that a degree of incapacity less than enough to produce acquittal of a criminal charge would invalidate a will.<sup>66</sup>

### §96. Is contractual capacity a test of testamentary capacity?

Another question of greater importance is whether the standard for testamentary capacity is the same as that for making contracts and engaging in business, or whether one can be compared with the other, so as to say that the one requires the greater capacity and the other the less.

Some courts have made the attempt to compare contractual capacity with testamentary capacity. The result has been very unsatisfactory. We can find many opinions to the effect that testamentary capacity requires a higher degree of mental power than contractual capacity;<sup>67</sup> many in which it is said that

<sup>66</sup> *McTaggart v. Thompson*, 14 Pa. St. 149.

*L. D. 64; Chandler v. Barrett*, 21 La. Ann. 58; citing *Aubert v.*

<sup>67</sup> *Boughton v. Knight*, L. R. 3 P.

*Aubert*, 6 La. Ann. 106.

testamentary capacity requires a lower degree of mental capacity than contractual capacity;<sup>68</sup> and some in which it has been said that testamentary capacity and contractual capacity require the same degree of mental capacity.<sup>69</sup>

This divergence of judicial opinion is, of itself, enough to suggest the view that is undoubtedly the true one, and that now obtains by the weight of authority. This view is that testamentary capacity and contractual capacity are so different in their nature that it is impossible to use one as a test for measuring the other, or to say that the existence of one either proves or disproves the other's existence conclusively.<sup>70</sup>

Thus, it is possible for one to lack contractual capacity and to be unable to transact business, and yet to have sufficient testamentary capacity.<sup>71</sup> On the other hand, it is possible for one to possess sufficient contractual capacity, and yet to lack testamentary capacity.<sup>72</sup> However, one who has contractual capacity *prima facie*, possesses testamentary capacity.<sup>73</sup>

The courts, however, have not been unanimous in holding that mental capacity to make a valid contract can not be compared with mental capacity to make a will. Thus in Missouri, while the court once decided that a person may have mental capacity to make a will who can not transact 'complicated

<sup>68</sup> Brinkman v. Rueggessick, 71 Mo. 553; 83 Mo. 175; Thompson v. Kyner, 65 Pa. St. 368; Converse v. Converse, 21 Vt. 168; Kerr v. Lunsford, 31 W. Va. 659.

And where the court gave a correct statement of what testamentary capacity was, in law, it was held not to be error to add that it required less mental power to make a will than it did to make a contract. Gable v. Rauch, 50 S. Car. 95.

<sup>69</sup> Coleman v. Robertson, 17 Ala. 84.

<sup>70</sup> Turner's Appeal, 72 Conn. 305; Brown v. Mitchell, 88 Tex. 350; Segur's Will (Vt.) (1899), 44 Atl. 342.

<sup>71</sup> Turner's Appeal, 72 Conn. 305; Greene v. Greene, 145 Ill. 264; Sinnet v. Bowman, 151 Ill. 146; Taylor v. Cox, 153 Ill. 220; Petefish v. Becker, 176 Ill. 448; Linkmeyer v. Brandt, 107 Io. 750; Wood v. Lane, 102 Ga. 199; Thompson v. Kyner, 65 Pa. St. 368.

<sup>72</sup> American Bible Society v. Price, 115 Ill. 623.

<sup>73</sup> *In re Wax's Estate*, 106 Cal. 343; *Entwistle v. Meikle*, 180 Ill. 9; *Harp v. Parr*, 168 Ill. 459; *Sim v. Russell*, 90 Io. 656; *Morris v. Morton's Ex'rs.* — Ky. —; 20 S. W. 287.

business,'<sup>74</sup> in a later case it was held proper to instruct the jury that a person possessed testamentary capacity if he had a "disposing mind, that is to say, that he had sufficient understanding to transact his ordinary business affairs, and understood what disposition he was making of his property, and to whom he was giving it," although the charge "did not repeat the formula so often adopted"; namely, the definition of testamentary capacity given in the following section.<sup>75</sup>

In Indiana a similar charge was approved.<sup>76</sup> In Illinois an earlier case to the same effect has been repeatedly overruled; and the proposition is now firmly established that the capacity for making a will is not necessarily the same as that for engaging in the ordinary business of life.<sup>77</sup>

While the courts quite generally hold that testamentary and contractual capacity are in their nature so different that they can not be compared, yet it has been held that where the trial court gave a correct definition of testamentary capacity substantially as given in the following section, and then added that

<sup>74</sup> *Maddox v. Maddox*, 114 Mo. 35.

<sup>75</sup> *Farmer v. Farmer*, 129 Mo. 530, citing *Myers v. Hauger*, 98 Mo. 433; *Benoist v. Murrin*, 58 Mo. 307; *Jackson v. Hardin*, 83 Mo. 175; *Brinkman v. Rueggessick*, 71 Mo. 553; so *Riley v. Sherwood*, 144 Mo. 354. But in *Von de Veld v. Judy*, 143 Mo. 348, evidence that testator was "not competent to do business" was held not to be such evidence of incapacity to make a will as would justify the court in submitting the question to the jury.

<sup>76</sup> *Whiteman v. Whiteman*, 152 Ind. 263; *Bower v. Bower*, 146 Ind. 393; s.c. 142 Ind. 194, citing (in 146 Ind. 393) *Todd v. Fenton*, 66 Ind. 25; 58 Ind. 538; *Durham v. Smith*, 120 Ind. 463; *Burkhart v. Gladish*, 123 Ind. 337; *Harrison v. Bishop*, 131 Ind. 161.

In Connecticut it is held proper to show whether testator could manage ordinary business affairs or not.

*Turner's Appeal*, 72 Conn. 305 (but such ability is not held in this case to determine testamentary capacity).

<sup>77</sup> The case of *Keithley v. Stafford*, 126 Ill. 507, though apparently followed in *Francis v. Wilkinson*, 144 Ill. 370, has been overruled in *Craig v. Southard*, 148 Ill. 37; *Greene v. Greene*, 145 Ill. 264; *Taylor v. Cox*, 153 Ill. 220; *Petefish v. Becker*, 176 Ill. 448; *Prather v. McClelland*, 76 Tex. 574.

"Capacity to transact ordinary business, and to know and understand the business in which one is engaged at the time of making the will, are evidence of testamentary capacity, unless the testator was at that time afflicted with some morbid delusion which affected his action." *Orchardson v. Cofield*, 171 Ill. 14, citing and following *American Bible Society v. Price*, 115 Ill. 623.



it took less capacity for a will than for a contract, this charge, though strictly speaking error, was not so prejudicial to the party complaining as to be reversible error.<sup>78</sup>

In some jurisdictions a statutory definition of testamentary capacity is "of sound and disposing mind and memory and capable of making a valid deed or contract."<sup>79</sup> Such statute, of course, supersedes the definitions of sound mind evolved by the courts.

### §97. Test of testamentary capacity now adopted.

The real test of capacity has finally been agreed upon by the great weight of authority, as follows:

The testator must have strength and clearness of mind and memory sufficient to know in general, without prompting, the nature and extent of the property of which he is about to dispose, the nature of the act which he is about to perform, and the names and identity of the persons who are the proper objects of his bounty, and his relation towards them.<sup>80</sup>

Greater capacity than this the law does not demand; less than this is insufficient; and in each case it is a question of fact

<sup>78</sup> Gable v. Rauch, 50 S. Car. 95.

<sup>79</sup> Connelly v. Beal, 77 Md. 116; Barbour v. Moore, 4 App. D. C. 535.

<sup>80</sup> Campbell v. Carnahan, — Ark. —; 13 S. W. 1098; Thompson v. Ish, 99 Mo. 160; Lee's Will, 46 N. J. Eq. 193; Durham v. Smith, 120 Ind. 463; Spratt v. Spratt, 76 Mich. 384; Prather v. McClelland, 76 Tex. 574; Hudson v. Hughan, 56 Kan. 152; Lodge's Will, 2 Hous. (Del.) 418; Hampton v. Westcott, 49 N. J. Eq. 522; Martin v. Thayer, 37 W. Va. 38; Couch v. Gentry, 113 Mo. 248; Schmidt v. Schmidt, 47 Minn. 451; Franke v. Shipley, 22 Ore. 104; Bannister v. Jackson, 46 N. J. Eq. 593; Clifton v. Clifton, 47 N. J. Eq. 227; Peninsular Trust Company v.

Barker, 116 Mich. 333; O'Brien v. Spalding, 102 Ga. 490; Smith v. Henline, 174 Ill. 184; Entwistle v. Meikle, 180 Ill. 9; Young v. Miller, 145 Ind. 652; Roller v. Kling, 150 Ind. 159; Cash v. Lust, 142 Mo. 630; Claffey v. Ledwith, 56 N. J. Eq. 333; King v. King, — Ky. — (no off. rep.); 42 S. W. 347; Howat v. Howat, — Ky. —, (no off. rep.); 41 S. W. 771; Shreiner's Appeal, 178 Pa. St. 57; Hall v. Perry, 87 Me. 569; Hudson v. Hughan, 56 Kan. 152; Westcott v. Sheppard, 51 N. J. Eq. 315; Baptist v. Baptist, 23 Can. S. C. 37; Mendenhall v. Tugate, 95 Ky. 208; Loughney v. Loughney, 87 Wis. 92; Chappell v. Trent, 90 Va. 849; Gorkow's Estate, 20 Wash. 563; 85 Wis. 162.

or of mixed law and fact whether the testator possesses the requisite capacity.<sup>81</sup> While not necessary, it is perfectly proper to qualify such a rule by adding that an insane delusion directly affecting the will may destroy testamentary capacity.<sup>82</sup>

In some jurisdictions a rule to the effect that mental capacity consists in having a mind sound enough to know and understand the business in which he was engaged, in making the will, is approved.<sup>83</sup> This is practically the same rule as

<sup>81</sup> *Coleman v. Robertson*, 17 Ala. 84; *Burney v. Torrey*, 100 Ala. 157; *Tobin v. Jenkins*, 29 Ark. 151; *St. Leger's Appeal*, 34 Conn. 434; *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Stancell v. Kenan*, 33 Ga. 56; *Jones v. Grogan*, 98 Ga. 552; *Nicewander v. Nicewander*, 151 Ill. 156; *McCommon v. McCommon*, 151 Ill. 428; *Roller v. Kling*, 150 Ind. 159; *Hudson v. Hugan*, 56 Kan. 152; *Newcomb's Exr. v. Newcomb*, 96 Ky. 120; *Howat v. Howat's Exr.* Ky. 1898, 41 S. W. 771; *King v. King*, 42 S. W. 347; *Wise v. Foote*, 81 Ky. 10; *Whitney v. Twombly*, 136 Mass. 145; *Higgins v. Carlton*, 28 Md. 115; *Moriarity v. Moriarity*, 108 Mich. 249; *Peninsular Trust Co. v. Barker*, Mich. 1898, 74 N. W. 508; *Cash v. Lust*, 142 Mo. 630; *Hampton v. Westcott*, 49 N. J. Eq. 522; *Bennet v. Bennet*, 50 N. J. Eq. 439; *Chaffey v. Ledwith*, 56 N. J. Eq. 333; *Lawrence v. Steel*, 66 N. Car. 584; *Delafield v. Parish*, 25 N. Y. 9; *Van Guysling v. Van Kurew*, 35 N. Y. 70; *Hubbard v. Hubbard*, 7 Oregon, 42; *Chrisman v. Chrisman*, 16 Oregon, 127; *Keebler v. Shute*, 183 Pa. St. 283; *Tomkins v. Tomkins*, 1 Bailey (S. Car.), 92; *Ford v. Ford*, 7 Hump. (Tenn.), 92; *Prather v. McClelland*, 76 Tex. 574; *Greer v. Greers*, 9 Gratt. (Va.) 330; *Martin v. Thayer*, 37 W. Va. 38; *Holden v. Meadows*, 31 Wis. 284; *In re Farnsworth's Will*, 62 Wis. 474.

"A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. It is not necessary that he should collect these in one review. If he understands in detail what he is about and chooses with understanding and reason between one disposition and another, it is sufficient for making a will." *Wilson v. Mitchell*, 101 Pa. St. 495; *Miller v. Oestrich*, 157 Pa. St. 264; *Hoopes' Estate*, 174 Pa. St. 373.

<sup>82</sup> *Nicewander v. Nicewander*, 151 Ill. 156.

<sup>83</sup> *Sturdevant's Appeal*, 71 Conn. 392; *Steele v. Helm*, 2 Marv. (Del.) 237.

"The jury were told that it was sufficient if the mind and memory of the testatrix were sound enough to enable her to know and understand the business in which she was engaged at the time when she executed the paper in question. This is the fundamental test and it was stated in proper form." *Sturdevant's Appeal*, 71 Conn. 392, citing *Kimberly's Appeal*, 68 Conn. 428.

that given in the earlier part of this section, though put in simpler form.

Accordingly, it is error to charge that "it is not necessary that one should know the number and condition of his relations, or their claim on his bounty, or that he should know or understand the reason for giving or withholding his bounty to or from any relative,"<sup>84</sup> as this understates the degree of capacity required by law. On the other hand, it is error to define a "person of sound mind, with reference to testamentary matters, as one who is capable of recalling his property; its amount, condition and situation; of estimating it and dividing it; of comprehending the scope and provisions of the will, of recalling all persons who reasonably come within the range of the bounty of testator, and all he had done for each of them." This overstates the capacity required,\* and a charge that testamentary capacity is absent, if testator does not have an 'intelligent knowledge' of his conduct and acts, and an 'intelligent perception' of what provision he was making in his will, requires too high a standard of testamentary capacity.<sup>85</sup>

A charge that capacity to make a will required that testator must possess sufficient mind to know and understand what he is doing, and sufficient mental capacity to know and understand the extent of his estate, and the persons who would naturally be the objects of his bounty, and that testator be able to keep these in mind long enough to form a rational judgment in regard to them was approved.<sup>86</sup>

This does not, of course, mean that testator must be able to understand the meaning of all the technical legal terms which are employed by counsel in drafting testator's will, under his general instructions. It is sufficient if testator understands the legal effect and intent of the instrument as a whole, and if

<sup>84</sup> *Moriarity v. Moriarity*, 108 Mich. 249, distinguishing *Spratt v. Spratt*, 76 Mich. 395.

\* *Couch v. Gentry*, 113 Mo. 248; on the same point are *Trish v.*

*Newell*, 62 Ill. 196; *Yoe v. McCord*, 74 Ill. 33.

<sup>85</sup> *Burney v. Torrey*, 100 Ala. 157.

<sup>86</sup> *Blough v. Parry*, 144 Ind. 463.

the instrument is so drawn as to express testator's intent;<sup>87</sup> nor that he should be free from all error, and infallible as to the actual relationship of the different natural objects of his bounty.<sup>88</sup>

In some jurisdictions especial stress is laid upon the necessity of testator's having capacity to entertain a 'fixed rational plan' of disposing of his estate.<sup>89</sup>

### §98. Degree of memory requisite.—Effect of size of estate.

This rule for testamentary capacity does not require a perfect memory.<sup>90</sup>

A testator may forget the existence of part of his estate, or of some one who has natural claims upon him, and yet make a valid will.<sup>91</sup> What is required is merely that the testator have such mind as is able to remember the necessary facts, not that he shall actually remember them all.<sup>92</sup>

Accordingly, it is error to charge that the capacity of testatrix is to be determined by finding "whether or not . . . she knew . . . the nature and extent of her property"; as this requires actual knowledge at the time and not capacity of remembering what she has once known.<sup>93</sup>

The effect of a will made under mistake of fact is hereafter discussed. It is not a question of capacity and therefore is not treated of here.\*

It is generally held that testator is not required to be able to keep the whole of his estate, and his duties towards those surviving him in mind at once. It is sufficient if he can re-

<sup>87</sup> *O'Brien v. Spalding*, 102 Ga. 490.

<sup>88</sup> *Smith v. Smith*, 48 N. J. Eq. 566.

<sup>89</sup> *Newcomb v. Newcomb*, 96 Ky. 120.

<sup>90</sup> *Henry v. Hall*, 106 Ala. 84; *Bice v. Hall*, 120 Ill. 597; *Taylor v. Pegram*, 151 Ill. 106; *Whiteman v. Whiteman*, 152 Ind. 263; *McFadin v. Catron*, 138 Mo. 197; 120 Mo. 252; *Sharp's Appeal*, 134 Pa. St.

492; *In re Doughlass's Estate*, 162 Pa. St. 567; *Shreiner v. Shreiner*, 178 Pa. St. 57; *Montague v. Allen*, 78 Va. 592.

<sup>91</sup> *Hall v. Perry*, 87 Me. 569; *Livingstone's Will* (N. J. Eq.) 1897, 37 Atl. 770; *Knauss's Appeal*, 114 Pa. St. 10.

<sup>92</sup> *Roller v. Kling*, 150 Ind. 159.

<sup>93</sup> *Brown v. Mitchell*, 75 Tex. 9.

\* See Secs. 118-121.

call them in detail.<sup>94</sup> Yet he must be able to keep these facts in mind long enough to understand their relation to each other, and to form a rational judgment concerning them.<sup>95</sup> There is some confusion, in judicial decision, as to the effect of the size and complexity of the estate upon the question of testamentary capacity. In Illinois it is laid down that "the capacity to comprehend a few simple details may in one case suffice to enable the party to intelligently dispose of his property by contract or will, while in another case if the estate be large, requiring the remembrance of many facts, and the comprehension of many details, and the disposition to be made is completed, the same mental capacity may be wholly insufficient to the intelligent understanding of the business requisite to the making of a valid will."<sup>97</sup> In Pennsylvania and New York, while the decisions can not in the nature of things be clean-cut on this point, the courts seem to hold that testamentary capacity can not vary according to the size of the estate or the complexity of the will.<sup>97</sup>

#### §99. Classes of those mentally incapacitated.—General discussion.

The test of testamentary capacity already given is clear and simple. Its application to the various forms of departure from the normal type is very difficult, owing to disputes among scientists as to characteristics of such forms of departure, and to the identification of the case in dispute, with any of the recognized forms. While judicial decisions still seem to be occasionally in conflict upon fundamental questions of testamentary capacity, the difference of opinion is, as a rule, due not to any real clash upon rules of law, but to complications over questions of fact, which belong to the domain of psy-

<sup>94</sup> *McMasters v. Blair*, 29 Pa. St. 298; *Daniel v. Daniel*, 39 Pa. St. 191, approved and followed in *Thompson v. Kyner*, 65 Pa. St. 368.

<sup>95</sup> *Roller v. Kling*, 150 Ind. 159; *Hall v. Perry*, 87 Me. 569; *Pitt's Estate*, 85 Wis. 162.

<sup>96</sup> *Trish v. Newell*, 62 Ill. 196,

cited and approved in *Campbell v. Campbell*, 130 Ill. 466; 6 L. R. A. 167.

<sup>97</sup> *Delafeld v. Parish*, 25 N. Y. 9; *In re McCarthy*, 55 Hun (N. Y.), 7; *Reichenbach v. Rudach*, 127 Pa. St. 564.

chology and the science of medicine. The extreme cases of insanity, idiocy, and the like are easy to recognize. In the milder types of mental disorder the line between the presence and the absence of testamentary capacity is a very difficult one to locate. Further, the scientist is troubled in classifying types of mental unsoundness by the fact that many individuals present symptoms of two or more types of unsoundness at the same time. This difficulty is less annoying in the law of wills than it is in a scientific treatise, as in the former the existence or non-existence of testamentary capacity is the only point to be determined.

A just ground of objection to the present state of science upon this topic is that the very terms which are used have, as a rule, no exact or uniform meaning. In this work the meanings are given which are commonly employed in text-books and cases, but with the warning that every scientist speaks a different dialect.

Keeping in mind the modern rule as to what testamentary capacity is, and the elementary propositions that it is a question of law as to what testamentary capacity is, and that it is a question of fact to determine from the evidence whether testamentary capacity exists in the case in dispute, we will proceed in the discussion of the various forms of departure from the normal type and the effect of each form upon the question of testamentary capacity.

### §100. Idiocy.

An idiot is one who is congenitally deficient in intellect—one “who hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any.”<sup>98</sup> In the technical use of the term, “idiot” is restricted to those who lack mind from birth.<sup>99</sup> It is generally laid down as an absolute proposition that an idiot can not make a will.<sup>100</sup> This doubtless is correct. One who possesses testamentary

<sup>98</sup> Black. Com. I, p. 302.

<sup>100</sup> *Browning v. Reame*, 2 Phil.

<sup>99</sup> *Speedling v. Worth County*, 68 69; *Hovey v. Chase*, 52 Me. 304.  
Io. 152.

capacity has a mind of too high a type to be classed as an idiot. There is rarely a serious attempt to uphold a will made by one who is clearly an idiot. The doubtful cases are where wills are made by persons of a low grade of intellect, and the question for adjudication is whether such person has sufficient mind and memory to know and understand the nature and extent of his property, the proper objects of his bounty and the nature of the testamentary act.<sup>101</sup>

The test laid down shows that a high grade of intellect is not required to make a will. It is not even necessary that testator should possess average intellect.<sup>102</sup> The fact that testator was competent to transact the ordinary business of life conclusively establishes his capacity as far as a charge of idiocy or imbecility is concerned.<sup>103</sup> As we have already seen, this would not be conclusive if the evidence disclosed that testator suffered from insane delusions. In this respect the insane delusion is very different from idiocy and imbecility.

### §101. Imbecility.

An imbecile is one who is mentally deficient as a result of disease. He differs from the idiot in not being congenitally deficient,<sup>104</sup> and may have once had full mental capacity. In many cases imbecility is the result of insanity;<sup>105</sup> but whatever its cause, the mental condition of the imbecile is similar to that of the idiot, and the same rules of testamen-

<sup>101</sup>Bannatyne v. Bannatyne, 14 Eng. L. & Eq. 581; Townsend v. Bogart, 5 Redf. (N. Y.) 93.

<sup>102</sup>Hoban v. Campau, 52 Mich. 346; St. Joseph's Convent of Mercy v. Garner, 66 Ark. 623; 53 S. W. 298; Howell v. Taylor, 50 N. J. Eq. 428; Bennett v. Bennett, 50 N. J. Eq. 439.

<sup>103</sup>"One who is competent to . . . contract is competent to dispose of property by will." Hoban v. Campau, 52 Mich. 346 (a case

where idiocy was charged, and not insane delusions). To the same effect are: Bannatyne v. Bannatyne, 14 Eng. L. & Eq. 581; Errickson v. Fields, 30 N. J. Eq. 634.

<sup>104</sup>Speedling v. Worth Co., 68 Io. 152. Bouvier's Law Dict. regards imbecility as either congenital or supervening in infancy, and apparently a grade above idiocy. "Imbecility."

<sup>105</sup>Delafield v. Parish, 25 N. Y. 9.

tary capacity apply.<sup>106</sup> The only practical difficulty is in determining whether a given person is an imbecile or is only of a low intellect, consistent with testamentary capacity.

## §102. Senile dementia.—Old age.

Senile dementia is a form of imbecility due rather to the structural degeneracy caused by old age than to any specific disease.<sup>107</sup> In this practical application the topic of senile dementia is perhaps the most difficult among the many difficult ones of mental capacity; not by reason of any serious doubt as to the law of the subject, but because of the difficult questions of fact presented in such cases.

The courts use the rule already given as the test for testamentary capacity in cases of alleged senile dementia. "Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time that he executed the will." If testator does not possess mental capacity of this degree he can not make a will, even if he wrote it out himself, and has carried on business transactions with apparent ability.<sup>109</sup> Accordingly it is well established that old age alone will not deprive the testator of testamentary capacity.\* Wills of the aged have been sustained

<sup>106</sup> *Smith v. Smith*, 75 Ga. 477; *Primmer v. Primmer*, 75 Io. 415; *Hudson v. Hughan*, 56 Kan. 152; *Ayres v. Ayres*, 43 N. J. Eq. 565; *Rothrock v. Rothrock*, 22 Oreg. 551.

<sup>107</sup> *Bouvier "Dementia,"* 1 Redf. Wills, 94; *Schouler on Wills*, Sec. 131.

<sup>108</sup> *Bever v. Spangler*, 93 Io. 576; *so*, *Greene v. Greene*, 145 Ill. 264; *Galt v. Provan*, 178 Io. 561; 79 N. W. 357; *Hudson v. Hughan*, 56 Kan. 152; *Minor v. Thomas*, 12 B. Mon. (Ky.) 106; *Harvey v. Sullens*, 46 Mo. 147; *Horn v. Pullman*, 72 N. Y. 269; *Mendenhall v. Tunge*, 95 Ky. 208; *Wilson v. Mitch-*

*ell*, 101 Pa. St. 495; *Hoope's Estate*, 174 Pa. St. 373.

<sup>109</sup> *Bever v. Spangler*, 93 Io. 576;

\* *Campbell v. Carnahan*, — Ark. —; 13 S. W. 1098; *O'Connor v. Madison*, 98 Mich. 183; *Norton v. Paxton*, 110 Mo. 456; *Clifton v. Clifton*, 47 N. J. Eq. 227; *Waddington v. Buzby*, 45 N. J. Eq. 173; *Blair's Will*, 16 N. Y. Supp. 874; *Nafle's Estate*, 134 Pa. St. 492; *In re Boyer's Estate*, 166 Pa. St. 630; *In re Lessor's Estate*, 167 Pa. St. 498; *McIntire v. Wright*, 12 Rich. (S. Car.), 232; *Trezevant v. Rains*, 85 Tex. 329; *Sehr v. Lindemann*, Mo. (1899), 54 S. W. 537.



where executed when testator was over a hundred years old,<sup>110</sup> and where testator was over ninety,<sup>111</sup> and cases where testator was over eighty are common.<sup>112</sup>

Complications of growing eccentricity, weakness, slight failure of memory and the like, even when added to extreme old age, do not of themselves destroy testamentary capacity.<sup>113</sup>

The fact that testator's mind was not as strong at the time of making the will as it was before does not prevent him from possessing testamentary capacity. The question is not if his mind was at its best when he made the will, but if it conformed to the legal standard.<sup>114</sup> So the fact that testator's feelings towards his children and other natural objects of his bounty change as he grows older does not establish a lack of testamentary capacity.<sup>115</sup> Nor will the fact that he asks foolish questions and often repeats them after they are answered establish a lack of testamentary capacity.<sup>116</sup>

### §103. Insanity.

Insanity is the prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual

<sup>110</sup> *Wilson v. Mitchell*, 101 Pa. St. 495.

<sup>111</sup> *Maverick v. Reynolds*, 2 Bradf. (N. Y.) 360.

<sup>112</sup> *Manogue v. Herrell*, 13 App. D. C. 455; *Reed's Will*, 2 B. Mon. (Ky.) 79; *Lowe v. Williamson*, 1 Green's Ch. N. J. Eq. 82; *McFadin v. Catron*, 138 Mo. 197; 120 Mo. 252; *In re Eddy*, 32 N. J. Eq. 701; 33 N. J. Eq. 219; *Waddington v. Buzby*, 45 N. J. Eq. 173; *Horn v. Pullman*, 72 N. Y. 269; *In re Snelling's Estate*, 136 N. Y. 515; *Sharp's Appeal*, 134 Pa. St. 492; *Fowe's Estate*, 147 Pa. St. 264; *Boyer's Estate*, 166 Pa. St. 630; *Loeser's Estate*, 167 Pa. St. 498; *Silverthorn's Will*, 68 Wis. 372.

<sup>113</sup> *Wood v. Lane*, 102 Ga. 199; *Holmberg v. Phillips*, Io. 78 N. W.

66; *O'Connor v. Madison*, 98 Mich. 183; *Riley v. Sherwood*, 144 Mo. 354; *Maddox v. Maddox*, 114 Mo. 35; *Merrill v. Rush*, 33 N. J. Eq. 537; *White v. Starr*, 47 N. J. Eq. 244; *In re Cline*, 24 Ore. 175; *Fow's Estate*, 147 Pa. St. 264.

<sup>114</sup> *Taylor v. Kelly*, 31 Ala. 59; *Stancell v. Kenan*, 33 Ga. 56; *Taylor v. Pegram*, 151 Ill. 106; *O'Connor v. Madison*, 98 Mich. 183; *Norton v. Paxton*, 110 Mo. 456; *Von de Veld v. Judy*, 143 Mo. 348; *Westcott v. Sheppard*, 51 N. J. Eq. 315; *Sharp's Appeal*, 134 Pa. St. 492; *Flansburgh's Will*, 82 Hun, 49.

<sup>115</sup> *Riley v. Sherwood*, 144 Mo. 354.

<sup>116</sup> *White v. Starr*, 47 N. J. Eq. 244; *Clifton v. Clifton*, 47 N. J. Eq. 227.

to the individual in health.<sup>117</sup> The term insanity is sometimes used with so broad a meaning as to include all forms of unsoundness of mind, even idiocy. A more limited meaning excludes idiocy and the forms of imbecility, even though they may result from insanity.

From the standpoint of the law which attempts merely to determine the mental capacity of the specific individual, this confusion in definition, though annoying, does not present great difficulty when its existence is once recognized. In its extreme forms insanity so clearly destroys testamentary capacity that there is but little litigation on the subject. In doubtful cases the test of testamentary capacity already given must be applied. If the testator has mind and memory sufficient to comprehend the nature and extent of his estate, the proper objects of his bounty and the nature of the testamentary act, he has in law testamentary capacity; otherwise he has not.<sup>118</sup>

In connection with insanity, however, two points must be discussed further in detail—the insane delusion with the special type of insanity known as monomania, and the lucid interval.

#### §104. Insane delusion.—Definition.

The insane delusion is “a permanent and most usual symptom of insanity;<sup>119</sup> or, as has been said, is not merely a symptom of insanity, but is insanity.<sup>120</sup> While it has been held that the term insane delusion is so clear that no definition is necessary,<sup>121</sup> the majority of the courts prefer to define it, and substantially agree upon the following definition:

“An insane delusion is a diseased condition of the mind in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imagina-

<sup>117</sup> Bouvier's Law Dictionary, “Insanity”; *Lundway v. Croft*, 3 Curt. 678.

<sup>118</sup> *Potts v. House*, 6 Ga. 324; *In re Fenton's Will*, 97 Io. 192; *In re Hoopes' Estate*, 174 Pa. St. 373.

<sup>119</sup> *Mill's Appeal*, 44 Conn. 484.

<sup>120</sup> *Waring v. Waring*, 6 Moore P. C. 341; 12 Jur. 947.

<sup>121</sup> *Farmer v. Farmer*, 129 Mo. 530.

tions, with a persuasion so firm and fixed that neither evidence nor argument can convince them to the contrary."<sup>122</sup>

Another definition involving the same essential idea is:

"A person persistently believing supposed facts, which have no real existence, against all evidence and probability, and conducting himself upon an assumption of their existence, is, so far as such facts are concerned, under an insane delusion."<sup>123</sup>

An insane delusion is often defined as "a false belief for which there is no reasonable foundation, which would be incredible, under the given circumstances, to the same person if of sound mind, and concerning which the mind of the testator was not open to permanent correction through evidence or argument";<sup>124</sup> or as a belief "purely a creature of the imagination such as no sane man could believe."<sup>125</sup> Some courts have defined an insane delusion as a belief in facts that no rational person would believe.<sup>126</sup>

Definitions of this character, though approved by eminent authority, are of but little practical value. They assume that everyone knows what a sane man could or could not believe, and thus leave the distinction between sanity and insanity an open question.

It has been further held that to constitute an insane delusion the belief must have been genuine and of a permanent type.<sup>127</sup>

<sup>122</sup> Bouvier's Law Dictionary, Title, "Delusion." *Dew v. Clark*, 3 Add. Eccl. 79; *Boardman v. Woodman*, 47 N. H. 120; *Middleditch v. Williams*, 45 N. J. Eq. 726; *In re White's Will*, 121 N. Y. 406; *Potter v. Jones*, 20 Oreg. 239; *Robinson v. Adams*, 62 Me. 401.

<sup>123</sup> *Haines v. Hayden*, 95 Mich. 332.

<sup>124</sup> *Kimberly's Appeal*, 68 Conn. 428.

<sup>125</sup> *Redfield on Wills*, 67; *Taylor v. Trich*, 165 Pa. St. 586; *Hemingway's Estate*, 195 Pa. St. 291.

<sup>126</sup> *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Nicewander v. Nicewander*, 151 Ill. 156; *Orchardson v. Cofield*, 171 Ill. 14.

<sup>127</sup> *Redfield's Estate*, 116 Cal. 637.

### §105. Analysis of insane delusion.—Mistake of fact.

The insane delusion is characterized by peculiarities so marked yet so difficult to define that it has been said by able authority that it is better to determine the nature of the delusion from the sanity or insanity of the person entertaining it than to determine his mental condition from the nature of his delusion.<sup>128</sup> The weight of authority, however, is that the presence or absence of sanity is to be determined from the nature of the delusion. In their attempts to determine what delusions are sane and what are insane the courts have agreed upon certain fundamental principles and upon the application of these principles in many ways. The divergence of authority as usual is in the reasoning in the opinions in the nature of dicta.

The insane delusion is much more than a mere delusion of fact. Many a sane man suffers from mistakes and delusions. The fact that the testator, at the time that he made his will, was mistaken in a matter of fact, does not of itself even tend to show that he was then suffering from an insane delusion.<sup>129</sup> It is therefore proper for the court to refuse to consider a delusion as a ground of attack upon the validity of a will; and instead to limit the consideration of the jury to the insane delusion.<sup>130</sup> Accordingly where a man upon slight evidence is convinced that his wife is unchaste and that his own children are not his, and on such belief disinherits them, such belief may be a delusion, but is not an insane delusion, and the will is proof against attack on this ground;<sup>131</sup> and the fact that a testator,

<sup>128</sup> *Smith v. Tebbitt* L. R. 1 P. & D. 401.

<sup>129</sup> *Hall v. Hall*, 38 Ala. 131; *In re Ruffino's Estate*, 116 Cal. 304; *Carpenter v. Bailey*, 94 Cal. 406; *Kimberly's Appeal*, 68 Conn. 428; *Maynard v. Tyler*, 168 Mass. 107; *Middlewiche v. Williams*, 45 N. J. Eq. 726; *Smith v. Smith*, 48 N. J. Eq. 566; *White's Will*, 121 N. Y. 406; *In re Cline*, 24 Oreg. 175;

*Titus v. Gage*, 70 Vt. 13; *Martin v. Thayer*, 37 W. Va. 38.

<sup>130</sup> *Maynard v. Tyler*, 168 Mass. 107, citing *Brown v. Ward*, 53 Md. 376.

<sup>131</sup> *Smith v. Smith*, 48 N. J. Eq. 566; *Clapp v. Fullerton*, 34 N. Y. 190. So when testator believes that the son is not only the product of adulterous intercourse, but is a drunkard. *Kidney's Will*, 33 N. B. 9.

in anger at his wife and son, and by way of retaliation for their attacks upon his moral character, called his son a bastard, without any evidence to suggest such a charge, was held not to show an insane delusion upon the subject.<sup>132</sup> But it has been held that "if the testator, utterly without cause or reason and without expressing distrust of the fidelity of his wife, doubted the paternity of his son, and from that cause alone disinherited him when he was one of the natural objects of his bounty, and if he was in such condition of mind that he did not know the actual objects of his bounty, and such condition caused him to make a will that he otherwise would not have made, then he was not of sound and disposing mind and memory."<sup>133</sup>

Another form of delusion not uncommon exists where the testator wrongly believes that those who would naturally be the objects of his bounty are hostile to him. If this belief is not based on evidence and is not removable by evidence it amounts to an insane delusion;<sup>134</sup> while if founded upon evidence, though slight and inconclusive, it is not an insane delusion.<sup>135</sup>

The insane delusion must consist at least of a mistake of fact. Without such mistake there may be insanity, imbecility and the like, but there can be no insane delusion. The word "fact," as here used, has a very broad meaning. It includes

<sup>132</sup> *Dobie v. Armstrong*, 160 N. Y. 584. The same principle applies where the evidence shows that the wife accused the husband of committing adultery and of trying to poison her, but does not show that she believed that the charges were true. If made in anger as a means of annoying her husband, they did not show an insane delusion. *Scott's Estate* (Cal.) (1900), 60 Pac. 527.

<sup>133</sup> *Petefish v. Becker*, 176 Ill. 448. For another instance of insane delusion as to legitimacy, see *Haines v. Hayden*, 95 Mich. 332.

<sup>134</sup> *Burkhardt v. Gladdish*, 123 Ind. 337; *Sherley v. Sherley*, 81

Ky. 240; *Woodbury v. Obear*, 7 Gray (Mass.) 467; *American Seaman's Friend Society v. Hopper*, 33 N. Y. 619; *Ballantine v. Proudfoot*, 62 Wis. 216.

<sup>135</sup> *Mosser v. Mosser*, 32 Ala. 551; *Carpenter v. Bailey*, 94 Cal. 406; *In re Ruffino's Estate*, 116 Cal. 304; *Appeal of Kimberly*, 68 Conn. 428; *Hite v. Sims*, 94 Ind. 333; *Shorb v. Brubaker*, 94 Ind. 165; *Maynard v. Tyler*, 168 Mass. 107; *Salter v. Ely*, 56 N. J. Eq. 357; *Coit v. Patchen*, 77 N. Y. 533; *White's Will*, 121 N. Y. 406; *Martin v. Thayer*, 37 W. Va. 38.

not merely actual occurrences but conditions, natural laws, moral duties and the like.<sup>136</sup> Thus, as we have already seen, an arbitrary belief that a certain child was not his own may amount to an insane delusion,<sup>137</sup> and a belief that testator's body was to be preserved forever was held an insane delusion.<sup>138</sup> A belief that no woman should be virtuous was held to be an insane delusion where it caused testator to disinherit his daughter,<sup>139</sup> and an arbitrary dislike for, or repulsion toward, testator's children or near relatives may be so extreme as to amount to an insane delusion.<sup>140</sup>

**§106. Analysis of insane delusion.—Mistake not based upon evidence.**

In order to be an insane delusion the mistake must be one which is not based upon evidence;<sup>141</sup> or at least without any evidence from which a sane man could draw the conclusion which forms the delusion.<sup>142</sup> This excludes mistakes based upon insufficient or inadequate evidence; or evidence from which most persons would draw conclusions very different from those drawn by the one who entertains the delusion; for mistakes of this sort are often made by persons who are perfectly sane.<sup>143</sup> This last qualification, as said before, really begs the whole question, for it presupposes a knowledge of what a sane man is and what he believes. Thus dislike of testator's children because they had appeared against testator in a suit for divorce

<sup>136</sup> *Morse v. Scott*, 4 Dem. (N. Y.) 507; *Joslyn v. Sedam*, 2 Cinn. L. B. (Ohio), 147.

<sup>137</sup> *Petefish v. Becker*, 176 Ill. 448.

<sup>138</sup> *Morse v. Scott*, 4 Dem. (N. Y.) 514.

<sup>139</sup> *Joslyn v. Sedam*, 2 Cinn. L. B. (Ohio) 147.

<sup>140</sup> *Baker v. Lewis*, 4 Rawle (Pa.) 359.

<sup>141</sup> *Dew v. Clerk*, 3 Add. 79; *Banks v. Goodfellow*, L. R. 5 Q. B.

549; 22 L. T. 813; *Medill v. Snyder*, Kan. 58 Pac. 902; *Smith v. Smith*, 48 N. J. Eq. 566; *Potter v. Jones*, 20 Oreg. 239.

<sup>142</sup> *Petefish v. Becker*, 176 Ill. 448, and cases cited in note before the last.

<sup>143</sup> *Hall v. Hall*, 38 Ala. 131; *Middlewich v. Williams*, 45 N. J. Eq. 726; *White's Will*, 121 N. Y. 406; *In re Cline*, 24 Oreg. 175; *Potter v. Jones*, 20 Ore. 239; 12 L. R. A. 161.

which testator's wife brought against him and because they sympathized with her, while possibly unreasonable, does not constitute an insane delusion.<sup>144</sup>

**§107. Analysis of insane delusion.—Mistake not removable by evidence.**

A further test of the insane delusion is that it can not be removed, or at least permanently removed, by evidence.<sup>145</sup> This follows naturally from the fact that it is not founded upon evidence; but though a mere corollary, it is in practice a very valuable test—possibly the most valuable of those as yet suggested by the courts. A mistake made by a sane person is always susceptible of correction. When evidence clearly demonstrates that a mistake exists, that of itself corrects such mistake in the mind of the person who was deluded. Further, many mistakes made by a person who is actually insane may be corrected in this way. But the insane delusion can not be thus corrected. No amount of evidence is capable of correcting the mistake in the mind of the person suffering from the delusion—permanently at least.<sup>146</sup>

**§108. Effect of insane delusion on testamentary capacity.**

When an insane delusion is proved to exist, it follows from the definition already given that the person suffering from it is insane, for the insane delusion is a symptom of insanity if not insanity itself. But insanity does not always mean a lack of testamentary capacity. The law, as we have seen, does not require perfect sanity. Further inquiry, therefore, must be made to determine whether the person suffering from the insane delusion possesses testamentary capacity or not.

Of course, the nature of the insane delusion, together with the remaining evidence, may clearly establish the fact that

<sup>144</sup> *In re Cline*, 24 Ore. 175.

<sup>145</sup> Bouvier's Law Dict., "Delusion." *Dew v. Clark*, 3 Add. 79; *Medill v. Snyder*, Kan. 58 Pac. 962; *Robinson v. Adams*, 62 Me. 369;

*Gass v. Gass*, 1 Heiskell, 613; *Denson v. Beazley*, 34 Tex. 191.

<sup>146</sup> See Sec. 105 and cases there cited.

such person does not conform to the standard of testamentary capacity already set forth, and, consequently, can not make a will. As this case has already been discussed under the topic of Insanity it will be omitted here.<sup>147</sup>

The class of cases to be discussed are those in which the insane delusion is the only symptom of insanity, and is confined to a clearly marked set of subjects.

This type of insanity is often called monomania, or partial insanity. Monomania is defined as 'insanity upon a particular subject only, and with a single delusion of the mind.'<sup>148</sup> This definition, and the terms 'monomania' and 'partial insanity' are all open to the objection that they imply the theory of the mind referred to as the compartment theory; namely, that a person may be insane upon one subject and perfectly sane upon another.

This theory is now generally rejected by psychology, and monomania is explained as a type of insanity which is manifest only upon certain subjects, though it undoubtedly affects the whole mind. In actual practice, from the standpoint of the law, the modern theory of the mind does not, in specific cases, give a different rule for testamentary capacity from the abandoned compartment theory.

In case of a person whose capacity is rendered doubtful by the existence of an insane delusion, the rule is that, if the delusion was not such as to affect his knowledge, memory and understanding of the extent and nature of his estate, the proper objects of his bounty and the nature of the testamentary act, he has capacity in law to make a will.<sup>149</sup> Thus, an insane

<sup>147</sup> See Secs. 94, 96 and 97.

<sup>148</sup> Bouvier's Law Dictionary, "Monomania."

<sup>149</sup> *In re* Redfield's Estate, 116 Cal. 637; *Dunham's Appeal*, 27 Conn. 192; *Wetter v. Habersham*, 60 Ga. 193; *Blough v. Parry*, 144 Ind. 463; *Young v. Miller*, 145 Ind. 652; *Rice v. Rice*, 50 Mich. 448; *Peninsular Trust Co. v. Barker*, 116 Mich. 333, 74 W. W. 508; *Board-*

*man v. Woodman*, 47 N. H. 120; *Maynard v. Tyler*, 168 Mass. 107; *Lee v. Scudder*, 31 N. J. Eq. 633; *Potter v. Jones*, 20 Ore. 239; 12 L. R. A. 161; *Pidcock v. Potter*, 68 Pa. St. 342; *In re Trich's Will*, 165 Pa. St. 586; *Shreiner's Appeal*, 178 Pa. St. 57; *Hemingway's Estate*, 195 Pa. St. 291; *Blakley's Will*, 48 Wis. 294.



delusion as to visions of a religious nature vouchsafed a testator does not of itself destroy testamentary capacity.<sup>150</sup>

Nor does a belief of testatrix that her sons had defrauded her in settling their father's estate affect the validity of the will, where it is shown that she had endeavored after the quarrel thus arising to induce her sons to become reconciled to her; and that she discriminated against them in her will because they would have nothing to do with her.<sup>151</sup>

If, however, the insane delusion does affect the memory and understanding of the person who suffers therefrom as to the nature and extent of his estate, the proper objects of his bounty and the nature of the testamentary act, such person has not capacity in law to make a will.<sup>152</sup> Thus, an insane delusion that the beneficiary under the will was Christ is sufficient to avoid the will;<sup>153</sup> or an insane delusion that testator's daughter was a member of a house of ill fame;<sup>154</sup> or that testator's children were not his own.<sup>155</sup>

### §109. Lucid interval.

The second point to consider in dealing with insanity is the so-called lucid interval. The old idea of the lucid interval was that it was a temporary restoration to perfect sanity—"an interval in which the mind, having thrown off the disease, had recovered its general habit."<sup>156</sup> In such an interval a person ordinarily insane might make a will.

There are two serious objections to this definition.

<sup>150</sup> *Williams v. Williams*, Ky. 23 S. W. 789, no off. rep.

<sup>151</sup> *Hemingway's Estate*, 195 Pa. St. 291.

<sup>152</sup> *Gwin v. Gwin* (Idaho), 48 Pac. 295; *Orchardson v. Cofield*, 171 Ill. 14; *Whitney v. Twombly*, 136 Mass. 145; *Haines v. Hayden*, 95 Mich. 332; *Rivard v. Rivard*, 109 Mich. 98; *Tawney v. Long*, 76 Pa. 106; *Thomas v. Carter*, 170 Pa. St. 272; *Segur's Will* (Vt.), 44 Atl. 342.

<sup>153</sup> *Orchardson v. Cofield*, 171 Ill. 14.

<sup>154</sup> *Rivard v. Rivard*, 109 Mich. 98.

<sup>155</sup> *Petefish v. Becker*, 176 Ill. 448; *Haines v. Hayden*, 95 Mich. 332.

<sup>156</sup> *Attorney-General v. Parnter*, 3 Brown Ch. 441, Lord Thurlow's opinion.

First. It requires too high a standard of testamentary capacity. Perfect sanity is not requisite ordinarily to constitute testamentary capacity, and there is no reason why it should be requisite in the case of one who has previously been more seriously deranged than he is when he makes his will.

Second. At present science inclines to say that a lucid interval as above described either never exists or is extremely rare.

The modern definition of the lucid interval is "a period in which an insane person is so far free from his disease that the ordinary legal consequences of insanity do not apply to acts done therein."<sup>157</sup>

This definition requires a less complete restoration of sanity than the old definition; does not set up a standard of capacity in excess of that imposed upon other testators, and indicates a mental condition which, according to the teachings of science, exists quite frequently.

The law admits the possibility of a lucid interval of this nature;<sup>158</sup> therefore a change which ignores the contingency that testator may recover from an insane delusion is properly refused.<sup>159</sup>

Whether the particular will in question was made during a lucid interval is a question of fact to be determined from the evidence adduced. The rule as to testamentary capacity in cases of lucid intervals is the same as that in other cases of doubtful mental capacity. If, at the time of executing the will, the testator had sufficient mind and memory to know the nature and extent of his property, the proper objects of his bounty and the nature of the testamentary act, he possesses legal capacity to make a will;<sup>160</sup> while if testator has not such disposing mind and memory he can not make a valid will, even

<sup>157</sup> Bouvier's Law Dictionary, "Insanity," Lucas v. Parsons, 27 Ga. 593.

<sup>158</sup> Potts v. House, 6 Ga. 324; Manley's Executor v. Staples, 65 Vt. 370.

<sup>159</sup> Manley's Executors v. Staples, 65 Vt. 370.

<sup>160</sup> Weir's Will, 9 Dana (Ky.) 434; Chandler v. Barrett, 21 La. Ann. 58; Goble v. Grant, 3 N. J. Eq. 629; Davis's Will, 91 Hun, 209; Wright, v. Lewis, 5 Rich. (S. Car.) 212; Manley's Executors v. Staples, 65 Vt. 370.

if the violent symptoms of insanity have entirely disappeared.<sup>161</sup>

A text-book on law does not furnish room for a discussion of scientific theories of the lucid interval and of the distinctions between the true lucid interval and mere abatement of the more violent symptoms of insanity. For this, reference is made to the scientific treatises upon this subject.

### §110. Eccentricity.

To distinguish eccentricity from forms of insanity is very easy in theory but not in practice. Eccentricity is deviation from the methods of conduct and behavior usual to the great mass of mankind similarly situated.<sup>162</sup>

Every person has slight peculiarities of his own, which never cause any suspicion of his testamentary capacity. It is only when they become pronounced by contrast with those about him that they become known as eccentricities, and are invoked to discredit his testamentary capacity. If the eccentricity is not due to any form of mental disorder, but to vanity, selfishness and the like, testator may make a will.<sup>163</sup> Nor do the facts that testator was filthy, miserly and penurious to an extreme degree establish a lack of testamentary capacity.<sup>164</sup>

The rule of law on this subject is that eccentricity has of itself no effect upon testamentary capacity. The wills of persons eccentric to the verge of insanity have accordingly been sustained.<sup>165</sup> So, where mere eccentricity existed of an extreme type, manifesting itself in the conduct of testator in blasphemy, filthiness, belief in witchcraft, and such other peculiarities as having the dogs eat at the same table with him,

<sup>161</sup> *White v. Wilson*, 13 Ves. 88.

<sup>162</sup> *Austen v. Graham*, 8 Moore, P. C. 493; *Farnum v. Boyd*, 56 N. J. Eq. 766.

<sup>163</sup> *Farnum v. Boyd*, 56 N. J. Eq. 766.

<sup>164</sup> *Tallman's Will*, 148 Pa. St. 286.

<sup>165</sup> *Ouachita Baptist College*, v. Scott, 64 Ark. 349; *Hutchinson v.*

*Hutchinson*, 152 Ill. 347; *Bennett v. Hibbert*, 88 Io. 154; *Prentiss v. Bates*, 88 Mich. 567; *Fulbright v. Perry Co.*, 145 Mo. 432; *Farnum v. Boyd*, 56 N. J. Eq. 766; *In re Knight's Estate*, 167 Pa. St. 453; *Lee v. Lee*, 4 McCord (S. Car.) 183; *Mercer v. Kelso*, 4 Gratt. (Va.)

106.

it was held that all this was compatible with testamentary capacity.<sup>166</sup>

To be carefully distinguished from these cases are those of insanity, where some of the symptoms are those of eccentric and peculiar behavior.<sup>167</sup>

### §111. Spiritualism.

In many recent cases the validity of wills has been attacked on the ground that the testators have held the belief known as Spiritualism—that departed spirits hold communication with the living through various physical means. It is difficult to state any consistent reason why in law such belief should affect testamentary capacity. It is, of course, perfectly possible that a believer in Spiritualism may be insane; but, under the rules already given such belief is not, of itself, insanity. The belief is not the result of insane delusions, but is based upon extrinsic evidence; and, though such evidence might not convince the general run of people, it is sufficient foundation for distinguishing a belief based thereon from an insane delusion. Accordingly the courts have held, when such cases have been presented for adjudication, that belief in Spiritualism does not of itself constitute insanity.<sup>168</sup>

Whether in a given case the advice of the medium, together with the belief in the advice of spirits as to a given disposition of property, may not amount to undue influence is, of course,

<sup>166</sup> *Bennett v. Hibbert*, 88 Io. 154.

<sup>167</sup> See Secs. 103, 105 and 106.

<sup>168</sup> *In re Spencer's Estate*, 96 Cal. 448; *Whipple v. Eddy*, 161 Ill. 114; *Adams*, 62 Me. 369; *Brown v. Ward*, *Otto v. Doty*, 61 Io. 23; *Robinson v. 53 Md.* 376; *Turner v. Rusk*, 53 Md. 65; *McClary v. Stull*, 44 Neb. 175; *Middleditch v. Williams*, 45 N. J. Eq. 726; *In re Rohe's Will*, 50 N. Y. S. 392; *General Convention v. Crocker*, 7 Ohio C. C. 327; *Smith's Will*, 52 Wis. 543; *Chafin's Will*, 32

*Wis.* 557. "Belief in spiritualism is not proof of insanity, but if through that belief one is led into the delusion that another is a god—a christ—or gifted with powers and faculties belonging only to supernatural persons, the believer of the delusion is insane on that subject, and if he is prompted to make a will by that delusion his will can not be sustained." *Orchardson v. Cofield*, 171 Ill. 14.

another question to be discussed under "Undue Influence."<sup>169</sup>

It has been held also that a belief in witchcraft does not render one incapable of making a will.<sup>170</sup>

In a recent Pennsylvania case the testator believed in cure by faith, and thought that he ought to reject his family if they were wanting in faith. It was held proper for the trial court to submit to the jury the question of whether this was an insane delusion and affected his will, adding that otherwise they must hold the will valid, "however absurd, ridiculous or unfounded you may individually or collectively believe his peculiar views on faith and its effects to have been."<sup>171</sup>

### §112. Drunkenness and the use of drugs.

The principles of testamentary capacity already explained apply in cases where the testator is affected by the use of alcohol or drugs. In such case a person may have the capacity which the law requires for making a will, if, in spite of the effect of alcohol or drugs, such person has sufficient mind and memory to understand the nature and extent of his property, the proper objects of his bounty and the nature of the testamentary act.<sup>172</sup> But if his mind is so affected by alcohol or drugs that it lacks these requisites, he has not such capacity.<sup>173</sup>

As in other cases, the question to be determined is solely that of the capacity of the testator at the time of making his will. The fact that he was habitually intoxicated or under the influ-

<sup>169</sup> *Lyon v. Home*, L. R. 6 Eq. 655; *Thompson v. Hawks*, 14 Fed. 902; *Kimberly's Appeal*, 68 Conn. 428; 37 L. R. A. 261; *Orchardson v. Co-field*, 171 Ill. 14; *Robinson v. Adams*, 62 Me. 369; *Baylies v. Spaulding* (Mass.), 1 New Eng. 914.

<sup>170</sup> *Addington v. Wilson*, 5 Ind. 137; *Schuldnecht v. Rompf*, Ky.; *Kelly v. Miller*, 39 Miss. 17; *Fulbright v. Perry Co.*, 145 Mo. 432; *Van Guysling v. Van Kuren*, 35 N. Y. 70.

<sup>171</sup> *Taylor v. Trich*, 165 Pa. St. 586.

<sup>172</sup> *Slinghoff v. Bruner*, 174 Ill. 561; *Fluck v. Rea*, 51 N. J. Eq. 639; 51 N. J. Eq. 233; *Dieffenbach v. Greece*, 56 N. J. Eq. 365; *Bannister v. Jackson*, 46 N. J. Eq. 593; 45 N. J. Eq. 702; *Miller v. Oestrich*, 157 Pa. St. 264; *Levis's Estate*, 140 Pa. St. 179; *Key v. Hollaway*, 7 Baxt. (Tenn.) 575.

<sup>173</sup> *Ball v. Kane*, 1 Penne. (Del.) 90; 39 Atl. 778; *Peck v. Cary*, 27 N. Y. 9; *Reichenbach v. Rudach*, 127 Pa. St. 564; *Miller's Estate*, 179 Pa. St. 645.

ence of drugs does not render his will invalid, if he had the requisite understanding at the time that he made it.<sup>174</sup> Thus, a chronic morphine eater may make a will if not under the influence of the drug at the execution of the will.<sup>175</sup> Even where he is under the influence of brandy to a slight extent at the very time that he makes his will he may have testamentary capacity.<sup>176</sup>

The same rule as to testamentary capacity applies where the ravages of disease combine with the effects of alcohol or drugs. A man may be a physical wreck,<sup>177</sup> or may suffer from locomotor ataxia, combined with years of heavy drinking, and still have testamentary capacity.<sup>178</sup>

### §113. Delirium.

Delirium is a form of mental aberration incident to diseases usually febrile in nature.<sup>179</sup>

In the law of wills delirium is treated as a form of temporary insanity, and is subject to the same tests. If the effect of the delirium is to deprive testator of the ability to understand the nature and extent of his property, the proper objects of his bounty and the nature of the act which he is about to perform, he can not make a valid will.<sup>180</sup> In the law of wills the difference between delirium and insanity of the ordinary type is as to the presumption of continuance. Delirium is not presumed to continue; ordinary insanity is.<sup>181</sup>

<sup>174</sup> *Wilson's Estate*, 117 Cal. 262; *Johnston's Estate*, 57 Cal. 529; *Lang's Estate*, 65 Cal. 19; *Ball v. Kane*, 1 Penne. (Del.) 90; 39 Atl. 778; *Camp v. Shaw*, 52 Ill. App. 241; *Pierce v. Pierce*, 38 Mich. 412; *Hennessy v. Woulfe*, 49 La. Ann. 1376; *Fluck v. Rea*, 51 N. J. Eq. 233; *Bannister v. Jackson*, 45 N. J. Eq. 702; *Black v. Ellis*, 3 Hill (S. Car.) 68; *In re Gorkow's Estate*, 20 Wash. 563.

<sup>175</sup> *Bush v. Lisle*, 89 Ky. 393.

<sup>176</sup> *Bevelot v. Lestrade*, 153 Ill. 625.

<sup>177</sup> *Gorkow's Estate*, 20 Wash. 563; 56 Pac. 385.

<sup>178</sup> *In re Miller's Estate*, 179 Pa. St. 645.

<sup>179</sup> *Bouvier's Law Dict.*, "Delirium, febrile." *Owing's Case*, 1 Bland (Md.) 370.

<sup>180</sup> *Staples v. Wellington*, 58 Me. 453; *Hix v. Whittemore*, 4 Met. (Mass.) 545; *Clark v. Ellis*, 9 Oreg. 128.

<sup>181</sup> See Chap. XIX, Evidence of Incapacity, Sec. 384.

It is, moreover, a matter of fact recognized by courts of law that the lucid interval is far more common in delirium than in insanity; in fact, in delirium the lucid interval is the normal condition, which returns as soon as the severity of the disease abates.<sup>182</sup>

#### §114. Delirium tremens.

Delirium tremens is "a form of mental disorder incident to habits of intemperate drinking."<sup>183</sup> This form of delirium is also treated in the law of wills as a form of temporary insanity, and is subject to the tests already given.<sup>184</sup>

#### §115. Persons under guardianship.

Questions are occasionally raised as to the validity of wills made by persons under guardianship. Such persons may, and often do, lack the mental capacity to make a valid will; and, of course, if such ability is lacking, the adjudication of idiocy, insanity or the like, and the appointment of a guardian will not add to the capacity of the person in question. The question here considered is quite different. It is this: Can a person who has been adjudicated insane or idiotic or the like, and placed under guardianship or in an asylum, make a valid will if it can be shown that at the date of making such will he possessed the requisite mental capacity; or does the existence of the guardianship conclusively establish his incapacity to make a will until such guardianship is determined by a decree of court?

The courts have answered this question by holding that a person under guardianship may make a valid will if he has the testamentary capacity which is required by law in other

<sup>182</sup> Brogden v. Brown, 2 Add. 336; Brown v. Riffin, 94 Ill. 560; Staples v. Wellington, 58 Me. 453.

<sup>183</sup> Bouvier's Law Dict. "Delirium Tremens."

<sup>184</sup> Peck v. Cary, 27 N. Y. 9; Edge v. Edge, 38 N. J. Eq. 211. See Sec. 112.

cases.<sup>185</sup> The effect of the decree establishing the guardianships belongs under the subject of evidence, and will be discussed there.<sup>186</sup>

### §116. Disease, great weakness, and approaching death.

In cases where the testator is very weak from disease or accident, or where he is even at the point of death, the rules already given apply. Neither weakness nor approaching death of themselves render the testator incompetent to make a will. If, in spite of his weakness of body, he has sufficient mental capacity to be able to know and understand the nature and extent of his property, the natural, proper objects of his bounty and the nature of the act which he is about to perform, he has sufficient capacity to make a valid will.<sup>187</sup>

So where his physical ailments cause drowsiness and stupor he may still possess understanding sufficient to make his will.<sup>188</sup> But if he is so weak in body that his mind is not capable of grasping these necessary facts, he can not make a valid will.<sup>189</sup> Thus it is perfectly possible for one who does not suffer from any mental disease of any kind to be deprived by physical weakness of the power to make a will.<sup>190</sup>

<sup>185</sup> *Roe v. Nix*, 62 L. J. P. 36; [1893] P. 55; 1 R. 472; 68 L. T. 26. *In re Johnston's Estate*, 57 Cal. 529; *Lucas v. Parsons*, 27 Ga. 593; *Harrison v. Bishop*, 131 Ind. 161; *Stevens v. Stevens*, 127 Ind. 560; *In re Fenton's Will*, 97 Io. 192; *Linkmeyer v. Bandt*, 107 Io. 750; *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. (Mass.), 115; *Leonard v. Leonard*, 14 Pick. (Mass.), 280; *Rice v. Rice*, 50 Mich. 448; *Brady v. McBride*, 39 N. J. Eq. 495; *Wadsworth v. Sharpsteene*, 8 N. Y. 388; *Hoopes' Estate*, 174 Pa. St. 373; (obiter) *Hamilton v. Hamilton*, 10 R. Q. 538; *Robinson v. Robinson*, 39 Vt. 267; *Slinger's Will*, 72 Wis. 22.

<sup>186</sup> See Sec. 402.

<sup>187</sup> *Ball v. Kane*, 1 Penne. (Del.)

90; *Hall v. Hall*, 18 Ga. 40; *Bevelot v. Lestrade*, 153 Ill. 625; *Hathorn v. King*, 8 Mass. 371; *Ayres v. Ayres*, 43 N. J. Eq. 565; *O'Brien v. Dwyer*, 45 N. J. Eq. 689; *James v. Sutton*, 36 Neb. 393; *Bain v. Cline*, 24 Oreg. 175; *Gorkow's Estate*, 20 Wash. 563.

<sup>188</sup> *McLaughlin v. McLellan*, 26 Can. S. C. 646.

<sup>189</sup> *Copeland v. Copeland*, 32 Ala. 512; *Gurley v. Park*, 135 Ind. 440; *Manatt v. Scott*, 106 Io. 203; *Johnson v. Cochrane* (N. Y.) (1899) 54 N. E. 1092; *Tucker v. Sandage*, 85 Va. 546; *Walters v. Walters*, 89 Va. 849.

<sup>190</sup> *Baptist v. Baptist*, 23 Can. Sup. 37; *Manatt v. Scott*, 106 Io. 263; *Mitchell v. Corpening*, 124 N. Car. 472; *Chapell v. Trent*, 90 Va. 849.



Where the disease assumes the form of some lesion of the nervous system—such, for example, as is popularly classed as paralysis—the effect upon the mind is likely to be more marked than in case of diseases affecting other parts of the body. Still, neither paralysis nor any kindred disease of itself disqualifies a testator to make a will,<sup>191</sup> but paralysis may progress so as to destroy testamentary capacity, especially when complicated with old age.<sup>192</sup>

### §117. The deaf, dumb and blind.

At the common law such persons as were born deaf, dumb and blind were classed as *non compotes*; for, “as they have always wanted the common inlets of understanding,” they “are incapable of having *animus testandi*, and their testaments are therefore void.”<sup>193</sup> Also those who were born deaf and dumb were always regarded, at the old common law, as lacking capacity to make a valid will.<sup>194</sup>

This theory is notoriously untrue. Many persons who are born deaf and dumb are capable of great intellectual exertion, and are as competent in reality to make wills as their more fortunate brethren. Those who are born deaf, dumb and blind have far greater difficulty in communicating with the outside world, as touch is practically the only sense available to them; yet the cases of Laura Bridgman, in the early part of the nineteenth century, and Helen Kellar, in the latter part, have proved beyond doubt that those who are deaf, dumb and blind from birth may possess vigorous and powerful minds.

Accordingly, the courts have gradually modified the old common law rule. The first step was to treat the rule that deaf and dumb persons could not make a will as a rule of *prima facie* presumption only, subject to be rebutted by evidence of capacity.<sup>195</sup> The modern rule is that a deaf and dumb person has,

<sup>191</sup> Rothrock v. Rothrock, 22 Ore. 551; 30 Pac. 453.

<sup>192</sup> Mendenhall v. Tungate, 95 Ky. 208; Rothrock v. Rothrock, 22 Ore. 551; 30 Pac. 453.

<sup>193</sup> Black. Com. 2, p. 497.

<sup>194</sup> Coke on Littleton, 42b; Yong v. Sant, 1 Dyer, 55b.

<sup>195</sup> Potts v. House, 6 Ga. 324; Perrine's Case, 41 N. J. Eq. 409.

as a matter of law, as much mental capacity to make a will as any other person, and that there is no presumption of his incapacity, whether he were born deaf and dumb or subsequently became so.<sup>196</sup> And those who are born deaf, dumb and blind are not on that account to be considered at modern law as lacking testamentary capacity.<sup>197</sup>

Those who were not born deaf and dumb, but became so by accident subsequent to birth, were not regarded by the old common law as incapacitated to make a will.<sup>198</sup> There has never been any serious question that one who is blind is, as far as such disability is concerned, perfectly competent to make a will.<sup>199</sup> Similarly a testator who is deaf and blind may make a will, whether his infirmities arise from disease, congenital defects or old age.<sup>200</sup>

There is, of course, in the case of the deaf and dumb, and of the blind, a chance for imposition and deceit in making wills. This, however, belongs under the topics of "Execution," "Fraud," "Mistake" and "Undue Influence," rather than under the topic of "Mental Capacity."

<sup>196</sup> Goods of Geale, 3 S. & T. 430; 33 L. J. P. 125; 12 W. R. 1027; Potts v House, 6 Ga. 324. But if the evidence fails to show that the deaf and dumb person could communicate his wishes by intelligible signs, the court will not admit his will to probate. Goods of Owston, 2 Sw. & Tr. 461; 31 L. J. P. 177; 6 L. T. 368; 10 W. R. 410.

<sup>197</sup> Weir v. Fitzgerald, 2 Bradf. (N. Y.) 42 (67).

<sup>198</sup> Yong v. Sant, 1 Dyer 56a, note. In this case it was said that if by accident one born with all his senses were to become deaf, dumb and blind he must henceforth be treated as *non compos mentis*.

<sup>199</sup> Edwards v. Fincham, 4 Moore P. C. 198; Mitchell v. Thomas, 6 Moore P. C. 137; King v. Berry, Ir. Rep. 5 Eq. 309; Clifton v. Mur-

ray, 7 Ga. 564; Martin v. Mitchell, 28 Ga. 382; Reynolds v. Reynolds, 1 Spears (S. Car.) 253; Ray v. Hill, 3 Strob. (S. Car.) 297; Neil v. Neil, 1 Leigh (Va.) 6. Though if the evidence makes it appear that a blind man signed the will without understanding, its contents it should be refused probate. Dufar v. Croft, 3 Moore P. C. 136. (In this case the mental capacity of the testator was very doubtful).

<sup>200</sup> A testator over a hundred years old, and blind and deaf, can make a will. Wilson v. Mitchell, 101 Pa. St. 495.

Under same circumstances a man of eighty-five could make a will. Napfle's Estate, 134 Pa. St. 492; Sehr v. Lindemann, Mo. (1899); 54 S. W. 537.

## CHAPTER IX.

## MISTAKE, FRAUD, UNDUE INFLUENCE AND DURESS.

## §118. Classes of mistake.

The doctrine of mistake, in the law of wills, is one of comparatively slight importance, since it is rarely invoked. The facts which give any opportunity to apply the doctrine of mistake nearly always so involve fraud and undue influence that these different doctrines are all involved in the same case.<sup>1</sup>

In the cases where mistake can be separated from these other principles of law, it appears that mistake, as applied to wills, must be divided into mistake in the execution, and mistake in inducement causing the will, but without any mistake as to execution.

## §119. Mistake in execution.

Mistake in the execution exists where, from some cause, the testator executes a will of whose nature and contents he is in fact ignorant. This mistake is generally due to fraud or lack of capacity, or both. The effect of mistake in execution, no matter what its cause, is to avoid the will, since the will is executed without the *animus testandi*.<sup>2</sup>

<sup>1</sup> Coghill v. Kennedy, 119 Ala. 641; 24 So. 459; Haines v. Hayden, 95 Mich. 332; Budlong's Will, 126 N. Y. 423.

<sup>2</sup> Waite v. Frisbie, 45 Minn. 361; Hildreth v. Marshall, 51 N. J. Eq. 241; Baker v. Baker, 102 Wis. 226; 78 N. W. 453.

Thus, where a testator signed his will, thinking that it was a direction for his burial, such will was held invalid.<sup>3</sup>

## §120. Mistake in inducement.

A mistake in inducement exists where testator is mistaken as to facts which cause him to draw up and execute the will that he does, where he intends to execute the very instrument that he did, but where he would not have executed such a will with full knowledge of the facts. The rule upon this subject is that a will is valid, even though made by reason of a mistake of fact.<sup>4</sup>

Two reasons may be assigned for this rule.

First. The statute upon the subject of wills does not provide that any mistake of fact shall avoid the will, but, on the contrary, expressly provides that a will executed by a testator of full age, sound and disposing mind and memory, and not under restraint, shall be valid. To add to these requirements that testator must not be mistaken as to a material fact is to legislate, not to construe the statute.

Second. To inquire into what testator would have wished to do if he had known the material facts, and to determine just to what extent his will is affected by the mistake is a task of intolerable difficulty. No one probably ever made a will with absolute and perfect knowledge of every fact which might affect his disposition by will; and to determine the exact effect of each mistake is a task upon which no court could enter. Accordingly, it is held that a mistake even upon so vital a matter as the hostility of the heirs towards testator,<sup>5</sup> or the legitimacy

<sup>3</sup> *Hildreth v. Marshall*, 51 N. J. Eq. 241.

<sup>4</sup> *Ruffino's Estate*, 116 Cal. 304; *Wenning v. Teeple*, 144 Ind. 189; 41 N. E. 600; *Livingston's Will* (N. J. Prerog.), 37 Atl. 770; *Stewart v. Jordan*, 50 N. J. Eq. 733; *Clapp v. Fullerton*, 34 N. Y. 190; *Martin v. Thayer*, 37 W. Va. 38.

<sup>5</sup> *Kidney's Will*, 33 N. B., 9; *Ruffino's Estate*, 116 Cal. 304; *Kimberly's Appeal*, 68 Conn. 428; *Salter v. Ely*, 56 N. J. Eq. 357; *Stewart v. Jordan*, 50 N. J. Eq. 733; *Martin v. Thayer*, 37 W. Va. 38; *Maynard v. Tyler*, 168 Mass. 107; *White's Will*, 121 N. Y. 406.

of his own child,<sup>6</sup> or a mistake as to the fact that his supposed wife really had a former husband living and not divorced<sup>7</sup> is not such a mistake as to avoid the will.

The cases where the mistake is the result of misrepresentation, and is itself only a means of exercising undue influence, must be distinguished from these cases of mistake alone.<sup>8</sup>

### §121. Mistake.—Statutory rule.

In Georgia, by statute, the rules here given have been changed in part, and any mistake of fact on the part of testator as to the existence of conduct of an heir invalidates a will as far as such heir is concerned;<sup>9</sup> and the heir need not show that but for such mistake he would have taken under the will.<sup>10</sup> But where contestant had claimed to be the nearest relative of testator, and it appeared that testator knew of his claims, and had ample opportunity to determine whether the claim was well founded or not, it was held that, even if testator were in error in believing that such person was not his nearest relative, this was not a mistake of fact as to the existence of an heir within the meaning of the statute.<sup>11</sup>

A mistake as to the property owned by testatrix and a dispute over certain rents arising therefrom, which the beneficiary received as his own, and which testatrix at once charged up to him as advancements, is not such a mistake under this statute as to affect the validity of the will.<sup>12</sup>

Statutes avoiding the will where testator was mistaken as to the existence of a child are quite common.<sup>13</sup>

<sup>6</sup> *Kidney's Will*, 33 N. B. 9;  
*Smith v. Smith*, 48 N. J. Eq. 566;  
*Clapp v. Fullerton*, 34 N. Y. 190.

<sup>7</sup> *Wenning v. Teeple*, 144 Ind.  
189; 41 N. E. 600.

<sup>8</sup> See Sec. 128; *Coghill v. Kennedy*,  
119 Ala. 641; 24 So. 459;  
*Haines v. Hayden*, 95 Mich. 332;  
*Budlong's Will*, 126 N. Y. 423.

<sup>9</sup> *Jones v. Grogan*, 98 Ga. 552.

<sup>10</sup> *Mallery v. Young*, 98 Ga. 728.

<sup>11</sup> *Young v. Mallory* (Ga.) (1900),  
35 S. E. 273.

<sup>12</sup> *Meeks v. Lafley*, 99 Ga. 170.

<sup>13</sup> See Sec. 291.

## §122. Fraud.—General discussion and classification.

Fraud is in its nature closely allied to undue influence, and in many cases where the issue to be tried is *devisavit vel non*, it is practically impossible to distinguish the two, as the same evidence often tends to support each charge.<sup>14</sup>

The confusion is increased by the theory sometimes expressed by the courts that undue influence is to be treated as a kind of constructive fraud.<sup>15</sup> But, while allied to undue influence, fraud is not the same thing. Undue influence is essentially overpowering the will; fraud is deceit. Such considerations have led courts, where the rules of pleading permit of a distinction between fraud and undue influence in making up the issues, to hold that fraud is not the same thing as undue influence, and that an allegation of the one does not include an allegation of the other.<sup>16</sup>

Like mistake, fraud is to be classified under the two general heads of fraud in the factum, or execution, and fraud in the inducement.

## §123. Fraud in execution.

Fraud in the execution exists where a person is, by wilfully false statements of fact made to him with intent to deceive him and resulting in his actual deception, induced to execute an instrument of whose nature and contents he is ignorant.<sup>17</sup>

When the testator signs an instrument misapprehending its nature and contents through fraud it is equally invalid, whether he thinks he is signing a different sort of instrument from a will,<sup>18</sup> or whether he knows that he is signing a will, but is deceived as to its contents.<sup>19</sup>

<sup>14</sup> *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Lyon v. Dada*, 111 Mich. 340; 69 N. W. 654.

<sup>15</sup> *Coghill v. Kennedy*, 119 Ala. 641; *Shipman v. Furness*, 69 Ala. 555; *Smith v. Henline*, 174 Ill. 184.

<sup>16</sup> *Wilson's Estate*, 117 Cal. 262.

<sup>17</sup> *Smith v. Henline*, 174 Ill. 184;

*Waite v. Frisbie*, 45 Minn. 361; *Burns's Will*, 121 N. Car. 336; 28 S. E. 519; *Hildreth v. Marshall*, 51 N. J. Eq. 241; *Chappell v. Trent*, 90 Va. 849; *Baker v. Baker*, 102 Wis. 226; 78 N. W. 453.

<sup>18</sup> *Hildreth v. Marshall*, 51 N. J. Eq. 241.

<sup>19</sup> *Waite v. Frisbie*, 45 Minn. 361.

Thus, where testatrix had caused a will to be prepared by which property was left to her brothers in trust for a grandchild, and one brother and an attorney whom testatrix trusted completely suggested that the trust might be invalid, and suggested the omission of the clause creating the trust, without explaining that the effect of such omission was to give the brothers the estate absolutely, to the exclusion of the grandchild, it was held that this was such fraud as to invalidate the will.<sup>20</sup>

And in another case one of the natural beneficiaries induced testatrix to leave him her personal property by will and her real estate to the other beneficiaries, a disposition which was at the time a fair one, and afterward, in pursuance of his previous plan, he induced testatrix to convey her real estate to him by deed, taking his notes in payment. She made these transfers, thinking by his statements that the equal disposition made in the will was unaffected. On her death he claimed the real estate by deed, and the personal property, including his own notes, by the will.<sup>21</sup>

#### §124. Fraud in inducement.

Fraud in the inducement consists of wilfully false statements of fact which are intended to and do induce testator to execute the instrument which he does execute, with full knowledge of its nature and contents. Where the fraud is in the inducement as distinct from the execution, the same considerations apply to the validity of a will obtained thereby as to a will executed under a mistake of fact. The Statute of Wills makes no provision for fraud; and the difficulties of inquiring into the exact effect of deceit upon the mind of the testator and the extent to which it influenced him are intolérable. It is held, accordingly, that fraud in the inducement, alone, where not amounting to undue influence, does not vitiate the will.<sup>22</sup>

<sup>20</sup> Lyon v. Dada, 111 Mich. 340.

<sup>21</sup> Such conduct was held to amount to undue influence. Jones v. Simpson, 171 Mass. 474; 50 N. E. 940.

<sup>22</sup> Moore v. Heineke, 119 Ala.

627; 24 So. 374; Orth v. Orth, 145 Ind. 184; 44 N. E. 17; Wenning v. Teeple, 144 Ind. 189; 41 N. E. 600; Stewart v. Jordan, 50 N. J. Eq. 733; Salter v. Ely, 56 N. J. Eq. 357.

### §125. Undue influence.—Definition.

Undue influence is “such as in some measure destroys the free agency of testator and prevents the exercise of that discretion which the law requires that a party should possess.”<sup>23</sup> It consists in such influence, overpersuasion, coercion or force as destroys the free agency and will power of testator.<sup>24</sup>

Another definition, involving the same idea, is that undue influence is that ascendancy which prevents testator from exercising his unbiased judgment.<sup>25</sup>

Another definition is “Any improper or wrongful constraint, machination or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not have done or forborne had he been left to act freely.”<sup>26</sup>

Other definitions given by the courts involve substantially the same idea.<sup>27</sup>

The rules for determining what undue influence is are the same for wills executed in pursuance of a power as for wills disposing of testator’s own property.<sup>28</sup>

### §126. Theory of undue influence.

The theory underlying the doctrine of undue influence is that the testator is induced by the various means employed, which are hereafter discussed, to execute an instrument which, though in outward form and appearance his, is, in reality, not his will,

<sup>23</sup> *Johnston v. Armstrong*, 97 Ala. 731; 12 So. 72.

<sup>24</sup> *Steele v. Helm*, 2 Marv. (Del.), 237; *Riley v. Sherwood*, 144 Mo. 354; *McFadin v. Catron*, 138 Mo. 197; 120 Mo. 252.

<sup>25</sup> *Coghill v. Kennedy*, 119 Ala. 641; 24 So. 459.

<sup>26</sup> *Smith v. Henline*, 174 Ill. 184. (The court in this case spoke of undue influence as a sort of constructive fraud which the court would not undertake to define by fixed words.)

<sup>27</sup> *Shipman v. Furness*, 69 Ala. 555; *Gilbert v. Gilbert*, 22 Ala. 529; *Potts v. House*, 6 Ga. 324; *Sullivan v. Foley*, 112 Mich. 1; 70 N. W. 322 (1); *Turner v. Chessman*, 15 N. J. Eq. 243; *Gardiner v. Gardiner*, 34 N. Y. 155; *O’Neill v. Farr*, 1 Rich. (S. Car.), 80; *Chappel v. Trent*, 90 Va. 849; *Barbour v. Moore*, 4 App. D. C. 535; *Knox v. Knox*, 95 Ala. 495; 11 So. 125.

<sup>28</sup> *Coleman’s Estate*, 185 Pa. St. 437.



but the will, wish and desire of some other person. Such instrument, therefore, though signed by the testator, is not executed by him *animo testandi*. This important and inherent element is lacking.<sup>29</sup>

Undue influence is to be distinguished, furthermore, from lack of capacity. It is true that a person who lacks mental capacity to make a will does not execute a will *animo testandi*.

In both undue influence and lack of mental capacity this inherent element is wanting. But where testator lacks mental capacity he is not capable of entertaining the *animus testandi*. In cases of mere undue influence the testator is capable of entertaining the *animus testandi*, but on account of the circumstances he does not in fact entertain it.

This distinction between lack of capacity and undue influence is sometimes expressed by saying that undue influence presupposes and requires mental capacity as essential to its existence.<sup>30</sup> This statement is true in the following sense: If testator has mental capacity, the question of undue influence may become of vital importance as the only available means of attacking the will, while if the testator has not mental capacity, there is no need of invoking the doctrine of undue influence to overthrow the will.<sup>31</sup>

In determining a case involving undue influence, the question is not what effect the influence actually exerted would have had upon an ordinarily strong and intelligent person, but what effect the influence actually exerted had upon the person on whom it was exerted, taking into consideration the time and place and all the surrounding circumstances.<sup>32</sup>

<sup>29</sup> *Krankel v. Krankel* (Ky.), 50 S. W. 863; *Campbell v. Barrera* (Tex. Civ. App.), 32 S. W. 724.

<sup>30</sup> *Orchardson v. Cofield*, 171 Ill. 14; *Gwin v. Gwin* (Ida.), 48 Pac. 295; *Thompson v. Kyner*, 65 Pa. St. 368.

<sup>31</sup> *Manley's Exr. v. Staples*, 65 Vt. 370.

<sup>32</sup> *Olmstead v. Webb*, 5 App. D. C. 38; *Henry v. Hall*, 106 Ala. 84; *Mooney v. Olsen*, 22 Kan. 69; *Gur-*

*ley v. Park*, 135 Ind. 440; *Griffith v. Diffenderfer*, 50 Md. 480; *Shailer v. Bumstead*, 99 Mass. 112; *Sullivan v. Foley*, 112 Mich. 1; 70 N. W. 322; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Perrett v. Perrett*, 184 Pa. St. 131; *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Knox v. Knox*, 95 Ala. 495; 11 So. 125. *Contra*, *St. Leger's Appeal*, 34 Conn. 434.

Thus, misrepresentations and attacks upon natural objects of testator's bounty where testator was well and strong and within reach of the protection of those who were thus denounced, were held not to amount to undue influence;<sup>33</sup> while similar misrepresentations and attacks upon the natural objects of bounty made to a testator who is sick and unable to ascertain the truth for himself may be undue influence;<sup>34</sup> and urgent solicitation, while not usually undue influence, may amount to such where testatrix is at the point of death and utterly exhausted when she makes her will.<sup>35</sup>

While in the sense above given, undue influence presupposes capacity, nevertheless the question of the mental and physical condition of testator is a matter of great importance. This topic belongs under "Evidence" and will be discussed there.<sup>36</sup>

### §127. Elements of undue influence.

As the name implies, undue influence is a form of influence exerted upon testator whereby he is induced to make the will that he does in fact make. Accordingly, if it can be shown that the alleged influence did not operate upon the mind of testator and induce him to make the will which he made, such alleged influence is clearly not undue influence.<sup>37</sup>

Thus, where the person, A, who was claimed to exert the undue influence, wished to be the beneficiary under testator's will, and testator, instead, left his property to A's daughter and niece, to A's great anger, it was held that no undue in-

<sup>33</sup> *Salter v. Ely*, 56 N. J. Eq. 357; *Dumont v. Dumont*, 46 N. J. Eq. 223.

<sup>34</sup> *Coghill v. Kennedy*, 119 Ala. 641; 24 So. 459.

<sup>35</sup> *Gurley v. Park*, 135 Ind. 440; *Chappell v. Trent*, 90 Va. 849.

<sup>36</sup> See Sec. 428.

<sup>37</sup> *Ethridge v. Bennett's Exrs.*, 9 Houst. (Del.), 295; *Wilcoxon v. Wilcoxon*, 165 Ill. 454; *Harp v. Parr*, 168 Ill. 459; *Herbert v. Long* (Ky.), 23 S. W. 658; *Maynard v.*

*Tyler*, 168 Mass. 107; *In re Wills' Estate*, 67 Minn. 335; *Maddox v. Maddox*, 114 Mo. 35; *Doherty v. Gilmore*, 136 Mo. 414; *Norton v. Paxton*, 110 Mo. 456; *Berberet v. Berberet*, 131 Mo. 399; *McFadin v. Catron*, 138 Mo. 197; *Hampton v. Westcott*, 49 N. J. Eq. 522; *Miller v. Oestrich*, 157 Pa. St. 264; *In re Douglass's Est.* 162 Pa. St. 567; *Peery v. Peery*, 94 Tenn. 328; *McMaster v. Scriven*, 85 Wis. 162.

fluence existed;<sup>38</sup> and where testatrix voluntarily took vows, upon entering a religious order, to will all her property to this order, and never was dissatisfied with such vow, undue influence was not present.<sup>39</sup>

So, where it was claimed that testator was unduly influenced by his wife, but the will actually made did not provide for her as well as she would have been provided for by law had testator died intestate, undue influence did not exist.<sup>40</sup>

Influence, it must be noticed, is not of itself undue influence. Argument, persuasion and appeals to the affection, which do not destroy free agency, are not of themselves undue influence;<sup>41</sup> nor are advice and persuasion.<sup>42</sup> So when the evidence showed that testator had endeavored to live in peace with his daughter and her children, but could not, it was no evidence of undue influence that his sister advised him to send the daughter away if he could not get along with her.<sup>43</sup>

False and malicious statements concerning the natural objects of testator's bounty are not of themselves undue influence; such as information concerning the vicious habits of a son of testator, or criticism of such habits;<sup>44</sup> or conveying in-

<sup>38</sup> *Hampton v. Westcott*, 49 N. J. Eq. 522; *Westcott v. Sheppard*, 51 N. J. Eq. 315.

<sup>39</sup> *Will's Estate*, 67 Minn. 335.

<sup>40</sup> *Maynard v. Tyler*, 168 Mass. 107.

<sup>41</sup> *Eastis v. Montgomery*, 93 Ala. 293; *Lyons v. Campbell*, 88 Ala. 462; *Turner's Appeal*, 72 Conn. 305; *Bevelot v. Lestrade*, 153 Ill. 625; *Wilcoxon v. Wilcoxon*, 165 Ill. 454; *Barlow v. Waters*, — Ky.—; 28 S. W. 785; *Maynard v. Vinton*, 59 Mich. 139; *Hughes v. Murtha*, 32 N. J. Eq. 288; *Jones v. Roberts*, 37 Mo. App. 163; *Riley v. Sherwood*, 144 Mo. 354; *Pensyl's Will*, 157 Pa. St. 465; *Peery v. Peery*, 94 Tenn. 328; *Trezevant v. Rains*, 85 Tex. 329.

"Every will is the product of some influence. The influence which arises from legitimate family and so-

cial relations comes without suspicion or taint of illegality, and there can be no presumption that it is unlawfully exercised merely from the fact that it appears that when the will was made the testator was surrounded by it, and it operated on his mind to induce the testamentary disposition. It is only when such influence is shown to have been unduly exerted over the subject of will-making, so as to constrain the testator to do that which he would not have done if left to himself, that the law condemns it." *Arnault v. Arnault*, 52 N. J. Eq. 801.

<sup>42</sup> *Ball v. Kane*, 1 Penn. (Del.), 90; *Wilcoxon v. Wilcoxon*, 165 Ill. 454; *Sullivan v. Foley*, 112 Mich. 1; *Hurley v. O'Brien*, 34 Ore. 58.

<sup>43</sup> *Fox v. Martin*, 104 Wis. 581.

<sup>44</sup> *Defoe v. Defoe*, 144 Mo. 458.

formation as to unkind and unpleasant remarks concerning testatrix made by her sister.<sup>45</sup> In order to amount to undue influence, the advice, persuasion, entreaty and the like must therefore, first, actually influence testator to make the will that he does make; and second, exert such influence as is too powerful for the mind of testator to resist.<sup>46</sup> It is, therefore, error to charge that the jury must not consider the degree or extent of the undue influence, and that it was sufficient to invalidate the will, however slight.<sup>47</sup>

### §128. Classes and forms of undue influence.

Undue influence may be divided into actual or direct undue influence, and presumptive or constructive undue influence; the distinction between the two classes being in the manner of proving the undue influence. Actual or direct undue influence is that which is proven by showing specific acts on the part of the party exercising undue influence, whereby the mind of testator is overpowered. This effect may be produced in several ways:

(1) Appeals to the affection and emotions of testator, solicitation and persuasion may be carried to such a degree as to overpower his mind, and in such case will amount to undue influence.<sup>48</sup>

<sup>45</sup> *Campbell v. McGuiggan* (N. J. Prer.), 34 Atl. 383.

<sup>46</sup> *Bulger v. Ross*, 98 Ala. 267; *Eastis v. Montgomery*, 93 Ala. 293; 9 So. 311; *Carpenter's Estate*, 94 Cal. 406; *McDevitt's Estate*, 95 Cal. 17; *Spencer's Estate*, 96 Cal. 448; *In re Carriger*, 104 Cal. 81; *In re Langford*, 108 Cal. 608; *In re Calkins*, 112 Cal. 296; *Bevelot v. Lestrade*, 153 Ill. 635; *Storey's Will*, 20 Ill. App. 183; *Denning v. Butcher*, 91 Io. 425; *Grove v. Spiker*, 72 Md. 300; *Maynard v. Vinton*, 59 Mich. 155; *Sullivan v. Foley*, 112 Mich. 1; *Mitchell's Estate*, 43 Minn. 73; *McFaddin v. Catron*, 138 Mo. 197; *Thompson v. Ish*, 99 Mo. 160; *Hampton v. Westcott*, 49 N. J. Eq. 522; *Carroll v. House*, 14 N. J.

L. J. 179; *Frost v. Dingler*, 18 Pa. St. 259; *Pensyl's Est.*, 157 Pa. St. 465; *Robinson v. Stuart*, 73 Tex. 267; *Trezevant v. Rains*, 85 Tex. 329; *Chappell v. Trent*, 90 Va. 849; *Davis v. Strange*, 86 Va. 793; 8 L. R. A. 261.

<sup>47</sup> *Riley v. Sherwood*, 144 Mo. 354.

<sup>48</sup> *Higginbotham v. Higginbotham*, 106 Ala. 314; *Gwin v. Gwin*, Ida. 48 Pac. 295; *Smith v. Henline*, 174 Ill. 184; *Bevelot v. Lestrade*, 153 Ill. 625; *Barlow v. Waters*, —Ky. —:28 S. W. 785; *Rivard v. Rivard*, 109 Mich. 98; *Gordon v. Burris*, 141 Mo. 602; *Miller v. Oestrich*, 157 Pa. St. 264; *Perrett v. Perrett*, 184 Pa. St. 131.

(2) Flattery may be of such sort as will amount to undue influence. This is usually combined with deceit and solicitation.<sup>49</sup>

(3) Fraud and deceit may be made the means whereby testator's mind is overpowered, in which case they will amount to undue influence.<sup>50</sup>

Fraud is itself, as we have seen,<sup>51</sup> essentially different from undue influence. Still, fraud in the inducement, while in itself not sufficient to invalidate the will, may so affect the mind of testator as to amount to undue influence. Thus, false statements as to the conduct of those who are the natural objects of testator's bounty,<sup>52</sup> or as to legitimacy of testator's child<sup>53</sup> may amount to undue influence. False statements as to the identity and character of the beneficiary under the will may amount to undue influence.<sup>54</sup>

Presumptive or constructive undue influence is that which is inferred from the circumstances of the case, and the relations of the parties. Undue influence is peculiarly a question of fact. The rules of substantive law on this subject are neither many nor complicated. The greater number of questions to be determined in these cases are those upon evidence. For these reasons the subject of presumptive undue influence will be considered under the subject of "Evidence of Undue Influence."<sup>55</sup>

<sup>49</sup> Orchardson v. Cofield, 171 Ill. 14; Riley v. Sherwood, 144 Mo. 354.

As, where among other means of undue influence, the beneficiary, who represented himself to be a being like Christ, agreed to dedicate to testatrix the book whereby he was to regenerate the world. Orchardson v. Cofield, 171 Ill. 14.

<sup>50</sup> Coghill v. Kennedy, 119 Ala. 641; 24 So. 459; Higginbotham v. Higginbotham, 106 Ala. 314; Orchardson v. Cofield, 171 Ill. 14; Jones v. Simpson, 171 Mass. 474; 50 N. E. 940; Haines v. Hayden, 95 Mich. 332; Lyon v. Dada, 111

Mich. 340; Budlong's Will, 126 N. Y. 423; Gordon v. Burris, 153 Mo. 223; 54 S. W. 546.

<sup>51</sup> See Secs. 122, 123 and 124.

<sup>52</sup> Coghill v. Kennedy, 119 Ala. 641, 24 So. 459; Higginbotham v. Higginbotham, 106 Ala. 314; Defoe v. Defoe, 144 Mo. 458; Salter v. Ely, 56 N. J. Eq. 357; Budlong's Will, 126 N. Y. 423.

<sup>53</sup> Haines v. Hayden, 95 Mich. 332.

<sup>54</sup> Orchardson v. Cofield, 171 Ill. 14, distinguishing Whipple v. Eddy, 161 Ill. 114.

<sup>55</sup> See Chapter XIX, Secs. 408-421.

### §129. Who may exert undue influence.

The undue influence is generally exerted by the beneficiary under the will; but this is not necessary. If influence is exerted to such a degree as to be undue, by one who is not a beneficiary under the will, the will caused by such undue influence is as invalid as if the influence were exerted by one of the beneficiaries.<sup>56</sup>

At the same time it is true that "It is a strong circumstance tending to show the absence of any undue influence when the proof fails to connect the beneficiary in the will in any way with the making of the will either by agency, procurement, suggestion, solicitation or knowledge of its execution."<sup>57</sup>

### §130. Time at which undue influence may exist.

In order to avoid the will, it must be shown that the undue influence operated at the time that the will was made, and caused its execution.<sup>58</sup> Thus, where the undue influence was exercised before the will was executed, but such influence persisted until after the execution of the will, it vitiated the will;<sup>59</sup> while influence exerted after the will was made can not affect its validity, no matter how overpowering;<sup>60</sup> even if such subsequent influence goes to the extent of preventing tes-

<sup>56</sup> "It is of course equally fatal to the validity of a will whether the undue influence was exerted by proponent or another person." *Barney's Will*, 70 Vt. 352.

To the same effect are *Coghill v. Kennedy*, 119 Ala. 641; *Drake's Appeal*, 45 Conn. 9; *Smith v. Henline*, 174 Ill. 184.

<sup>57</sup> *Harp v. Parr*, 168 Ill. 459, citing *Goodbar v. Lidikey*, 136 Ind. 1; *Douglass's Estate*, 162 Pa. St. 567.

<sup>58</sup> *Kaufman's Estate*, 117 Cal. 288; *Pooler v. Cristman*, 145 Ill. 405; *Guild v. Hull*, 127 Ill. 523; *Brownfield v. Brownfield*, 43 Ill. 147;

*Eckert v. Flowry*, 43 Pa. St. 46; *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Gable v. Rauch*, 50 S. Car. 95; *Campbell v. Barrera* (Tex. Civ. App.), 32 S. W. 724.

"Undue influence, however used, must, in order to avoid the will, destroy the free agency of the testator at the time and in the very act of making the testament." *Trost v. Dingler*, 118 Pa. St. 259.

<sup>59</sup> *Overall v. Bland* (Ky.), 12 S. W. 273.

<sup>60</sup> *Haines v. Hayden*, 95 Mich. 332; *Riley v. Sherwood*, 144 Mo. 354; *Gable v. Rauch*, 50 S. Car. 95.

tator from revoking his will when he wishes to do so.<sup>61</sup> Influence exerted before the will was made, not shown to have persisted to the date of the execution thereof, does not of itself avoid the will.<sup>62</sup>

### §131. Effect of undue influence.

Undue influence avoids such part of the will as is caused thereby. If the whole will is the product of undue influence it is thereby entirely avoided.<sup>63</sup> Thus fraud amounting to undue influence vitiates a will like any other form of undue influence.<sup>64</sup>

Where, however, it can be shown that a part of the will was caused by undue influence, and that the rest of the will was not caused thereby, and the part of such will caused by undue influence can be separated from the rest, leaving it intelligible and complete in itself, it is held that only such part of the will as is caused by undue influence is invalid, and the rest is valid.<sup>65</sup>

### §132. Injustice of will not undue influence.

A testator of full age, sound and disposing mind and memory, and not under restraint, may make such disposition of his property as does not conflict with the law. The fact, then,

<sup>61</sup> *Floyd v. Floyd*, 3 Strobb. (S. Car.), 44.

<sup>62</sup> *Mitchell v. Donahue*, 100 Cal. 202; *Batchelder v. Batchelder*, 139 Mass. 1; *Ketchum v. Stearns*, 76 Mo. 396.

<sup>63</sup> *Knox v. Knox*, 95 Ala. 495; 11 So. 125; *Smith v. Henline*, 174 Ill. 184; *Rivard v. Rivard*, 109 Mich. 98; *Riley v. Sherwood*, 144 Mo. 354; *Perrett v. Perrett*, 184 Pa. St. 131; *Barney's Will*, 70 Vt. 352.

<sup>64</sup> *Higginbotham v. Higginbotham*, 106 Ala. 314; *Gordon v. Burris* 153 Mo. 223; 54 S. W. 546; *Budlong's Will*, 126 N. Y. 423.

<sup>65</sup> *Trimblestown v. D'Alton*, 1 Dow and Clark, 85; *Allen v. McPherson*, 1 H. L. Cas. 191; *Henry v. Hall*, 106 Ala. 84; *Eastis v. Montgomery*, 93 Ala. 293; *Lyons v. Campbell*, 88 Ala. 462; *Flore v. Florey*, 24 Ala. 248; *Harrison's Appeal*, 48 Conn. 202; *Morris v. Stokes*, 21 Ga. 552; *Randolph v. Lampkin*, 90 Ky. 551; 10 L. R. A. 87.

"The jury upon sufficient proof may strike out his legacy and establish the balance of the will so that the will may be good as to one party and bad as to another." *Morris v. Stokes*, 21 Ga. 552.

that a testator with such qualifications makes a foolish, unnatural or unjust will, does not show that undue influence caused the will.<sup>66</sup> Thus the fact that testator left more to his children by his second marriage than those by his first marriage does not establish undue influence on the part of his second wife.<sup>67</sup> So the fact that testator excludes his wife and children entirely from all of his property that he could does not show that undue influence necessarily produced the will.<sup>68</sup>

An unjust will executed on account of strong and unreasonable prejudices of testator is not on that account to be regarded as the product of undue influence.<sup>69</sup> So a will due to the strong prejudices of the testator against the Roman Catholic religion was held not to be attributable to undue influence where the will on this account excluded his nieces, one of whom had married a Catholic and the other was engaged to one, even though testator was angered at receiving a letter from a nephew containing false statements about the conduct and behavior of these nieces.<sup>70</sup> A will caused by

<sup>66</sup> Burney v. Torrey, 100 Ala. 157; Chandler v. Jost, 96 Ala. 596; In McLane's Estate, 21 D. C. 554; Kaenders v. Montague, 180 Ill. 300; Hollenbeck v. Cook, 180 Ill. 65; Pooler v. Cristman, 145 Ill. 405; Conway v. Vizzard, 122 Ind. 266; In re Merriman, 108 Mich. 454; Maddox v. Maddox, 114 Mo. 35; Farmer v. Farmer, 129 Mo. 530; Stewart v. Jordan, 50 N. J. Eq. 733; Bennett v. Bennett, 50 N. J. Eq. 439; James v. Sutton, 36 Neb. 393; Doherty v. Gilmore, 136 Mo. 414; Hegney v. Head, 126 Mo. 619; Kaufman v. Caughman, 49 S. Car. 159; McFadin v. Catron, 120 Mo. 252; Maddox v. Maddox, 114 Mo. 35; Arnault v. Arnault, 52 N. J. Eq. 801; Smith v. Smith, 48 N. J. Eq. 566; Trezevant v. Rains, 85 Tex. 329; Martin v. Thayer, 37 W. Va. 38.

<sup>67</sup> Nicewander v. Nicewander, 151 Ill. 156; Sehr v. Lindemann, Mo. 1899; 54 S. W. 537.

<sup>68</sup> Kessinger v. Kessinger, 37 Ind. 341; Arnault v. Arnault, 52 N. J. Eq. 801; In re Mondorf, 110 N. Y. 450; Monroe v. Barclay, 17 O. S. 302; Dean v. Negley, 41 Pa. St. 312; McClure v. McClure, 86 Tenn. 173; Rudy v. Ulrich, 69 Pa. St. 177; Main v. Rider, 84 Pa. St. 217; Cutler v. Cutler, 103 Wis. 258; 79 N. W. 240.

<sup>69</sup> Mitchell's Estate, 43 Minn. 73; Stewart v. Jordan, 50 N. J. Eq. 733; White's Will, 121 N. Y. 406; Dobie v. Armstrong, 160 N. Y. 584; Fox v. Martin, 104 Wis. 581; 80 N. W. 921.

<sup>70</sup> Stewart v. Jordan, 50 N. J. Eq. 733.



dislike of testator's son, due to a long standing quarrel with testator's wife, in which the son sided with his mother is not, of course, the result of undue influence.<sup>71</sup>

### §133. Duress.

Duress, in this connection, may be defined as the use of coercion or force to such a degree that it destroys the free agency and will power of testator.<sup>72</sup> Duress and undue influence are not infrequently confused, owing to a fondness for similes in judicial opinions. Thus it has been said that the influence to be undue must amount to a moral coercion.<sup>73</sup> Duress is not, however, a necessary element of undue influence; and it is error to instruct the jury that influence must amount to force or coercion in order to affect the will as undue influence.<sup>74</sup> Still less is physical force a synonym for undue influence.<sup>75</sup> But the exercise of actual duress, which causes testator to make a will that he would not otherwise have made, will render the will invalid. This is occasionally expressed by saying that it will amount to undue influence. Thus, threats, force and violence exerted toward testator to induce him to make his will, will if successful amount to undue influence; or more exactly, will avoid the will.<sup>76</sup> Threats and violence towards those closely related to testator, who are the natural objects of his bounty, will, if they cause

<sup>71</sup> *Dobie v. Armstrong*, 160 N. Y. 584.

<sup>72</sup> *Riley v. Sherwood*, 144 Mo. 354; *McFadin v. Catron*, 120 Mo. 252.

<sup>73</sup> "It must go to the extent of depriving the testator of his free agency and amount to moral coercion which he is unable to resist." *Peery v. Peery*, 94 Tenn. 328, citing *Nailing v. Nailing*, 2 Sneed, 630; *Wisener v. Maupin*, 2 Bax. 342.

<sup>74</sup> *Higginbotham v. Higginbotham*, 106 Ala. 314; *Estes v. Bridgeforth*, 114 Ala. 221; *Burney v. Torrey*, 100

Ala. 157; *Eastis v. Montgomery*, 93 Ala. 293; *Knox v. Knox*, 95 Ala. 495; *Bancroft v. Otis*, 91 Ala. 279; *Chappell v. Trent*, 90 Va. 849.

Thus a charge that undue influence "must amount to force and coercion" to make the will invalid was held reversible error. *Chappell v. Trent*, 90 Va. 849.

<sup>75</sup> *Estes v. Bridgeforth*, 114 Ala. 221.

<sup>76</sup> *Sullivan v. Foley*, 112 Mich. 1; *Peery v. Peery*, 94 Tenn. 328.

testator to make a will that he would not otherwise have made, render such will invalid.<sup>77</sup>

In the law of wills duress is often classed under undue influence.<sup>78</sup> The sub-divisions of duress need not be considered here in detail. As far as the reported cases go, it is believed that duress of the person of testator or of his family is the only form that has been presented for adjudication in the law of wills; duress of goods never having been discussed.

<sup>77</sup> Frye v. Jones, Ky. 24 S. W. 5; 95 Ky. 148; Capper v. Capper, 172 Mass. 262, 52 N. E. 98.

<sup>78</sup> Hall v. Hall, 18 L. T. 152; Haydock v. Haydock, 33 N. J. Eq. 494; Layman v. Conrey, 60 Md. 286.

In the law of contracts, however, objection has been made to classing duress in this way, though it has been said "Duress is but the extreme of undue influence." National Bank v. Wheelock, 52 O. S. 534.

## CHAPTER X.

### WHAT CAN BE DISPOSED OF BY WILL.

#### §134. Property in general.

We have seen that at common law no legal interests in real property could be devised; and that there were originally serious limitations upon the power of disposing of personalty. These restrictions have gradually been swept away by statute until with certain limitations all the property rights belonging to testator which would have passed to his heirs, or his personal representatives, had he died intestate, may pass by will. The language of most Wills Acts is that any person of specified qualifications 'having any property' may dispose of 'the same' by will and testament, executed in the form required by statute. Accordingly, it will be assumed that under modern statutes the power of disposition by will pertains to property as such except where limited by specific statute, by the nature of the property, or by the interests of others in the property sought to be disposed of.

#### §135. Ownership of property disposed of by will.

No property can be disposed of by testator's will except such as belongs to testator,<sup>1</sup> since no one can pass title to the property of another; unless, of course, in pursuance of a power giving him express authority to make such disposi-

<sup>1</sup> *Young v. Snow*, 167 Mass. 287.

tion.<sup>2</sup> Thus a married woman who is empowered by statute to devise her separate property, can not dispose of property accumulated during coverture by husband's labor, even though it is evidenced by notes and mortgages which the married woman has renewed in her own name.<sup>3</sup> So one to whom support for life has been given can not dispose by will of any accumulations of income over and above such support.<sup>4</sup>

In accordance with this general principle, a testator can not devise his property free from any liens or encumbrances which he may have created thereon in his lifetime; such as an outstanding lease with option for a further lease.<sup>5</sup> This principle is so self-evident that the mere statement would seem sufficient. There are, however, certain peculiar and interesting applications of the general rule arising in cases where property rights are misunderstood. It often happens that important and valuable property interests in the forms of life insurance, dower, curtesy, homestead rights and community property are ignored, and dispositions of property by will are made without any reference to them. These special cases need further discussion. The proposition that testator can not dispose by will of the property rights of any but himself is so clear that no dispute ordinarily arises, except over the construction of the will which gives something of value to the person whose property interests testator has attempted to bestow upon others. These questions are therefore generally presented under election.<sup>6</sup>

### §136. Insurance policies.

Testator can not, by will, pass proceeds of insurance policies upon his own life, though he has taken them out and paid the premiums, where the policies are by their terms payable to a specified person, and where testator has no power to change

<sup>2</sup> See Chap. XXXII.

<sup>3</sup> *Wehle v. Umpfenbach* — Ky. —, 23 S. W. 360.

<sup>4</sup> *Kimball v. New Hampshire Bible Society*, 65 N. H. 139: See Sec. 605.

<sup>5</sup> *In re Kidd* (1894), 3 Ch. Div. 558.

<sup>6</sup> See Ch. XXXIV.

the beneficiary;<sup>7</sup> or has power to change in a specified manner which he has not seen fit to use; but a policy payable to insured's "executors, administrators and assigns" may be disposed of by will,<sup>8</sup> or one in which the name of the beneficiary is purposely left blank.<sup>9</sup>

Where testator has a right to dispose of his policy by will, the fact that he also attempted to transfer the policy to the legatee, by a void assignment, does not prevent the will from taking effect.<sup>10</sup> Where the insured may, by law, declare that a specified policy is in trust for his wife, by a 'writing' identifying the policy, and thereby create such an interest in his wife that her claim is prior to that of her husband's creditors, a will may be such a writing;<sup>11</sup> but where by the terms of the insurance policy, the policy is payable to the beneficiary named therein, unless the insured appoints a different payee by an order acknowledged before a justice of the peace, a will can not be a substitute for such an order, in order to pass the policy.<sup>12</sup> By special statute the beneficiary of the policy may bequeath his interest therein by testament.<sup>13</sup>

### §137. Dower, curtesy, and distributive share of personalty.

Under the dower acts now in force a husband can not devise his land to others to the exclusion of his wife's dower

<sup>7</sup> *Block v. Association*, 52 Ark. 201; *De Silva v. Supreme Council*, 109 Cal. 373; *Masonic Association v. Severson*, 71 Conn. 719; *Martin v. Stubbings*, 126 Ill. 387; *Wilburn v. Wilburn*, 83 Ind. 55; *Holland v. Taylor*, 111 Ind. 121; *Haine v. Iowa Legion of Honor*, 78 Io. 245; *Weisert v. Muehl*, 81 Ky. 336; *Golder v. Chandler*, 87 Me. 63; *Daniels v. Pratt*, 143 Mass. 216; *Pingrey v. Ins. Co.*, 144 Mass. 374; *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Masonic Benevolent Association v. Bunch*, 109 Mo. 560; *Mellows v. Mellows*, 61 N. H. 137; *Arthur v. Odd Fellows' etc., Assn.*, 29 O. S. 557; *Charch v. Charch*, 57

O. S. 561; *Masonic Association v. Jones*, 154 Pa. St. 107; *Schardt v. Schardt*, 100 Tenn. 276.

<sup>8</sup> *In re Davies* (1892), 3 Ch. 63; *Hartwig v. Schiefer*, 47 Ind. 64; 46 N. E. 75; *Golder v. Chandler*, 87 Me. 63; *Fox v. Senter*, 83 Me. 295.

<sup>9</sup> *Hannigan v. Ingraham*, 55 Hun, 257.

<sup>10</sup> *Stoelker v. Thornton*, 88 Ala. 241; 6 L. R. A. 140.

<sup>11</sup> *McKibbin v. Feegan*, 21 Ont. App. 87.

<sup>12</sup> *Mellows v. Mellows*, 61 N. H. 137.

<sup>13</sup> *Harvey v. Van Cott*, 71 Hun, 394; *Small v. Jose*, 86 Me. 120.

rights. This right is consummate upon the husband's death, and is inchoate upon the acquisition of the realty by him during coverture. It has therefore a priority over a devise of such realty by the husband, and may be asserted by the wife against a devisee claiming under the husband's will.<sup>14</sup> So a husband can not be deprived of similar interests in his wife's realty without his consent.<sup>15</sup> This consent is not necessarily indorsed on the will. It may be given irrevocably by an ante-nuptial contract.<sup>16</sup> A husband can not by testament, in some jurisdictions, dispose of his personalty to the exclusion of his wife's distributive share of the same.<sup>17</sup> In other states, however, the testator may by will exclude his wife from share in his entire personal estate.<sup>18</sup> Dower, curtesy and distributive share of personalty are at modern law creatures of the local statutes; and the power of a testator to dispose of such rights by will is, therefore, in each jurisdiction peculiarly a matter of local policy dependent upon the local statutes.

### §138. Homestead rights.

Under modern legislation, in some states, the house and land, which constitute the family residence, is not only exempted in some cases from forced sale, but is appropriated after testator's death to the use of the widow and minor children. Where such a rule is in force it is generally held that a husband can not deprive his wife of her homestead right in

<sup>14</sup> *Purnell v. Reed*, 32 Fla. 329; 13 So. 831; *Warren v. Warren*, 148 Ill. 641; *McClanahan v. Williams*, 136 Ind. 30; *Pepper v. Thomas*, 85 Ky. 539; *Jennings v. Jennings*, 21 O. S. 56; *Hibbs v. Insurance Co.* 40 O. S. 543; *Cunningham's Estate*, 137 Pa. St. 621; *Rutherford v. Mayo*, 76 Va. 117; *Wilber v. Wilber*, 52 Wis. 298.

<sup>15</sup> *Cook v. Adams*, 169 Mass. 186.

<sup>16</sup> *Cook v. Adams*, 169 Mass. 186.

<sup>17</sup> *Cummings v. Daniel*, 9 Dana

(Ky.), 361; *Coomes v. Clements*, 4 Har. & M. (Md.), 101; *Tyler v. Wheeler*, 160 Mass. 206; *Doyle v. Doyle*, 50 O. S. 330; *Melizet's Appeal*, 17 Pa. St. 449.

Nor in some states can a wife exclude her husband. *Tyler v. Wheeler*, 160 Mass. 206.

<sup>18</sup> *Perkins v. Little*, 1 Me. 148. So in Michigan before the act of 1881. *Miller v. Stepper*, 32 Mich. 194.

the family residence by devising it to some one else;<sup>19</sup> and a widow may, in spite of her husband's will, have the entire property used as a homestead set off to her, though testator's son had been living in part of the house with his father's consent.<sup>20</sup> So the husband may after the death of his wife retain the homestead occupied by them in their joint lives, even though it belonged to the wife, and she has devised it to others.<sup>21</sup>

So a purchaser in good faith of a homestead from a widow to whom the law gave a homestead in fee may hold the same in fee, though by a will which was never probated within the state, the widow was given a life estate in such property, and she elected to take under the will.<sup>22</sup> The husband may devise a homestead in fee to his wife.<sup>23</sup> A husband or wife may, however, in most states assent in writing to a will made by deceased spouse devising the homestead to another,<sup>24</sup> and such consent may be given after the death of such deceased spouse.<sup>25</sup> Where a homestead has not been selected in the life-

<sup>19</sup> *Stokes v. Pillow*, 64 Ark. 1; *Matheny's Estate*, 121 Cal. 267; *Walkerly's Estate*, 108 Cal. 627; 49 Am. St. Rep. 97; *Stunz v. Stunz*, 131 Ill. 210; *Peebles v. Bunting*, 103 Io. 489; *In re Franke*, 97 Io. 704; *Hazelett v. Farthing* (Ky.), 22 S. W. 646; 15 Ky. Law Rep. 197; *Pendergest v. Heekin* (Ky.), 22 S. W. 605; 15 Ky. Law Rep. 180; *Myers v. Myers* (Ky), 12 S. W. 933; 11 Ky. Law Rep. 659; *Pratt v. Pratt*, 161 Mass. 276; *Shorr v. Etling*, 124 Mo. 42; *Kleinman v. Geiselman*, — Mo.—; (1893), 21 S. W. 796; *Wells v. Congregational Church*, 63 Vt. 116; *Contra*, in Florida a certain amount of homestead property, (\$1000), may be held exempt from a forced sale: but testator may bequeath it to others than his widow. *Hinson v. Booth*, 39 Fla. 333; *Scull v. Beatty*, 27 Fla. 426; *Purnell v. Reed*, 32 Fla. 329; 13 So. 831.

So in Georgia. *Bostick v. Chovin*, 55 S. Car. 427. If children survive testator, he can not dispose of his homestead by will. *Walker v. Redding*, 40 Fla. 124.

<sup>20</sup> *Pratt v. Pratt*, 161 Mass. 276.

<sup>21</sup> *Reed v. Talley*, 13 Tex. Civ. App. 286. In Missouri, however, a husband has no homestead estate of any kind in his wife's realty after her death. *Richter v. Bohnsack*, 144 Mo. 516.

<sup>22</sup> *Van Syckel v. Beam*, 110 Mo. 589.

Where testator's wife dies before testator, a will executed by him during her lifetime is valid to pass the homestead. *Penstock v. Wentworth*, 75 Minn. 2.

<sup>23</sup> *Martindale v. Smith*, 31 Kan. 270.

<sup>24</sup> *Eckstein v. Radl*, 72 Minn. 95; *Radl v. Radl*, 72 Minn. 81.

<sup>25</sup> *Radl v. Radl*, 72 Minn. 81.

time of testator, his wife can not, after his death, select one out of property devised by him, so as to prevent such devise from taking effect.<sup>26</sup> If the husband devises property to his wife in lieu of her homestead interests, and she accepts such property, she can not have her homestead in his property.<sup>27</sup>

### §139. Community property.

In some of the western states legislation has adopted from the Spanish law the general rule that matrimonial gains and *acquets* belong equally to husband and wife. Where this rule is in force the gains and *acquets* during coverture, which are to be divided equally between the spouses, are known as community property, and a testator can dispose by will only of his own half of the community property. He has no power to dispose of the half of the community property belonging to the other spouse.<sup>28</sup> But testator may by will give power to his executor to sell community property in order to pay off claims which could in law be charged against such property.<sup>29</sup>

### §140. Non-surviving interests.

The interest in property which can be disposed of by will must further be one which will survive testator. Thus, testator can not by will dispose of property in which he has a life-interest only.<sup>30</sup> Nor can testator, in jurisdictions where joint tenancy still exists, devise his joint interest in property to the prejudice of the remaining joint tenants.<sup>31</sup>

<sup>26</sup> Eyres' Estate, 7 Wash. 291.

<sup>27</sup> Warren v. Warren, 148 Ill. 641; Blackmer's Estate, 63 Vt. 236; 28 Atl. 419; See Sec. 716.

<sup>28</sup> De Grandmont v. Societe des Artisans, 15 C. S. 147; Sharpe v. Loupe, 120 Cal. 89; Payne v. Payne, 18 Cal. 291; Scott v. Ward, 13 Cal. 459; Neuber v. Shoel, 8 Kan. App. 345; 55 Pac. 350; Cox v. Von Ahlenfeldt, 50 La. Ann. 1286; 23 So. 959; Mayo v. Tudor, 74 Tex.

471; Haley v. Gatewood, 74 Tex. 281; Box v. Word, 65 Tex. 159; Hill's Estate, 6 Wash. 285; Ziegler v. His Creditors, 49 La. Ann. 144.

<sup>29</sup> Sharpe v. Loupe, 120 Cal. 89.

<sup>30</sup> Dorion v. Dorion, 20 Can. S. C. 430; Young v. Snow, 167 Mass. 287; Studdard v. Wells, 120 Mo. 25.

<sup>31</sup> Wilkins v. Young, 144 Ind. 1; 41 N. E. 68.



An estate, however, which is a life estate, subject upon a given contingency to enlarge to a fee, may be devised subject to the fulfillment of such contingency. Thus, where testatrix acquired an estate by a consent decree in a partition suit, which was to be a life estate if any of her children or their issue survived her, and on her death to them, but which was to be a fee simple in case she survived them, it was held that her estate in this remainder might be devised, subject to be defeated if such issue survived testatrix.<sup>32</sup>

#### §141. After-acquired personalty.

After it became established that testator might dispose by will of any property which he owned at the time of the execution of the will, another and different question was raised where testator attempted by will to dispose of property which he did not own at the time that he made the will, but which he expected to acquire afterwards.

Personalty, under the common law, might be disposed of by testament executed before testator became the owner thereof. It was recognized that he had full power so to dispose of his property, and the only question was as to the intention of testator.<sup>33</sup> So where testator can control the disposition of his life insurance, he may do so by will if conformable to the rules of the company and the terms of his contract, though such property does not accrue to his estate until his death.<sup>34</sup>

<sup>32</sup> Bigley v. Watson, 98 Tenn. 353;

<sup>33</sup> 38 L. R. A. 679.

<sup>33</sup> James v. Dean, 11 Ves. 389; affirmed in 15 Ves. 236; 8 R. R. 178; Bland v. Lamb, 2 J. & W. 405; Wilde v. Holtzmeier, 5 Ves. 811; Nannock v. Horton, 7 Ves. 399; Smith v. Edrington, 8 Cranch (U. S.), 66; Marshall v. Porter, 10 B. Mon. (Ky.), 1; Wait v. Belden, 24 Pick. (Mass.), 129;

Loverin v. Lamprey, 22 N. H. 434; McNaughton v. McNaughton, 34 N. Y. 201; Frick v. Frick, 82 Md. 218; Stannard v. Barnum, 51 Md. 440; Dalrymple v. Gamble, 68 Md. 523; Nichols v. Allen, 87 Tenn. 131; Henderson v. Ryan, 27 Tex. 670.

<sup>34</sup> Mackenzie v. Mackenzie, 3 Mac. & G. 559; Golder v. Chandler, 87 Me. 63; Stoelker v. Thornton, 88 Ala. 241; 62 R. A. 140.

## §142. After-acquired realty.

But in devises of realty it was settled, at common law, that a will could operate only upon the land owned by testator at the time that he executed the will, and that after-acquired property could not pass.<sup>35</sup> This rule rested upon two bases. A devise of land was treated as a form of conveyance under the Statute of Wills, and it was a well settled rule of common law that one could not pass title to real estate which he did not at that time possess.<sup>36</sup>

Furthermore, the Statute of Wills provided that those 'having lands' might pass them by devise. By strict construction of this statute it was held that 'having lands' restricted devises to lands owned at the time of the will; and that "if the devisor has not the lands he is out of the statute."<sup>37</sup> This restriction has been done away in most jurisdictions by statute, and a testator may, if he wish, pass by his will after-acquired lands, as well as those belonging to him when the will was executed.<sup>38</sup>

<sup>35</sup> *Brydges v. Chandos*, 2 Ves. 417; *Nannock v. Horton*, 7 Ves. 391; *Langford v. Pitt*, 2 P. Wms. 629; *Carroll v. Carroll*, 6 How. 275; *Brewster v. McCall*, 15 Conn. 274; *Ross v. Ross*, 12 B. Mon. (Ky.), 437; *Ballard v. Carter*, 5 Pick. (Mass.), 112; *George v. Green*, 13 N. H. 521; *Dodge v. Gallatin*, 130 N. Y. 117; *Girard v. Philadelphia*, 4 Rawle (Pa.), 323; *Raines v. Barker*, 13 Gratt. (Va.), 128; *Frazier v. Boggs*, 37 Fla. 307; 20 So. 245.

<sup>36</sup> *Brydges v. Chandos*, 2 Ves. 417; *Langford v. Pitt*, 2 P. Wms. 629; *Milnes v. Slater*, 8 Ves. Jr. 295; *George v. Green*, 13 N. H. 521.

<sup>37</sup> *Bunter v. Coke*, 1 Salk. 237.

The former reason is said to be the real one, the latter being criticised in *Brydges v. Chandos*, 2 Ves. 417.

<sup>38</sup> *Jepson v. Key*, 2 H. & C. 873;

10 Jur. (N. S.), 392; 10 L. T. 68; 12 W. R. 621; *Doe & York v. Walker*, 12 M. & W. 591; 13 L. J. Ex. 153; *Langdale v. Briggs*, 3 Sm. & G. 246; affirmed 8 De G. M. & G. 391; 26 L. J. Ch. 27; 2 Jur. (N. S.), 982; 4 W. R. 783; *Castle v. Fox*, 40 L. J. Ch. 302; L. R. 11 Eq. 542; 24 L. T. 536; 19 W. R. 840; *Hardenbergh v. Ray*, 151 U. S. 112; *Gibbon v. Gibbon*, 40 Ga. 562; *Woman's Missionary Society v. Mead*, 131 Ill. 338; *Morgan v. Mc-Neeley*, 126 Ind. 537; *Blakemore Succession*, 43 La. Ann. 845; *Paine v. Forsaith*, 84 Me. 66; *Meserve v. Meserve*, 63 Me. 518; *Ruckle v. Grafflin*, 86 Md. 627; *Frick v. Frick*, 82 Md. 218; *Dalrymple v. Gamble*, 68 Md. 523; *Bedell v. Fradenburgh*, 65 Minn. 361; 68 N. W. 41; *Cushing v. Aylwin*, 12 Met. (Mass.), 169; *Hale v. Audesley*, 122 Mo. 316; *Webb v. Archibold*, 128 Mo.

### §143. Classes of property devisable.—Realty in general.

There is no practical difference at modern law between legal and equitable interests as to their devisability, and the two classes may be discussed together for convenience, with subsequent reference to the peculiar forms of equitable interests.<sup>39</sup> Thus under the common law rule that after-acquired lands could not be devised, testator could devise lands in which he had equitable interests, even though he afterward acquired the legal title.<sup>40</sup> Thus, where testator had contracted to purchase lands by a contract enforceable in equity, he thereupon acquired an equitable interest in such lands which he could devise by will executed before he acquired the legal title.<sup>41</sup> But where the contract was not enforceable in equity, no equitable interest was acquired, and such realty would not pass by will executed before testator acquired the legal estate.<sup>42</sup> A testator, however, could not devise an equitable interest acquired after his will was executed, as where he contracted to purchase land after he had made his will.<sup>43</sup>

### §144. Effect of disseisin.

If the testator has both possession and estate in land, we have seen that there can be no question as to his right to devise.<sup>44</sup> But where testator was disseised of his land, the common law regarded a conveyance of such land as champerty;

299; *Flummerfeldt v. Flummerfeldt*, 51 N. J. Eq. 432; *Lamb v. Lamb*, 131 N. Y. 227; *Smith v. Jones*, 4 Ohio, 116; *Pruden v. Pruden*, 14 O. S. 251; *Jacob's Estate*, 140 Pa. St. 238; 11 L. R. A. 767; *Gable v. Daub*, 40 Pa. St. 217; *In re Pearce* 20 R. I. 380; *Webster v. Wiggin*, 19 R. I. 73; 28 L. R. A. 510; *Welborn v. Townsend*, 31 S. Car. 408; *Haley v. Gatewood*, 74 Tex. 281; *Hamilton v. Flinn*, 21 Tex. 713.

<sup>39</sup> *Perry v. Phelps*, 1 Ves. 255.

<sup>40</sup> *Marston v. Roe*, 8 Ad. & El. 14; *Morgan v. Holford*, 1 W. R.

101; 1 Sm. & Gif. 101; 17 Jur. 225; (interests created by contract to buy land).

<sup>41</sup> *Greenhill v. Greenhill*, 2 Vern. 679; *Capel v. Girdler*, 9 Ves. 510; *Prideaux v. Gibbon*, 2 Ch. Cas. 144; *Seton v. Slade*, 7 Ves. 274; *Broome v. Monck*, 10 Ves. 605.

<sup>42</sup> *Gascarth v. Lowther*, 12 Ves. 107; 8 R. R. 310.

<sup>43</sup> *Langford v. Pitt*, 2 P. Wms. 629; *Lushington v. Sewell*, 1 Russ. & M. 169.

<sup>44</sup> See Sec. 134.

and it was therefore held that such interest could not be devised.<sup>45</sup>

Under modern law the old rules as to champerty have been in a great measure abandoned, and it is very generally held that a disseised owner of lands may convey his estate therein by deed.<sup>46</sup> In analogy to this rule it is generally held that a testator may now devise all the interest that he possesses in land of which he is disseised.<sup>47</sup>

At common law one who had no valid title to certain real property as against the real owner, but was in actual adverse possession of such property, had such title against all but the true owner as he could devise,<sup>48</sup> and this rule is, of course, unchanged by modern legislation.

#### §145. Estates in futuro.

A reversion may be devised by the owner thereof.<sup>49</sup> A vested remainder may be devised, if it is an estate which survives the testator.<sup>50</sup> So accumulations which by statute pass to the devisee of a remainder, pass upon the death of such remainderman before his estate takes effect in possession to his devise.<sup>51</sup> Likewise may a contingent remainder be devised where the contingency is one of event, and not of person. In the latter case there is no one to devise the property.<sup>52</sup> Thus a resulting trust contingent upon the failure of issue of certain specified persons, is devisable.<sup>53</sup>

<sup>45</sup> Goodright v. Forester, 8 East. 551; Culley v. Doe, 11 Ad. & El. 1008; Poor v. Robinson, 10 Mass. 131.

<sup>46</sup> Cressinger v. Welch, 15 Ohio, 156.

<sup>47</sup> Atwood v. Weems, 99 U. S. 183; May v. Slaughter, 3 A. K. Marsh (Ky.), 505; Humes v. McFarlane, 4 S. & R. (Pa.), 427; Watts v. Cole, 2 Leigh (Va.), 653.

<sup>48</sup> Asher v. Whitlock L. R., 1 Q. B. 1.

<sup>49</sup> *In re Hume* (C. A.) (1895), 1 Ch. Div. 422; 64 L. J. Ch. (N. S.), 267; Tompkin's Estate, 154 N. Y.

634; Carney v. Kain, 40 W. Va. 758.

<sup>50</sup> Harvard College v. Balch, 171 Ill. 275.

<sup>51</sup> Tompkin's Estate, 154 N. Y. 634.

<sup>52</sup> Ingilby v. Amcotts, 21 Beav. 585; 25 L. J. Ch. 769; 2 Jur. (N. S.), 410; Collins v. Smith, 105 Ga. 525; Buck v. Lantz, 49 Md. 439; Chess's Appeal, 87 Pa. St. 362; Loring v. Arnold, 15 R. I. 428; Bailey v. Hoppin, 12 R. I. 560; Clark v. Clark, 19 S. Car. 345.

<sup>53</sup> Carney v. Kain, 40 W. Va. 758.

## §146. Possibilities.

Mere possibilities are said not to be devisable, and this is undoubtedly true if the term 'mere possibilities' is restricted in its meaning. In this sense it "signifies nothing more than an expectancy, which is specifically applied to a mere hope of succession unfounded in any limitation, provision, trust, or legal act whatsoever."<sup>54</sup> Thus the hope of the heir of succeeding to his ancestor's estate is a mere possibility which is not subject to devise, and the hope of one who is named beneficiary in the will of another of succeeding to such beneficial interest is such a mere possibility that it can not be devised.<sup>55</sup>

What is known as a 'possibility coupled with an interest' has been held to be devisable.<sup>56</sup> It has been held that money donated by the United States Government to the sugar planters of Louisiana as a bounty may be bequeathed, where the planter died before the donation was in fact made and while it was merely expected.<sup>57</sup>

## §147. Rights of entry devisable.

Mere rights of entry are also said to be incapable of devise. This statement also is true with some qualification as to the meaning of 'right of entry.'

Where this term is applied to the right of one who is disseised of realty to recover the same, there can be no question that under modern law such right can be devised.<sup>58</sup> So where the term is used to denote the right of a remainderman or reversioner to cause his estate to take effect in possession before the particular estate originally granted is determined, under the deed creating it, by electing to determine the particular estate on account of some act or default of the particular tenant, such right can pass by devise together with the remainder or reversion.

<sup>54</sup> Smith on Real and Personal Property, Sec. 192, quoted in *Needles v. Needles*, 7 O. S. 432.

<sup>55</sup> *Hall v. Hall*, 26 Md. 107; *Pate v. Pate*, 40 Miss. 750; *Perry v. Hunter*, 2 R. I. 80.

<sup>56</sup> *Moor v. Hawkins*, 2 Eden. 341; *Perry v. Phelps*, 1 Ves. 255.

<sup>57</sup> *Allen's Succession*, 49 La. Ann. 1096.

<sup>58</sup> See Sec. 144.

Where on the other hand, testator has parted with all his interest and estate in certain realty, and merely reserves a right to re-enter for breach of condition subsequent, such right can not be devised unless by the provisions of express statute.<sup>59</sup>

So, a possibility that on the dissolution of a corporation, real estate may revert to the grantor is not devisable,<sup>60</sup> and where real estate was granted to one, reserving to grantor a life estate and providing that grantee should pay the taxes on such realty and support grantor for life, without any claim of re-entry or forfeiture, it was held that grantor had no interest in such realty that could be devised.<sup>61</sup> In some jurisdictions whose statutes provide that any person may devise all rights of entry for condition broken, as well as other rights of entry, the possibility of reverter upon failure of condition on which a conditional fee simple was granted, is devisable.<sup>62</sup>

<sup>59</sup> *Upington v. Corrigan*, 151 N. Y. 143, citing and following *Schulenberg v. Harriman*, 21 Wall. 44; *Ruch v. Rock Island*, 97 U. S. 693; *Southard v. R. R.* 26 N. J. L. 13.

"If, therefore, there was any estate left in Mrs. Davey upon her grant to Hughes, it was not one known to our statute on real property, and all expectant estates, within which class it would have to fall, are abolished by the article, except such as are therein defined, and which must be either estates limited to commence in possession at a future day or reversions. The real interest contended for here would not satisfy the requirement of either class. The mere possibility of reverter, which was all there was in this case, could not be included within the "reversions" spoken of by the statute, either within its letter or spirit. The Statute of Wills, through the use of such precise words as "every estate and interest in real property descendible to heirs," obviously must have reference to such as are recognized by the Revised Statutes

to be estates of inheritance. We would be without warrant in asserting the existence of any estate in Mrs. Davey in the premises granted to Hughes, whether at the common law or under the Revised Statutes. She had an election to enter for condition broken, and she could release her right to do so. To those rights her heirs, after her decease, succeeded by force of representation and not by descent. There was no estate upon which the Statute of Wills could operate, but as heirs there devolved upon them the bundle or aggregate of the rights which resided in and survived the death of the grantor, their ancestor. Her legal personality is continued in them." *Upington v. Corrigan*, 151 N. Y. 143.

So *Trustees of Presbyterian Church of Paris v. Venable*, 159 Ill. 215.

<sup>60</sup> *Presbyterian Church v. Venable*, 159 Ill. 215.

<sup>61</sup> *Studdard v. Wells*, 120 Mo. 25.

<sup>62</sup> *Pemberton v. Barres* (1899), 1 Ch. Div. 544; *Rockwell v. Swift*, 59 Conn. 289.

### §148. Equitable interests.

A testator who owned equitable interests in real estate could dispose of the same by will, as well as if he had the legal interest too. The questions arising under this doctrine are chiefly questions of real property law, and not questions concerning the law of wills. The difficulties which present themselves are almost always in determining whether a given transaction creates a mere chose in action, enforceable by action at law; or whether it creates an estate which equity would recognize and enforce by means of specific performance or other appropriate remedy. Thus, where testator had during his lifetime entered into a valid and binding contract for the purchase of an estate in lands, by which testator became bound for the purchase price, and the former owner of the realty became bound to convey to testator, testator thereby acquires an equitable interest in such land contracted for, which he may devise.<sup>63</sup>

This is an application of the doctrine of conversion in a special case. By entering into a valid contract for the purchase of real estate, testator in equity converted his personalty to that extent into realty; and this converted personalty passes by his will as realty. So where testator has conveyed real property under such circumstances, that equity will hold his grantee as a trustee for him and on his application will decree a reconveyance, he has such an equitable estate in this property that he may devise this interest. So an interest in realty which can not be asserted unless a conveyance or release thereof be set aside, may be devised, and the right to set such conveyance aside will pass with the property.<sup>64</sup>

Accordingly, in some cases where the sale ultimately fails, it has been held that the money to be used in such purchase should pass as realty. Out of these rules, as to equitable

<sup>63</sup> *Broome v. Monck*, 10 Ves. Jr. 605; *Buckmaster v. Harrop*, 7 Ves. 341; *Dodge v. Gallatin*, 130 N. Y. 117.

<sup>64</sup> *Gresley v. Mousley*, 28 L. J. Ch. 620; 5 Jur. (N. S.) 583; 7 W. R.

427; 4 De G. & J. 78; 5 Jur. (N. S.) 583; *Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291; *Culley v. Doe*, 11 Ad. & El. 1008; *Cogdell v. Widow, Heirs, etc.*, 3 De Saus. (S. Car.) 346.

estates, arose an apparent exception to the common law rule that after-acquired realty could not be devised. If a testator had an equitable interest in realty at the time that he executed his will and afterward he had the legal title conveyed to him by a suit for specific performance, or otherwise, the realty was not regarded as after-acquired realty, but it passed under the will by virtue of his ownership of the equitable estate when he made the will.<sup>65</sup>

#### §149. Rights of creditors.

A testator has no power to dispose of his property by will, so as to interfere with the rights and claims of his creditors. Thus, a testator can not direct legacies to be paid to infants within the time limited for creditors to present their claims, since no bond given by infants to refund in case the estate should prove insolvent, could be enforced against them.<sup>66</sup> So as between his devisee and his creditors, testator can not devise realty free from a lien for the unpaid purchase price.<sup>67</sup> This fundamental proposition finds its chief application in cases where testator's property is insufficient to pay his debts and legacies. In such case (except in some cases of legacies upon valuable consideration) there is no question that every legacy must fail before any creditor will be forced to yield any part of his claims. The only question is as between the legatees and devisees, in what order the devises and legacies are to be used to pay the debts.<sup>68</sup>

<sup>65</sup> *Marston v. Roe*, 8 Ad. & El. 14; *Smith v. Jones*, 4 Ohio, 116.

<sup>66</sup> *Moore v. Moore*, 50 N. J. Eq. 554.

<sup>67</sup> *Bradsher v. Hightower*, 118 N. Car. 399.

<sup>68</sup> See Chapters XXXVI and XXXVIII.



## CHAPTER XI.

### WHO CAN TAKE UNDER A WILL AND TESTAMENT.

#### §150. Aliens.—Common law rule.

At the common law an alien could not acquire realty by the operation of the law; and could not hold realty against the government, no matter how such realty was acquired.<sup>1</sup> But there was no restriction upon the power of an alien to acquire realty by purchase other than by operation of law. He could acquire title in this manner, though the government could deprive him of such realty by a direct proceeding for that purpose,<sup>2</sup> and if the alien became naturalized before the government took advantage of his disability, his title was unimpeachable.<sup>3</sup>

Accordingly, it was always held at common law that a devise of realty to an alien was valid and passed the title thereto.<sup>4</sup> Since only the government could attack the title of the alien,

<sup>1</sup> 1 Black. Com., 372; 2 Black. Com., 249; Washburn on Real Prop., p. 48; *Manuel v. Wolf*, 152 U. S. 505; *Stevenson v. Dunlap*, 7 T. B. Mon. (Ky.), 134; *Hauenstein v. Lynham*, 28 Gratt. (Va.) 62.

<sup>2</sup> *Quigley v. Birdseye*, 11 Mont. 439; *Wunderle v. Wunderle*, 144 Ill. 40; 19 L. R. A. 84; *Lenahan v. Spaulding*, 57 Vt. 115; *Hubbard v. Goodwin*, 3 Leigh (Va.) 492; *Goon Gar v. Richardson*, 16 Wash. 373;

*Oregon Mortgage Co. v. Carstens*, 16 Wash. 165.

<sup>3</sup> *Manuel v. Wulff*, 152 U. S. 505; *Putters v. Dawson*, 82 Tex. 18.

<sup>4</sup> *Taylor v. Benham*, 5 How. (N. S.) 233; *Osterman v. Baldwin*, 6 Wall. (U. S.) 116; *Harley v. State*, 40 Ala. 689; *Scanlan v. Wright*, 13 Pick. (Mass.) 523; *Marx v. McGlynn*, 88 N. Y. 357; *Gray v. Kauffman*, 82 Tex. 65.

neither the heirs of testator, the residuary devisee, nor any other person could take advantage of alienage to defeat the title of the devisee.<sup>5</sup> At common law an alien might acquire personal property and hold the same as fully as a citizen might do, unless such alien was or became an alien enemy and the state confiscated his property.<sup>6</sup> An alien might therefore take personal property under a testament as a citizen might.

### §151. Aliens.—Modern statutory rule.

The modern statutes of most American states allow an alien to inherit and take by devise as fully as a citizen could.<sup>7</sup> But in some states statutes forbid non-resident aliens to acquire any interest in real estate.<sup>8</sup> In such states it is held that the United States treaties with certain foreign nations conferring the right upon the citizens of each party to the treaty to hold real estate within the other nation supersede the state laws disqualifying aliens to take, as far as the citizens of such nations are concerned.<sup>9</sup> But aliens may in Iowa acquire by devise, or other form of purchase, not over three hundred and twenty acres of land if within five years from acquiring such lands they are placed in the actual possession of a relative of the alien within the third degree, and within ten years from the date of acquiring such lands, such relative becomes

<sup>5</sup> *Brigham v. Kenyon*, 76 Fed. 30; *Airhart v. Massieu*, 984 S. 491; *Phillips v. Moore*, 100 U. S. 208; *Racouillat v. Sansevain*, 32 Cal. 376; *Dudley v. Grayson*, 6 T. B. Mon. (Ky.) 259; *Crane v. Reeder*, 21 Mich. 24; *Lenahan v. Spaulding*, 57 Vt. 115; *Keenan v. Keenan*, 7 Rich. (S. Car.) 345.

<sup>6</sup> *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Evans's Appeal*, 51 Conn. 435; *Greenheld v. Morrison*, 21 Io. 538; *Harney v. Donohue*, 97 Mo. 141.

<sup>7</sup> *De Geofroy v. Riggs*, 133 U. S. 258; *Nicrosi v. Phillipi*, 91 Ala. 299; *Utasey v. Giedinghagen*, 132

Mo. 53; *Stamm v. Bostwick*, 122 N. Y. 48; 9 L. R. A. 597; *Hannon v. Hounihan*, 85 Va. 429.

<sup>8</sup> (Devise included.) *Ryan v. Egan*, 156 Ill. 224; *Jele v. Lemberger*, 163 Ill. 338; *Meier v. Lee*, 106 Io. 303; *DeGraff v. Went*, 164 Ill. 485; *Furenes v. Mickelson*, 86 Io. 508; *Burrow v. Burrow*, 98 Io. 400.

<sup>9</sup> *Burrow v. Burrow*, 98 Io. 400; *Opel v. Shoup*, 100 Io. 407; *Adams v. Akerlund*, 168 Ill. 632; *Scharff v. Schmidt*, 172 Ill. 255; *Rixner's Succession*, 48 La. Ann. 552; 32 L. R. A. 177.

a naturalized citizen.<sup>10</sup> In New York descendants of women who were born in this country, but have married aliens, and reside in a foreign country are excepted from the general rule of their statutes that aliens can not take real estate.<sup>11</sup> In other jurisdictions while aliens can take land they are bound to sell it within three years and withdraw the proceeds.<sup>12</sup>

### §152. Private corporations.—General rule.

Under the English Statutes of Mortmain, corporations were forbidden to acquire realty. The Wills Act expressly excepted from its provisions devises to corporations. There was at English law no authority to the corporation to take by devise, or to hold what it might acquire otherwise.

A similar statute was once in force in South Carolina, under which a corporation could not take by will.<sup>13</sup> This statute was modified in 1872 by omitting the words "except to bodies politic and corporate" from the Wills Act. Since that time a corporation has been able to take by will.<sup>14</sup> In the United States such provisions are rare. The Statutes of Wills, in force in the different states, do not except devises to corporations from their general terms; and it is held that in the absence of an express prohibition in the charter of the corporation, or in the general laws on the subject of corporations, a corporation may acquire realty by devise as a natural person might.<sup>15</sup>

<sup>10</sup> *Furenes v. Severtson*, 102 Io. 322; *Doehrel v. Hilmer*, 102 Io. 169; *Bennett v. Hibbert*, 88 Io. 154 55 N. W. 93; *Wilcke v. Wilcke*, 102 Io. 173; *Schultze v. Schultze*, 144 Ill. 290; 36 Am. St. Rep. 432; 19 L. R. A. 90; *Furenes v. Severtson*, 102 Io. 322. On the same point *Easton v. Huott*, 95 Io. 473; 31 L. R. A. 177.

<sup>11</sup> *McGillis v. McGillis*, 154 N. Y. 532.

<sup>12</sup> *Schultze v. Schultze*, 144 Ill.

290; 19 L. R. A. 90; 36 Am. St. Rep. 432.

<sup>13</sup> *American Bible Society v. Noble*, 11 Rich. Eq. (S. Car.) 156

<sup>14</sup> *McIntosh v. Charleston*, 451 S. Car. 584.

<sup>15</sup> *White v. Keller*, 68 Fed. 796; *White v. Howard*, 38 Conn. 342; *Moore v. Moore*, 4 Dana. (Ky.) 354; *American Bible Society v. Marshall*, 15 O. S. 537; *McIntosh v. Charleston*, 45 S. Car. 584.

**§153. Private corporations.—Special statutory and constitutional provisions.**

In some states specific statutory or constitutional provisions alter this rule. Thus, in Maryland, a devise to a religious corporation is invalid by constitutional provision unless the legislature specifically sanctions such devise.<sup>16</sup> And a grant to receive 'subscriptions and contributions' is not a power to receive a devise.<sup>17</sup>

A devise to an unauthorized corporation is void, and the heirs may take advantage of its invalidity.<sup>18</sup> But these provisions apply only to Maryland corporations. A devise by a Maryland testator to a foreign corporation, if valid otherwise, is not made invalid by these provisions.<sup>19</sup> In New York it is provided by statute that no devise to a corporation is valid unless it is expressly authorized by its charter or by statute to take by devise. This statute is strictly local in its application. It applies to devises by a New York testator to a foreign corporation,<sup>20</sup> but it does not forbid a devise of foreign land by a foreign testator to a New York corporation.<sup>21</sup>

In some states it is provided that certain corporations can not hold real estate to a value in excess of a specified sum. Where this restriction is imposed, an important question is raised by a devise to such corporation which, with the property already owned by it, will amount altogether to more than the value limited by statute. In some states it is held that such a devise is void as to such excess;<sup>22</sup> and the capacity of the corporation to take is determined by the capacity of the corporation to take at testator's death. If the devise was in excess of the amount which it could then lawfully hold, a

<sup>16</sup> *Church v. Smith*, 56 Md. 362.

<sup>17</sup> *Brown v. Tompkins*, 49 Md. 423.

<sup>18</sup> See cases cited in the two preceding notes.

<sup>19</sup> *Vansant v. Roberts*, 3 Md. 119; *Brown v. Tompkins*, 49 Md. 423.

<sup>20</sup> *Scott v. Ives*, 51 N. Y. S. 49.

<sup>21</sup> *American Bible Society v. Marshall*, 15 O. S. 537; *Thompson v. Swoope*, 24 Pa. St. 474; *contra*

*Starkweather v. American Bible Society*, 72 Ill. 50.

<sup>22</sup> *Starkweather v. Amer. Bible Soc.* 72 Ill. 50; *McGraw's Estate*, 111 N. Y. 66; *Coggeshall v. Home for Friendless Children*, 18 R. I. 696; 31 Atl. 694; *Wood v. Hammond*, 16 R. I. 98; *House of Mercy v. Davidson*, 90 Tex. 529.

subsequent amendment to the charter of the corporation, increasing such amount, can not give validity to such devise.<sup>23</sup> But a devise to a corporation in trust for certain designated beneficiaries is not avoided by the fact that the devise is in excess of the amount which the corporation may hold.<sup>24</sup> In other states a devise to a corporation in excess of the amount which it is allowed to hold, is held to be a perfectly valid devise, and one which the heirs can not defeat. Only the government by a direct proceeding can take advantage of the fact that the corporation is holding in excess of the legal amount.<sup>25</sup>

#### §154. Public corporations.

In the absence of special restrictions a devise to a public corporation is valid,<sup>26</sup> and the city in such case may establish a board of managers for such fund.<sup>27</sup> The state may be a beneficiary under a will,<sup>28</sup> or so may an unincorporated state university.<sup>29</sup>

Whether the United States may take property by devise is a question upon which the courts are at variance.<sup>30</sup>

#### §155. Convicts.

A convict may be a beneficiary under a will at modern law.<sup>31</sup>

<sup>23</sup> *Coggeshall v. Home for Friendless Children*, 18 R. I. 696; 31 Atl. 694. To the same effect is *White v. Howard*, 46 N. Y. 144.

<sup>24</sup> *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668.

<sup>25</sup> *Jones v. Habersham*, 107 U. S. 174; *Farrington v. Putnam*, 90 Me. 405; 37 Atl. 652; *Stickney's Will*, 85 Md. 79; 35 L. R. A. 693; *De Camp v. Dobbins*, 29 N. J. Eq. 36. See Sec. 36.

<sup>26</sup> *McIntosh v. Charleston*, 45 S. Car. 584; *Sheldon v. Stockbridge*, 67 Vt. 299; *Beurhaus v. City of Watertown*, 94 Wis. 617; 69 N. W. 986; *Quincy v. Attorney General*,

160 Mass. 431; *Carder v. Fayette County*, 16 O. S. 353.

<sup>27</sup> *Quincy v. Attorney General*, 160 Mass. 431. (In this case the board was made up of certain officials and one private citizen.)

<sup>28</sup> *In re President and Fellows of Yale University*, 67 Conn. 257.

<sup>29</sup> *Royer's Estate*, 123 Cal. 614; 56 Pac. 461.

<sup>30</sup> A devise to the United States was upheld in *Dickinson v. U. S.* 125, Mass. 311, and was held invalid in *Fox's Will*, 52 N. Y. 530; *U. S. v. Fox*, 94 U. S. 315.

<sup>31</sup> *La Chapelle v. Burpee*, 69 Hun, 436; *Kenyon v. Saunders*, 18 R. I. 590.

### §156. Illegitimate children.

Apart from the power of testator to disinherit his legitimate children in favor of his illegitimate children, a question arises as to the capacity of illegitimate children to take under a will in any event. If the illegitimate child to whom the devise is made is in existence when the will is executed and is so clearly described in the will that the law recognizes it as the intended beneficiary, there is no question of its capacity to take the devise.<sup>32</sup> By statute in Louisiana, however, it is provided that illegitimate children may claim 'alimony' from the estate of the deceased father; and it is held that this provision for them, independent of the will, prevents testator from making any other or further provision for them by will.<sup>33</sup> If the illegitimate child is not in existence when the will is executed, and is described in the will as an illegitimate child to be born, a serious question arises as to its capacity to take. On the one hand if the description is sufficiently accurate, some courts are strongly inclined to hold the gift as a valid provision for those unfortunates, who are disgraced without fault of their own, and to whose disgrace the law ought not to add the further disadvantage of forbidding its father, who is legally bound in his lifetime for its support, to provide for it after his death.

Accordingly, it is held in some cases that where the actual, though not of course the technical, father makes provision by will for his future born illegitimate children, describing them with sufficient certainty, such devise will be upheld.<sup>34</sup> Such children can be described with sufficient certainty by designating them as the illegitimate children of the designated

<sup>32</sup> *Savage v. Robertson*, L. R. 7 Eq. 176; *Owen v. Bryant*, 13 Eng. L. & Eq. 217; *Hill v. Crook*, L. R. 6 H. L. 265; *In re Walker* (1897), 2 Ch. 238; *In re Harrison* (1894), 1 Ch. 561; *Dunlap v. Robinson*, 28 Ala. 100; *Hughes v. Knowlton*, 37 Conn. 429; *Smith v. Du Brose*, 78 Ga. 413; *Hayden v. Barrett*, 172

Mass. 472; *Heater v. Van Aiken*, 14 N. J. Eq. 159.

<sup>33</sup> *Bennett v. Cane*, 18 La. Ann. 590; *Gaines v. Hennen*, 24 How. (U. S.) 553.

<sup>34</sup> *Occleston v. Fullalove*, L. R. 9 Ch. 147; *In re Bolton*, 31 Ch. Div. 542.

mother.<sup>35</sup> Possibly such children may be sufficiently designated by describing them as those who may be the 'reputed children' of testator at the time of his death.<sup>36</sup> But they can not be properly described as his 'children,' for technically speaking, illegitimate children are not recognized in law as having a 'father,' but at the best, only a 'reputed father.'<sup>37</sup>

In the early cases, where others than the parents provide by will for future born illegitimate children, the courts have been even more unwilling to allow such a disposition of property no matter how clear the intent, than where the parents make such provision. Some of the strongest considerations for upholding devises by the parents are lacking. The testator is not fulfilling, after his death, a duty which rested upon him during his lifetime. A third person is making a disposition of his property which will prove ineffective *pro tanto*, unless future unlawful sexual intercourse on the part of the designated mother results in the birth of illegitimate children. Under the old rule, and especially in England, it has been held accordingly that a devise by one not a parent of the beneficiary to a future born illegitimate child, is void.

The early cases upon which these propositions are based are cases in which the will or deed was in pursuance of a contract, one provision of which was that the parents of the illegitimate children should continue to live in unlawful sexual relations. Such contracts are, of course, contrary to public policy, illegal and void. Out of their hostility to such contracts grew the unwillingness of the courts to allow devises to future-born illegitimates.

The modern cases, however, are much more liberal toward devises to the illegitimate, than the earlier line of English cases. It seems now to be held in every case that it is a question of the intention of the testator. If testator describes the beneficiary with sufficient accuracy, and makes it clear that he means to provide for the future-born illegitimate, the law

<sup>35</sup> *Occleston v. Fullalove*, L. R. 9 Ch. 147; *In re Bolton*, 31 Ch. Div. 542.

<sup>36</sup> *Occleston v. Fullalove*, L. R. 9 Ch. 147.

<sup>37</sup> *In re Bolton*, 31 Ch. Div. 542.

does not now in most jurisdictions forbid such a disposition of property, even where one not the parent of such children provides for future born illegitimates.<sup>38</sup>

The policy now adhered to is "the more humane policy of the civil law, a policy which considers justice to the innocent as outweighing the controlling idea, so called, of the common law, the discouragement of illegitimacy."<sup>39</sup>

In other jurisdictions other restrictions have from time to time been imposed upon devisees, which have been so local as not to call for extended discussion. Thus, under some early statutes giving a married woman power to make a will it was provided that she could not devise property to her husband.<sup>40</sup>

These statutes have for the most part been so modified by subsequent legislation as to permit a married woman to devise to her husband if she wishes.

<sup>38</sup> *Hayden v. Barrett*, 172 Mass. 472; *Sullivan v. Parker*, 113 N. Car. 301; *Heater v. Van Auken*, 14 N. J. Eq. 159; *Scholl's Will*, 100 Wis. 650.

<sup>39</sup> *Scholl's Will*, 100 Wis. 650.

<sup>40</sup> *Wakefield v. Phelps*, 37 N. H. 295.



## CHAPTER XII.

### EXTRINSIC ELEMENTS OF A WRITTEN WILL OF THE ORDINARY TYPE.

#### Part I—Introduction.

#### §157. History of the Law of the Extrinsic Elements of Wills.

As to their extrinsic elements, as distinguished from the inherent elements,<sup>1</sup> wills may be divided into written and nuncupative or oral. Written wills again may be divided into written wills of the ordinary type, holographic wills, mystic wills, and nuncupative wills under the Louisiana Code. In this chapter, after a general discussion of the history of the law of the extrinsic formalities of wills, and the general place and scope of modern statutes upon the subject of formalities, a detailed discussion of the extrinsic elements of a written will of the ordinary type will follow, leaving the topics of the holographic will, the mystic will, and the nuncupative will for further discussion.<sup>2</sup>

In tracing the gradual development of the law of the extrinsic elements of a valid will or testament, a sharp distinction must be made between the history of the law of wills and that of testaments.

The Statute of Wills, 32 Hen. VIII, c. I, Sec. 2, which created the right of making a will of lands, provided that specified interests in realty could be devised by their owner "by

<sup>1</sup> See Sec. 42.

<sup>2</sup> See Ch. XIII.

his last will or testament in writing." No further formalities were imposed by this statute.<sup>3</sup>

The first formalities in addition to the requirement of a writing were imposed upon devises of realty by the Statute of Frauds, 29 Car. II, c. 3, Sec. 5, which provided that devises of land "shall be in writing and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of no effect."<sup>4</sup> The further formalities required by the later statutes (the chief of which is that the will must be signed at the end) are discussed under their respective headings.<sup>5</sup>

Testaments were governed by the ecclesiastical law. Originally the ecclesiastical courts enforced even the oral wishes of the decedent; but in course of time oral wishes were enforced only in certain specified cases.<sup>6</sup> The testament, except in the cases where a nuncupative will was enforced, was required to be in writing. No further formalities were required. If testator assented to the instrument it was not necessary that he sign it,<sup>7</sup> or that it be subscribed by attesting witnesses.<sup>8</sup> It was not

<sup>3</sup> See Sec. 15, note.

<sup>4</sup> 29 Car. II, c. 3, Sec. 5: "and be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June (1677) all devises and bequests of any lands or tenements, deviseable either by force of the statute of wills, or by this statute, or by force of the custom of Kent or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of no effect."

See Part II, and following parts of this chapter.

<sup>6</sup> See Ch. XIII, Nuncupative Wills.

<sup>7</sup> *Frierson v. Beall*, 7 Ga. 438; *Mealing v. Pace*, 14 Ga. 596; *Watts v. Public Administrator*, 4 Wend. 168; *McLean v. McLean*, 6 Hum. (Tenn.) 452.

<sup>8</sup> *Ex parte Henry*, 24 Ala. 638; *Frierson v. Beall*, 7 Ga. 438; *Watts v. Public Administrator*, 4 Wend. (N. Y.) 168; *Johnson v. Fry*, 1 Cold. (Tenn.) 10; *Morris v. Swaney*, 7 Heisk. (Tenn.) 591.

It is, of course, necessary that witnesses be called to show testator's assent to the will; though they need not subscribe. *Suggett v. Kitchell*, 6 Yerger (Tenn.) 425; *Moore v. Steele*, 10 Hum. (Tenn.) 562.

necessary that the testament be a holograph, that is, in testator's handwriting. An unsigned paper, not in testator's handwriting, and not signed by him, could be probated as his testament if the evidence showed that he intended it as his testament.<sup>9</sup>

The Statute of Frauds, already quoted,<sup>10</sup> did not affect testaments. The danger of fraud in the informal instruments, which were upheld by the courts, became so evident that statutes were passed in England in the first half of the nineteenth century,<sup>11</sup> and in the different states of this country at different dates, in many cases earlier than the date of the English statute, imposing upon testaments of personalty substantially the formalities requisite to a will of lands. The original freedom of wills and testaments from set formalities persisted longer as to testaments of personalty than as to wills of realty.<sup>12</sup> Indeed, in some jurisdictions testaments of personalty are still less formal instruments than wills.<sup>13</sup>

#### §158. General scope of modern statutes.

An instrument may possess all the inherent elements of a will, and yet be of no effect in law, because it lacks some of the additional requisites which are classified here as extrinsic formalities. These formalities are added by statute. In every case therefore the question of the validity of the will, apart from its inherent elements, depends upon the construction of the statute by which such formalities are required. The discussion of the subject is somewhat simplified by the disposition of American states to adopt the statute law of England, or of the other states of the Union, rather than to make new statutes based on original principles. The cases may, therefore, be arranged in groups which are decided under similar statutes and which are not opposed in principle by other classes decided under diverse statutes, though they should

<sup>9</sup> *McLean v. McLean*, 6 Hum. 452.

<sup>10</sup> 29 Car. II, c. 3, Sec. 5.

<sup>11</sup> 1 Vict. c. 26, Sec. 9.

<sup>12</sup> *Very v. Very*, 3 Pick. 374;  
*Bartlett v. Monroe*, 21 Pick. 98;  
*Kendall v. Kendall*, 24 Pick. 217;

*Hunt v. Hunt*, 4 N. H. 434; *Gage v. Gage*, 12 N. H. 371; *Marston v. Marston*, 17 N. H. 503.

<sup>13</sup> *Vestry of St. John's Parish v. Bostwick*, 8 App. D. C. 452; *Orgain v. Irvine*, 100 Tenn. 193.

be carefully distinguished from them. These statutes are exclusive by their terms since they provide substantially that no will shall be of any effect unless made in compliance with them. Since the legislature has full power to provide for the form and validity of wills,<sup>14</sup> it follows that these statutes must be substantially complied with or the will will be invalid.<sup>15</sup>

A will can only be either valid as complying with the statute, or void as in disregard of it.<sup>16</sup> The formalities required by statute may be classified as: Writing, signature by testator, competency of witnesses, attestation and signature by witnesses, and, in some states, publication.

## Part II—Writing.

### §159. Writing materials which can be used.

Under the different codes a will, with the exception of the nuncupative will, must be in writing. Verbal additions can not alter a written will.<sup>17</sup> It is generally held, in the absence of special statutory requirements, that any material which can be used to write upon may be used.<sup>18</sup> As to the material with which the writing is done, ink is, of course, the best at our disposal. This may be applied with a pen, as in ordinary writing, or the will may be printed or lithographed or typewritten. "Writing includes printing."<sup>19</sup> It may be written also in lead pencil.<sup>20</sup> But it has been held that a will written

<sup>14</sup> See Sec. 21 *Barker v. Bell*, 46 Ala. 216.

<sup>15</sup> *Walton v. Kendrick*, 122 Mo. 504; *Catlett v. Catlett*, 55 Mo. 330; *Simpson v. Simpson*, 27 Mo. 288; *St. Louis Hospital Association v. Williams*, 19 Mo. 609; *Voorhis's Will*, 125 N. Y. 765; *Luper v. Werts*, 19 Ore. 122.

<sup>16</sup> "We know nothing about 'voidable wills'." *McGee v. Porter*, 14 Mo. 611.

<sup>17</sup> *Knight v. Tripp*, 121 Cal. 674;

*McFadin v. Catron*, 120 Mo. 252; *Smith v. Smith*, 54 N. J. Eq. 1.

<sup>18</sup> *Rymes v. Clarkson*, 1 Phill. 22.

<sup>19</sup> *Henshaw v. Foster*, 9 Pick. 312. *Roush v. Wensel*, 15 O. C. 133; *Temple v. Mead*, 4 Vt. 133.

<sup>20</sup> *Harris v. P.* 535; *Myers v. Van* Pa. St. 510; *Knox's* 31 Pa. St. 220; *Tom* Estate, 133 Pa. St. 24; *Co. v. Alexander*, 22 Tex.

on a slate is so easy to alter that it should not be recognized as a valid will.<sup>21</sup> This seems to add to the requirements of the statute by judicial construction.

### §160. Language in which the will may be written.

The will may be written in any language. It is not necessary that it be in English;<sup>22</sup> nor that it be in a language with which the testator is acquainted.<sup>23</sup>

Under the doctrine of *animus testandi*, however, the testator must know the nature of the act which he is performing; and the fact that the will is drawn up in a language which he does not understand may be important as showing that he did not execute the instrument *animo testandi*.<sup>24</sup>

### §161. Writing on several pieces of paper.

Under statutes which require that a will be in writing a will may be written upon several pieces of paper.<sup>25</sup> The will is valid even where testator's signature is on a piece of paper separate from the dispositive clauses of the will.<sup>26</sup> It is not

<sup>21</sup> Reed v. Woodward, 11 Phila. (Pa.) 541.

<sup>22</sup> *In re Cliff's Trusts* (1892), 2 Ch. Div. 229.

<sup>23</sup> Hoshauer v. Hoshauer, 26 Pa. St. 404; Dickinson v. Dickinson, 61 Pa. St. 401; Walter's Will, 64 Wis. 487.

<sup>24</sup> Miltenberger v. Miltenberger, 78 Mo. 27; 8 Mo. App. 306. (In this case there was no proper execution; as the evidence tended to show that testatrix did not understand the legal effect of the transaction.)

<sup>25</sup> Bond v. Seawell, 3 Burrows, 1773; Barnewall v. Murrell, 108 Ala. 366; St. John's Parish v. Bostwick, 8 App. D. C. 452; Jones v. Habersham, 63 Ga. 146; Harp v. Parr, 168 Ill. 459; Ela v. Edwards, 16 Gray. (Mass.) 91; Burnham v. Porter, 24 N. H. 570; Grubb v. Dar-

lington, 174 Pa. St. 187; Ginder v. Farnum, 10 Pa. St. 98; Wikoff's Appeal, 15 Pa. St. 281; Gass v. Gass, 3 Hump. (Tenn.) 278.

"It is not necessarily an objection to a will that it is written on several separate pieces of paper. Such fact is not fatal to the validity of the will. All that is required is, that all the separate sheets of paper should be in the room and in the presence of the attesting witnesses."

Harp v. Parr, 168 Ill. 459, citing Bond v. Seawell, 3 Burr. 1773; Ela v. Edwards, 16 Gray, (Mass.) 91; Wikoff's Appeal, 15 Pa. St. 281; Gass v. Gass, 3 Hump. (Tenn.) 278.

<sup>26</sup> Cook v. Lambert, 3 Sw. & Tr. 46; 32 L. J. P. 93; 9 Jur. (N. S.) 258; 9 L. T. 211; 11 W. R. 401.

necessary that these papers be fastened together if their sense connects them each one with the preceding.<sup>27</sup>

A will written on separate pieces of paper, with but one paragraph on some of the pieces, and with blank spaces at the top and bottom of each piece, was held to comply with the statute. In this case the papers were sewed together with thread.<sup>28</sup>

The presumption is that the will was executed in the form in which it is found to exist at the death of the testator.<sup>29</sup> This presumption may be rebutted, and it may be shown that sheets of paper have been destroyed, rewritten or transposed.<sup>30</sup> In such case the will as it was executed is the valid one, unless the changes have amounted to such revocation as invalidates the will in whole or in part.<sup>31</sup> Still more is a will valid which is written upon two sheets of paper pasted together so that testator's signature came just below the line of union.<sup>32</sup>

## §162. Incorporation of documents.

From the proposition that a will may be written upon different pieces of paper connected only by the sense it follows that a will may by reference incorporate into itself as completely as if copied in full some other paper which in itself is not a will for lack of execution.<sup>33</sup> In order so to incorporate, three things are necessary.

<sup>27</sup> Wikoff's Appeal, 15 Pa. St. 281; Martin v. Hamlin, 4 Strobb (S. Car.) 188.

<sup>28</sup> Barnewall v. Murrell, 108 Ala 366.

<sup>29</sup> Rees v. Rees, L. R. 3 P. & D. 84; Marsh v. Marsh, 1 S. & T. 528; Barnewall v. Murrell, 108 Ala. 366.

<sup>30</sup> Varnon v. Varnon, 67 Mo. App. 534. See Ch. XV.

<sup>31</sup> See Secs. 260 and 276.

<sup>32</sup> Lamb v. Lippencott, 115 Mich. 611.

<sup>33</sup> Shillaber's Estate, 74 Cal. 144; 5 Am. St. Rep. 433; Skerrett's

Estate, 67 Cal. 585; Young's Estate, 123 Cal. 337; Wiley's Estate (Cal.). 56 Pac. 550; Newton v. Society, etc., 130 Mass. 91; Smith v. Smith, 54 N. J. Eq. 1; Tonnele v. Hall, 4 N. Y. 140; Gerrish v. Gerrish, 8 Ore. 351; 34 Am. Rep. 585; Ford v. Ford, 70 Wis. 19; Skinner v. American Bible Society, 92 Wis. 209; Mortgage Trust Company v. Moore, 150 Ind. 465; Fesler v. Simpson, 58 Ind. 83.

While the weight of authority is, as given in the text, it was queried in Phelps v. Robbins, 40 Conn. 250,

1. The will itself must refer to such paper to be incorporated (a) as being in existence at the time of the execution of the will,<sup>34</sup> and (b) in such a way as to reasonably identify such paper in the will,<sup>35</sup> and (c) in such a way as to show testator's intention to incorporate such instrument in his will and to make it a part thereof.<sup>36</sup> Thus a paper placed with a will is not a part thereof where the will shows no intention to incorporate it.<sup>37</sup>

2. Such document must in fact be in existence at the time of the execution of the will.<sup>38</sup> If this were not the rule testator could, by executing a will and incorporating therein a document to be executed in the future, create for himself a power to dispose of his property in a testamentary manner by an instrument not executed in accordance with the statute of wills.<sup>39</sup>

3. Such instrument must correspond to the description

if incorporation by reference is possible, and it was observed that in Connecticut no case of the sort had been presented in a hundred and fifty years.

And in *Booth v. Baptist Church*, 126 N. Y. 215, the court said:

"It is unquestionably the law of this state that an unattested paper which is of a testamentary character can not be taken as a part of the will, even though referred to by that instrument."

In this case the instrument in question was referred to in the will thus: "Among my papers will be found a memorandum of the various securities I have selected for the payment of the several lagacies." Among his papers was the instrument referred to, headed "List of securities which I wish transferred to different institutions under my will of February, 1885," and signed by testator. The court held that it was not incorporated in the will and cited and followed *Langdon v. Astor*, 16 N. Y. 9; *Williams v.*

*Freeman*, 83 N. Y. 561; *O'Neill's Will*, 91 N. Y. 516.

<sup>34</sup> *Durham v. Northern* (1895), Prob. 66; 6 Rep. 582; *Goods of Kehoe*, 13 L. R. Ir. 13; *Smith v. Smith*, 54 N. J. Eq. 1. But it is not necessary that it should be present when the will is executed. *Willey's Estate* (Cal.) (1900), 60 Pac. 471.

<sup>35</sup> *Young's Estate*, 123 Cal. 337; *Newton v. Society, etc.*, 130 Mass. 91; *Chambers v. McDaniel*, 6 Ired. Law (N. C.) 226; *Skinner v. American Bible Society*, 92 Wis. 209.

<sup>36</sup> *Young's Estate*, 123 Cal. 337; *Magoohan's Appeal*, 117 Pa. St. 238; *Hunt, ex rel v. Evans*, 134 Ill. 496; 11 L. R. A. 185; *Zimmerman v. Hafer*, 81 Md. 347; 32 Atl. 316.

<sup>37</sup> *Magoohan's Appeal*, 117 Pa. St. 238.

<sup>38</sup> *St. John's Parish v. Bostwick*, 8 App. D. C. 452.

<sup>39</sup> *Dennis v. Holsapple*, 148 Ind. 297; *Chase v. Stockett*, 72 Md. 235.

thereof in the will and must be shown to be the instrument therein referred to.<sup>40</sup>

In discussing incorporation by reference it must first be observed that these three requisites must co-exist in order to incorporate a foreign paper into the will. The absence of any one of them will prevent such incorporation.

### §163. Incorporation of documents.—Reference to document.

The will must refer to the instrument to be incorporated as in existence. A reference in the will to the instrument incorporated as “made or to be made” does not refer to it clearly as being in existence;<sup>41</sup> nor does a reference to it as a schedule of property “hereafter named.”<sup>42</sup> Since the document to be incorporated must be referred to in the will as in existence at the date of executing such will, it follows that, in the absence of such reference, parol evidence is not admissible to show that the document was in existence at the time of executing the will.<sup>43</sup>

### §164. Incorporation by the use of asterisks.

The testator sometimes indicates by the use of asterisks, or by such words as “See next page,” that a clause written upon the back of the will, following the signature and an attestation clause, is to be considered as a part of his will. In some jurisdictions this is treated as a part of the will.<sup>44</sup> The reason for including it is that it is a separate document incorporated into the will by reference.<sup>45</sup> An additional reason has been urged that, where all the writing is upon one piece of paper, or where the annexed provisions are on a piece of paper fastened to the will, the will is to be considered as signed at the

<sup>40</sup> *Brown v. Clark*, 77 N. Y. 369; *Baker's Appeal*, 107 Pa. St. 381.

<sup>41</sup> *Dunham v. Northern* (1895), Prob. 66; 6 Rep. 582; *In re Skair*, 5 No. Cas. 57; *In re Astell*, 5 No. Cas. 489n.

<sup>42</sup> *Singleton v. Tomlinson*, 3 App. Cas. 414.

<sup>43</sup> *Durham v. Northern* (1895), Prob. 66; 6 Rep. 582.

<sup>44</sup> *In Goods of Thomas Greenwood* (1892), P. 7; 66 L. T. 61; *Goods of Brit*, 24 L. T. R. 142; *Baker's Appeal*, 107 Pa. St. 381.

<sup>45</sup> See cases under last note.



end thereof. On this theory the end is taken as the end in point of sense, and not the end in point of space, and the theory of incorporation by reference is unnecessary.<sup>46</sup> Thus where the will was written upon a piece of paper so folded as to make four pages it was signed on page three. Above the signature appeared "4th. See next page." Upon the fourth page appeared "4. —," followed by a bequest to A. This clause on the fourth page was held to be a part of the will upon both theories suggested.<sup>47</sup>

In New York a clause so referred to is held not to be part of the will on the ground that such will is not signed at the physical end thereof, and that such additions are not so described in the will as to be incorporated by reference.<sup>48</sup> Likewise, where the dispositive part of the will completely filled the blank on which the will was written and ended with the words "Carried to back of will," and on the back appeared "Continued —," followed by bequests and then the words "Signature on face of will," the addition was held not to be a part of the will, and the whole will was invalidated, as not being signed at the end thereof.<sup>49</sup> So there was a similar holding where before the attestation clause appeared the words "See annexed sheet," and a piece of paper with dispositive provisions was fastened to the will by metal fasteners.<sup>50</sup>

These cases are in direct conflict. The New York courts attempt to distinguish the English cases on the ground of the different language of their respective statutes, but no such distinction can be urged against the Pennsylvania case, which, with statute similar to that of New York, follows the English doctrine.

<sup>46</sup> Baker's Appeal, 107 Pa. St. 381.

<sup>47</sup> Baker's Appeal, 107 Pa. St. 381.

<sup>48</sup> Sisters of Charity v. Kelly, 67 N. Y. 409; Conway's Will, 124 N. Y. 455; Whitney's Will, 153 N. Y. 259; Andrew's Will, 162 N. Y. 1.

<sup>49</sup> Conway's Will, 124 N. Y. 455. See Secs. 182 and 186.

"It is not believed that any paper or document containing testamen-

tary provisions not authenticated according to the provisions of our Statute of Wills has yet been held to be a part of a valid testamentary disposition of property simply because it was referred to in the body of the will." Conway's Will, 124 N. Y. 455, citing O'Neil's Will, 91 N. Y. 516; Hewitt's Will, 91 N. Y. 261.

<sup>50</sup> Whitney's Will, 153 N. Y. 259.

### §165. Actual existence of document at time of execution of will.

The reference in the will to the document as already in existence is not conclusive. It must be shown further that the document sought to be incorporated was, in fact, in existence at the time of the execution of the will.<sup>51</sup> Thus where the will referred to a document as in existence at the date of executing such will, and the evidence showed that such document was not completed till two months afterwards, it was held that such document was not to be treated as part of the will.<sup>52</sup> Where the document referred to is written after the will is executed, even if immediately thereafter and on the same day, it can not be regarded as part of the will.<sup>53</sup>

### §166. Identification of document to be incorporated.

The document sought to be incorporated in the will by reference must be so described in the will that this description, together with evidence of the identity and genuineness of the document, will be sufficient to show that it is the document referred to in the will.<sup>54</sup> If the will is drawn in such vague or inaccurate terms that the document produced can be identified with that mentioned in the will only by extrinsic evidence dehors the will or contradicting its description, such document can not be taken as a part of the will, since such

<sup>51</sup> *Vestry of St. John's Parish v. Bostwick*, 8 App. D. C. 452; *Thayer v. Wellington*, 9 Allen, 283; *Langdon v. Astor*, 16 N. Y. 9; *In re Shillaber*, 74 Cal. 144; 5 Am. St. Rep. 433.

<sup>52</sup> *Shillaber's Estate*, 74 Cal. 144; 5 Am. St. Rep. 433; *Vestry of St. John's Parish v. Bostwick*, 8 App. D. C. 452.

<sup>53</sup> *Shillaber's Estate*, 74 Cal. 144; 5 Am. St. Rep. 433.

<sup>54</sup> *Habergham v. Vincent*, 2 Ves. Jr. 228; *Allen v. Maddock*, 11 Moore P. C. 427; *Young's Estate*, 123 Cal. 337; *Skerrett's Estate*, 67 Cal. 585;

*Phelps v. Robbins*, 40 Conn. 250; *Newton v. Society*, 130 Mass. 91; *Allen v. Boomer*, 82 Wis. 364.

"Before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit and unambiguous as to leave its identity free from doubt. The identification of the paper must be had from a description given in the will itself; otherwise the will is not wholly in writing as our law requires, but rests partly upon a writing and partly in parol." *Young's Estate*, 123 Cal. 337.

a will would be in part oral, and hence in violation of the Statute of Wills.<sup>55</sup> Thus a direction in a will that "two deeds" shall be handed to the husband of testatrix upon her death does not so identify the deeds as to incorporate them by reference. The fact that the deeds were placed with the will does not supply the lack of identification; nor does extrinsic evidence.<sup>56</sup> Where the will referred to "the enclosed papers numbered 1, 2, 3, 4, 5 and 6," and recited that such papers were signed by testator in the presence of the attesting witnesses, it was held that these papers were not sufficiently identified, especially as the witnesses did not see the papers sought to be incorporated.<sup>57</sup> A description of a document as "written instructions in my handwriting to be left with my will" was held insufficient as an identification.<sup>58</sup>

A testator by will provided that A should have certain household furniture, "which she has got a list of." A produced a list which purported to be a list of goods given to her son B. Such list was held not to be a part of the will, since it could be made a part only by extrinsic evidence contradicting the description in the will.<sup>59</sup> A reference to "a deed of gift" by testator to his son is not such description as will incorporate the deed.<sup>60</sup> But inasmuch as no written recitals can ever prove their own genuineness, a document referred to in a will may be incorporated, even though extrinsic evidence is necessary to identify the document referred to by showing that it is in fact the document described in the will.<sup>1</sup> The fact that the description of the document given in the will is not so exhaustive as to make identification unnecessary is therefore no objection to incorporating an extrinsic document, as such description would be practically impossi-

<sup>55</sup> *Marchant's Estate* (1893), P. 254; *Smart v. Prujean*, 6 Ves. Jr. 560; *Habergham v. Vincent*, 2 Ves. Jr. 228; *Goods of Greves*, 1 Sw. & Tr. 250; *Young's Estate*, 123 Cal. 337; *Phelps v. Robbins*, 40 Conn. 250; *Chambers v. McDaniel*, 6 Ired. Law (N. Car.) 226.

<sup>56</sup> *Young's Estate*, 123 Cal. 337.

<sup>57</sup> *Garnett's Estate* (1894), P. 90.

<sup>58</sup> *Phelps v. Robbins*, 40 Conn. 250.

<sup>59</sup> *Goods of Greves*, 1 Sw. & Tr. 250.

<sup>60</sup> *Bailey v. Bailey*, 7 Jones (N. Car.) 44; *Tuttle v. Berryman*, 94 Ky. 553.

ble, at least without copying such instrument bodily into the will.<sup>61</sup> Thus a description "according to the directions written in a book by Melvin W. Pierce, signed by me, Alexander De Witt, and witnessed by said Melvin W. Pierce," was held a sufficient identification.<sup>62</sup> So a statement that a certain disposition of property was made in pursuance of an agreement with the husband of testatrix "as expressed in his will" was held to incorporate the husband's will in that of testatrix, probably.<sup>63</sup> So a description "the deed which I send you a copy of" was sufficient where a copy of the deed was in fact enclosed in the same letter with the will.<sup>64</sup>

A reference to a deed by giving the parties and the date of the deed is a sufficient description,<sup>65</sup> as is a reference to a note by giving the parties and amount.<sup>66</sup>

### §167. Effect of incorporation of document in will.

If the document is of such nature and is so referred to in the will as to comply with the requirements already given, it is treated as part of the will, and as if it were set forth therein in full.<sup>67</sup> If incorporated by reference it makes no difference whether the original document of itself was valid at law or not. Thus a deed invalid because of defective execution,<sup>68</sup> or because it never was delivered,<sup>69</sup> may be incorporated in a will. But it has been held that the incorporated document is not such a part of the will that it should be offered for probate in connection with the will.<sup>70</sup> But where the will does not so refer to another document as to incorporate it as a part of the will,

<sup>61</sup> *Skerrett's Estate*, 67 Cal. 585; *Newton v. Society*, 130 Mass. 91; *Allen v. Boomer*, 82 Wis. 364.

<sup>62</sup> *Newton v. Society*, 130 Mass. 91.

<sup>63</sup> *Allen v. Boomer*, 82 Wis. 364.

<sup>64</sup> *Skerrett's Estate*, 67 Cal. 585.

<sup>65</sup> *Bizzey v. Flight*, L. R. 3 Ch. Div. 269; *Sheldon v. Sheldon*, 1 Rob. 81; *Fesler v. Simpson*, 58 Ind. 83.

<sup>66</sup> *Fickle v. Snepp*, 97 Ind. 289;

*Loring v. Summer*, 23 Pick. (Mass.) 98.

<sup>67</sup> *In re Soher's Estate*, 78 Cal. 477; *Fickle v. Snepp*, 97 Ind. 289; *Ford v. Ford*, 70 Wis. 19.

<sup>68</sup> *Skerrett's Estate*, 67 Cal. 585.

<sup>69</sup> *Mortgage Trust Company v. Moore*, 150 Ind. 465.

<sup>70</sup> *In re Marchant* (1893), Prob. 254; *Tuttle v. Berryman*, 94 Ky. 553.

such other document may still be treated as a declaration of trusts if the will devises property in trust; and may thus be indirectly enforced.<sup>71</sup>

### §168. Reference to verbal instructions.

Verbal instructions can not be incorporated into a written will by any words of reference, however clear, since by statute the will must be in writing.<sup>72</sup>

### §169. Document used to identify beneficiary.

Testator may refer to some other document solely for identification of the beneficiaries of his will, which is of itself complete, except as to such identification. Where this is the sole object of the reference to such other document the ordinary rules of incorporation do not apply. The document may not be specifically described,<sup>73</sup> and may not even be in existence at the time.<sup>74</sup>

## Part III—Signature of Testator.

### §170. Necessity of seal.

Unless the statute specifically requires it, a will need not be under seal, even in jurisdictions where a seal is necessary to the validity of a deed.<sup>75</sup> Even where the testimonium clause contains the word "seal," the omission of a seal does not invalidate the will.<sup>76</sup>

<sup>71</sup> Marchant's Estate (1893), P. 254.

<sup>72</sup> Oliffe v. Wells, 130 Mass. 221; Smith v. Smith, 54 N. J. Eq. 1; Sims v. Sims, 94 Va. 580; 27 S. E. 436 (a private trust upon verbal instructions).

<sup>73</sup> Dennis v. Holsapple, 148 Ind. 297; 46 L. R. A. 168.

<sup>74</sup> Piffard's Estate, 111 N. Y. 410; 2 L. R. A. 193.

<sup>75</sup> Smith v. Evans, 1 Wils. (Eng.) 313; Doe v. Pattison, 2 Black. (Ind.) 355; Avery v. Pixley, 4 Mass. 460; Ketchum v. Stearns, 76 Mo. 396; 8 Mo. App. 66; Diez's Will, 50 N. Y. 88; Williams v. Burnet, Wright (Ohio) 53; Hight v. Wilson, 1 Dall. 94; Rhorer v. Stehman, 1 Watts, 442.

<sup>76</sup> Ketchum v. Stearns, 76 Mo. 396; 8 Mo. App. 66.

### §171. Methods of signing.

The modern codes usually require a will to be signed as a requisite to its validity.<sup>77</sup> The signature required may under most statutes be made in two ways:

1. By the testator himself.
2. By some other person authorized by the testator in the manner required by statute.

The signature by the testator himself may consist either of his own name or of his mark. But in some states testaments of personalty do not need the signature of the testator.<sup>78</sup>

### §172. Signature by name.

The testator may sign his name by writing it out in full or by abbreviating it, or by writing his initials<sup>79</sup> or his Christian name,<sup>80</sup> or by using an assumed name where not done with intent to deceive.<sup>81</sup> Misspelling the name signed does not invalidate the will.<sup>82</sup> The signature may be in ink or with a pencil,<sup>83</sup> or with a stamp,<sup>84</sup> or a seal.<sup>85</sup>

### §173. Signature by mark.

The signature may consist of a mark. This is usually in the form of a cross, about which someone writes the name of the testator and the words "His mark." The law, however, does not usually require such form; any lines visible on paper which were put there by testator as his signature is a mark in

<sup>77</sup> *Remington v. Bank*, 76 Md. 546.

Under the early Pennsylvania statute, if testator were prevented by his last illness from signing or asking another to sign, his unsigned will would be valid. *Showers v. Showers*, 27 Pa. St. 485.

<sup>78</sup> *Orgain v. Irvine*, 100 Tenn. 193.

<sup>79</sup> *Goods of Emerson*, 9 L. R. Ir. 443; *In re Savory*, 15 Jur. 1042; *Jacob's Will*, 21 W. N. C. (Pa.) 510. In *Goods of Emerson*, 9 L. R. Ir. 443, a seal stamped with tes-

tator's initials was held to be a good signature.

<sup>80</sup> *Knox's Appeal*, 131 Pa. St. 230; *Guilfoyle's Will*, 96 Cal. 598.

<sup>81</sup> *In re Redding*, 2 Rob. 339; 14 Jur. 1052; *In re Glover*, 11 Jur. 1022.

<sup>82</sup> *Word v. Whipps*, 28 S. W. 151 (Ky.) (no official report).

<sup>83</sup> *Knox's Estate*, 131 Pa. St. 220.

<sup>84</sup> *Jenkyns v. Gaisford*, 3 S. & T. 93; 32 L. J. Prob. 122.

<sup>85</sup> *Goods of Emerson*, 9 L. R. Ir. 443.

the contemplation of the law.<sup>86</sup> Even where testator is erroneously named in the will and signs by mark the will is valid if executed *animo testandi*.<sup>87</sup>

A different view was expressed in an early Pennsylvania case, in which the court said: "A naked mark is not a signature at common law, and the statute was not designed to make it so."<sup>88</sup>

The signature by initials or by an assumed name has been upheld on the theory that it is good as a mark. So the indistinct name of the testator may be good as a signature by mark.<sup>89</sup>

But where testator tried to sign the will himself, and was unable to do so from weakness, a small line made by him in such unsuccessful attempt, not intended by him as a signature, is not a mark within the meaning of the law.<sup>90</sup>

<sup>86</sup> *Guthrie v. Price*, 23 Ark. 396; *Bailey v. Bailey*, 35 Ala. 687; *In re Guilfoyle's Will*, 96 Cal. 598; *Bevelot v. Lestrade*, 153 Ill. 625; *Robinson v. Brewster*, 140 Ill. 649; *Rook v. Wilson*, 142 Ind. 24; *Cleveland v. Spielman*, 25 Ind. 95; *Scott v. Hawk*, 107 Io. 723; *Thompson v. Thompson*, 49 Neb. 157; *Nickerson v. Buck*, 12 Cush. 332; *Sheehan v. Kearney*, — Miss. —; 21 So. 41; *Stephens v. Stephens*, 129 Mo. 422; *Higgins v. Carlton*, 28 Md. 115; *Jackson v. Jackson*, 39 N. Y. 153; *Pool v. Buffman*, 3 Ore. 438; *Moreland v. Brady*, 8 Ore. 303; *Flannery's Will*, 24 Pa. St. 502; *Van Hamswyck v. Wiese*, 44 Barb. 494; *Keeney v. Whitmarsh*, 16 Barb. 141; *Jenkins's Will*, 43 Wis. 610.

"Whatever testator . . . was shown to have intended as his signature was a valid signing, no matter how imperfect or unfinished or fantastical or illegible or even false the separate characters or symbols used might be when critically judged." *Plate's Estate*, 148 Pa. St. 55, quoted in *Sheehan v. Kearney* (Miss.) 35 L. R. A. 102.

<sup>87</sup> *Goods of Douce*, 2 Sw. & Tr.

593; 31 L. J. P. 172; 8 Jur. (N. S.) 723; 6 L. T. 789.

<sup>88</sup> *Greenough v. Greenough*, 11 Pa. St. 489. In this case a witness wrote testator's name and testator then made his mark. It was held that the name, not the mark, was the real signature; and that the witness who wrote testator's name must have been requested so to do. The weight of authority is that on these facts the mark is the real signature.

<sup>89</sup> *Hartwell v. McMaster*, 4 Redf. (N. Y.) 389; *Sheehan v. Kearney*, — Miss. —; 21 So. 41.

<sup>90</sup> *Everhardt v. Everhardt*, 34 Fed. Rep. 82; *Plate's Estate*, 148 Pa. St. 55.

So where testator wrote three letters of his name and then said that he could not finish it, whereupon proponent made a mark, and completed testator's name, it was held that as testator had abandoned the attempt to sign, the letters written by him were of no effect as signature by initials or by mark, and the signature by proponent was without authority. *Knapp v. Reilly*, 3 Dem. (N. Y.) 427.

This last proposition is only an application of the principle that the execution of the will must be *animo testandi*. In the cases cited the evidence showed that the testator had abandoned the execution of the will after attempting it in vain.

In some jurisdictions a seal has been held a sufficient mark under the statute.<sup>91</sup>

Unless required by statute it is not necessary that the name of the testator be written by the mark.<sup>92</sup>

If the name by the mark is written incorrectly such mistake does not invalidate the will.<sup>93</sup> And where the statute requires that testator's name must be written by the mark by a person who writes his own name as a witness, this statute is complied with where the subscribing witness writes testator's name in the body of a will which is so short that testator's name is near the mark.<sup>94</sup>

The illiteracy or ill health of testator is usually the cause for his signing by mark. In the absence of special statutory provisions as to when a signature by mark is valid it is not necessary, however, that any especial reason for his signing in this manner should exist. A testator who is able to write and who is in good health may, if he pleases, make a valid signature by mark.<sup>95</sup> It is, however, an unsafe thing to do, as it may

<sup>91</sup> *Townsend v. Pearce*, 8 Vin. Abr. 142; Pl. 3; *Gryle v. Gryle*, 2 Atk. 177. (These were cases of republication where testator's name was already written, and the addition of the seal was a sufficient acknowledgment.)

<sup>92</sup> *In re Bryce*, 2 Curt. 325; *Scott v. Hawk*, 107 Io. 723; 77 N. W. 467; *Thompson v. Thompson*, 49 Neb. 157.

<sup>93</sup> *Goods of Clark*, 27 L. J. P. 18; 1 Sw. & Tr. 22; 4 Jur. (N. S.) 24; 6 W. R. 307; *Bailey v. Bailey*, 35 Ala. 687; *Long v. Zook*, 13 Pa. St. 400.

Thus where testatrix was named throughout the will by her name before marriage, the will was held

valid, it appearing clearly that testatrix was in fact the person intended.

*Goods of Clark*, 1 Sw. & Tr. 22; 27 L. J. P. 18; 4 Jur. (N. S.) 24; 6 W. R. 307.

<sup>94</sup> *Guilfoyle's Will*, 96 Cal. 598.

<sup>95</sup> *Taylor (or Baker) v. Dening*, 3 N. & P. 228; 8 A. & E. 94; 1 W. W. & H. 148; 7 L. J. Q. B. 137; 2 Jur. 775; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.) 102; *St. Louis Hospital v. Williams*, 19 Mo. 609; *St. Louis Hospital v. Wegman*, 21 Mo. 17; *Northcutt v. Northcutt*, 20 Mo. 266; *Ray v. Hill*, 3 Strob. (S. Car.) 29; *Rosser v. Franklin*, 6 Gratt. (Va.) 1.

*Contrary view.* In Pennsylvania



give rise to suspicions of fraud or forgery. Where the statute permits signature by mark "when the person can not write," physical inability as well as illiteracy is a good excuse for signing by mark.<sup>96</sup>

#### §174. Signature by other person.

The codes usually require that the will must be signed "by testator." In construing this provision it is held that the usual rules of agency have no application, and that no person other than testator can sign the will for testator and in his stead, unless there is a provision of the statute especially authorizing such signature by another.<sup>97</sup> Many of the codes provide that under certain conditions and in a specified manner some person other than testator may sign the will instead of testator.<sup>98</sup>

At the risk of repetition it must be noted that in each particular case the statute under which the will is executed must be complied with, and to determine what is such compliance the provisions of the statute must be carefully considered. The general principles underlying the statutes of most of the states are presented here; the details must be sought in the respective statutes. These statutes, as a rule, agree in requiring

(1) That the other person must sign the will in the presence of testator.

(2) That the other person must sign the will at the express direction of testator.

the courts have held that some special reason must appear for the use of the mark, and in the absence of such reason a will signed by a mark is invalid. *Cavett's Appeal*, 8 Watts & S. 21; *Greenough v. Greenough*, 11 Pa. St. 489.

<sup>96</sup> *Guilfoyle's Will*, 96 Cal. 598.

<sup>97</sup> *In re McElwaine*, 18 N. J. Eq. 499; citing *Robins v. Coryell*, 27 Barb. (N. Y.) 559; *Chaffee v. Bap-*

*tist Convention*, 10 Paige (N. Y.) 91; *Stevens v. Van Cleve*, 4 Wash. (U. S.) 262; *Fritz v. Turner*, 46 N. J. Eq. 515.

<sup>98</sup> *Riley v. Riley*, 36 Ala. 496; *Toomes's Estate*, 54 Cal. 509; *Herbert v. Berrier*, 81 Ind. 1; *Haynes v. Haynes*, 33 O. S. 598; *Peake v. Jenkins*, 80 Va. 293; *Jenkins's Will*, 43 Wis. 610.

### §175. Presence of testator.

A signature of testator's name made by another out of his presence is not a valid signature under these statutes.<sup>99</sup> The 'presence of the testator' in this connection means exactly what it does when used with reference to the signing of the will by the subscribing witnesses thereto. The meaning of the word "presence" will therefore be discussed under the topic of Attestation.<sup>100</sup> It will be sufficient to state here that the name can not be written in the presence of testator unless testator is conscious of what is taking place, as well as physically present.<sup>101</sup> Further, it has been held a good signing in the testator's presence where testator's name was written out of his presence; but afterwards in testator's presence the person writing testator's name added "By A. B., by request."<sup>102</sup> The name must be actually written by such other. If testator requests this other person to write his name and he refuse, no matter what his motive, such request is not a good execution.<sup>103</sup>

### §176. Express direction of testator.

The codes generally require that this signature by another person be at the express direction of the testator.<sup>104</sup> The most common and safe form of express direction is one given in so many words by the testator. This, however, is not indispensable. He may give the express direction by adopting a suggestion of some other person as his own. Thus when the attorney of the testator had drawn the will and then said to testator: "You can make your cross and I can sign it for you, if you so direct;" and the testator said: "Very well, do so;" it was held to be an express direction to sign.<sup>105</sup> It has been intimated in obiters that the gestures and acts of the testator may amount to an express direction without the use of any

<sup>99</sup> Catlett v. Catlett, 55 Mo. 330.

<sup>100</sup> See Sec. 209, *et seq.*

<sup>101</sup> Dunlop v. Dunlop, 10 Watts, (Pa.) 153; Chappell v. Trent, 90 Va. 849.

<sup>102</sup> *Ex parte* Leonard, 39 S. Car. 518.

<sup>103</sup> Stricker v. Groves, 5 Whart. 386. (Witness refused solely because of a misapprehension of the law.)

<sup>104</sup> Greenough v. Greenough, 11 Pa. St. 489.

<sup>105</sup> Mullin's Estate, 110 Cal. 252.

words; and this is undoubtedly true.<sup>106</sup> But the fact that the testator knows that someone is signing his name to the will and makes no objection does not amount to an express direction.<sup>107</sup>

In some states there must be some special reason, such as illiteracy or extreme sickness, why testator does not sign the will himself. But where this is the rule only a reasonable excuse is needed for his requesting another to sign. Thus, where he was physically and mentally able to sign, but it would have been very dangerous for him to make such exertion, it is held that he may sign by another.<sup>108</sup>

### §177. Who can sign for testator?

In addition to the requirements of statute the courts have considered in this connection two more important topics:

(3) Who can sign the will for testator.

(4) What form of signature must be used in signing the will.

In the absence of special statutory restriction, any person may sign the will for testator if properly authorized. Thus, one of the subscribing witnesses<sup>109</sup> or a beneficiary may sign the will for testator.<sup>110</sup>

### §178. Form of signing for testator.

The best method of signing the will in such case is to write the name of testator, followed by the statement that it was written by subscriber, naming such subscriber, in the presence

<sup>106</sup> Waite v. Frisbie, 48 Minn. 420.

<sup>107</sup> Waite v. Frisbie, 45 Minn. 361; 48 Minn. 420; Murry v. Hennesy, 48 Neb. 608, citing Asay v. Hoover, 5 Pa. St. 21; Grabill v. Bear, 13 Pa. St. 396; Greenough v. Greenough, 11 Pa. St. 489.

<sup>108</sup> Diehl v. Rogers, 169 Pa. St. 316; 47 Am. St. Rep. 908.

<sup>109</sup> Trembly v. Trembly (Ohio Supreme Ct. Commission), 11 Weekly

Law Bulletin Supplement, 50 (no official report). *Ex parte* Leonard, 39 S. Car. 518; Toomes's Estate, 54 Cal. 309; *In re* Langan, 74 Cal. 353; Herbert v. Berrier, 81 Ind. 1; Riley v. Riley, 36 Ala. 496.

<sup>110</sup> McGee v. Porter, 14 Mo. 611. This seems to be the holding of the court in this case, though the will was declared invalid on account of a technical defect in attestation.

of testator and at his express request. But such accuracy of statement is not indispensable unless demanded by the provisions of the statute. In some jurisdictions some such accuracy is required by the provisions of the statute.<sup>111</sup> Thus in Missouri the person who wrote testator's name had to add his name as a subscribing witness to the will and to state that he subscribed testator's name at his request or the will was void.<sup>112</sup> Under a somewhat similar New York statute it was held that if one who signed a will for testator omitted to sign his own name the will was not thereby invalidated, though such witness incurred a penalty.<sup>113</sup> In the absence of specific statutory provision the signature of testator's name seems to be all that is necessary.<sup>114</sup> A signature "A. B. by C. D. in his presence and at his request" was held valid.<sup>115</sup> Signatures have also been held valid where the witness signs his own name first and adds that it is for testator. Thus "E. N. for R. D. at her request" was upheld, R. D. being the testatrix.<sup>116</sup> So has "Written by T. J. R. in the presence of A and B and W. M. R. T. J. R., witness. By request of the above W. M. R.," W. M. R. being the testator;<sup>117</sup> and it has been held a valid signature where the person signing wrote "Signed on behalf of testator, in his presence and by his direction by me," and signed his own name thereto.<sup>118</sup>

### §179. Name of testator added by other to his mark.

It has been said already that the best way of signing by mark is for the testator to make his mark and for some other person who can write to put testator's name by his mark. Is

<sup>111</sup> In the matter of the will of Cornelius, 14 Ark. 675; McGee v. Porter, 14 Mo. 611; Pool v. Bufum, 3 Ore. 438.

<sup>112</sup> McGee v. Porter, 14 Mo. 611; Northcutt v. Northcutt, 20 Mo. 266; Simpson v. Simpson, 27 Mo. 288. The last case notes a change in the Missouri statute on this point.

<sup>113</sup> Hollenbeck v. Van Valkenburgh, 5 How. Pr. 281.

<sup>114</sup> Haynes v. Haynes, 33 O. S. 598.

<sup>115</sup> Abraham v. Wilkins, 17 Ark. 292.

<sup>116</sup> Vernon v. Kirk, 30 Pa. St. 218.

<sup>117</sup> Riley v. Riley, 36 Ala. 496.

<sup>118</sup> *In re Clark*, 2 Curt. 329.

this a signature by the testator or by another? Some courts have held that the addition of testator's name, if by his direction, has the effect of a signature by another person.<sup>119</sup> The effect of such holding under the former Missouri statute was remarkable. If testator signed by his mark the will was valid, but if at his request some one wrote testator's name by the mark the will was thereby rendered invalid, unless such person also added the statement that he signed testator's name at his direction and subscribed his own name as a witness.<sup>120</sup> The more logical view is that if the testator has signed by a mark the will is valid, even if some one has added testator's name, since the signature may be ignored and the will regarded as signed by mark only.<sup>121</sup> Hence, if by mistake the wrong name is written by the mark the signature is not invalidated thereby.<sup>122</sup> But, on the other hand, where testator's name was written, leaving a place for a mark, and no mark has been inserted, it is held that such a signature may be treated as a signature by another. Thus a will was produced with a signature "A (his mark) B," but no mark was made. It appearing that the will was executed as a finality, it was assumed, in the absence of the mark, that testator had adopted as his own his name written by another about the place where the mark was to be inserted.<sup>123</sup>

### §180. Guiding the hand of testator as signature by testator.

It not unfrequently happens that the testator's hand is guided by some other person when he signs his name or makes his mark. In such case this is a signing by the testator himself, and not by the person who guides his hand.<sup>124</sup> So where

<sup>119</sup> *St. Louis Hospital Association v. Williams*, 19 Mo. 609; *Northcutt v. Northcutt*, 20 Mo. 266; *St. Louis Hospital Association v. Wegman*, 21 Mo. 17; *Pool v. Buffum*, 8 Ore. 438; *Tucker v. Sandidge*, 85 Va. 546.

<sup>120</sup> See cases cited in above note.

<sup>121</sup> In the matter of the will of *Cornelius*, 4 Ark. 675; *Rook v. Wilson*, 142 Ind. 24; *Jackson v.*

*Jackson*, 39 N. Y. 153; *Moreland v. Brady*, 3 Ore. 303.

<sup>122</sup> *Rook v. Wilson*, 142 Ind. 24.

<sup>123</sup> *Cleveland v. Spilman*, 25 Ind. 95.

<sup>124</sup> *Wilson v. Beddard*, 12 Sim. 28; 10 L. J. Ch. 305; 5 Jur. 624; *Vines v. Clingfost*, 21 Ark. 309; *Higgins v. Carlton*, 28 Md. 115; *Sheehan v. Kearney*, — Miss. —; 35 L. R. A. 1028, 21 So. 41; citing *Watson v.*

the testator holds the pen while the other person really writes the name or makes the mark it is a signature by the testator.<sup>125</sup> Even where the testator is so weak as to be unable to write his name and another person guides his hand so as to form the letters of testator's name it is held to be a valid signature by testator if he touches the pen while his name is thus written.<sup>126</sup> Thus in New Jersey, where another can not sign for testator, testator was so weak that he was unable to write his name unaided, and the evidence left it in doubt whether the person who steadied his hand did not guide his fingers so as to write his name. The court held that in any event the signature was valid.<sup>127</sup> But where testatrix put her hand upon the hand of another person who was writing her name it was held to be a signature by such other person, and not by testatrix.<sup>128</sup> And where testator was unconscious and his mark was made by putting a pen into his hand and guiding so as to make a mark, it was held not to be a valid execution.<sup>129</sup>

### §181. Place of signature upon will.—Early statutes.

The original Wills Act merely required that a will be signed. The wording of this statute was in this respect like that of the Statute of Frauds, and a similar construction followed. It was held that the signature need not be at the end of the will, but that it might appear in any part thereof.<sup>130</sup> All that was nec-

Pipes, 32 Miss. 451; Vandruff v. Rinehart, 29 Pa. St. 232; McMechen v. McMechen, 17 W. Va. 683; Cozzen's Will, 61 Pa. St. 196; Stevens v. Van Cleve, 4 Wash. C. C. 262.

<sup>125</sup> Campbell v. McGuiggan, N. J. Eq. (1896), 34 Atl. 383.

<sup>126</sup> Fritz v. Turner, 46 N. J. Eq. 515; Sheehan v. Kearney (Miss.) 35 L. R. A. 102; Vandruff v. Rinehart, 29 Pa. St. 232; Trezevant v. Rains, 85 Tex. 329.

<sup>127</sup> Fritz v. Turner, 46 N. J. Eq. 515.

<sup>128</sup> Waite v. Frisbie, 45 Minn. 361; 48 Minn. 420.

<sup>129</sup> Dunlop v. Dunlop, 10 Watts 153.

<sup>130</sup> Armstrong's Exr. v. Armstrong, 29 Ala. 538; Brown's Will, 1 B. Mon. (Ky.) 56; Miles' Will, 4 Dana (Ky.) 1; Hall v. Hall, 17 Pick. (Mass.) 373; Catlett v. Catlett, 55 Mo. 330; Kirkpatrick's Will, 22 N. J. Eq. 463; Allen v. Everett, 12 B. Mon. 371; Lawson v. Dawson's Estate (21 Tex. Civ. App. 361), 53 S. W. 64. \*

essary was that the name be written by the testator,<sup>131</sup> or by some person in his presence and by his direction,<sup>132</sup> with the intention of finally executing the instrument.<sup>133</sup>

It was even held before the great strictness exacted by modern statutes that a signature written by another out of testator's presence and not at the end of the will might be adopted by him as his signature. The best method of indicating such intention was by express language in the will. The formalities apparent on the face of the will might also indicate such intention, without the use of express language. Some courts held that extrinsic evidence could not be received to show that the testator's name in the body of the will was intended as a signature.<sup>134</sup> Many of these decisions depend on specific statutory provisions. Other courts receive such evidence and allow the surrounding facts and circumstances, including the declarations of testator,<sup>135</sup> to be received to determine whether the name of testator was intended as a signature or not.

Under a statute which merely required a will to be signed "in such a manner as to make it manifest that the name is intended as his signature," it was held that where testator's name appeared in his own writing at the beginning of the will, and also on the envelope in which the will was contained, but not at the end of the will, it was not a sufficient signature within the statute;<sup>136</sup> and where a will contained testator's name in his own handwriting in the body of the will, but concluded with an unsigned testimonium clause, "in witness whereof I have hereunto set my hand," it was held that testator had intended that

<sup>131</sup> *Adams v. Field*, 21 Vt. 256; *Morison v. Turnour*, 18 Ves. 175.

<sup>132</sup> *Armstrong's Exr. v. Armstrong*, 29 Ala. 538.

<sup>133</sup> *In matter of Booth's Will*, 127 N. Y. 109. (In this case testatrix's name was written only at the beginning of the will. She said to the witnesses: "This is my will; take it and sign it." It was held that if a will controlled as this was, by New Jersey law, could be valid

where not signed at the end, the facts given did not show her intention that the name as written should be a signature.)

<sup>134</sup> *Jolly's Will*, 5 N. J. Eq. 456; *Warwick v. Warwick*, 86 Va. 596.

<sup>135</sup> *Armstrong's Exr. v. Armstrong*, 29 Ala. 538; *Adams v. Field*, 21 Vt. 256.

<sup>136</sup> *Warwick v. Warwick*, 86 Va. 596.

his name in the body of the will was not to be the final signature thereto.<sup>137</sup>

So, where testatrix's name appeared in the body of the instrument only, but not at the end, it was not a valid signature where there was no evidence except a declaration of testatrix that she had written the will.<sup>138</sup>

### §182. Place of signature upon will.—Modern statutes.

In order to remove the uncertainty which arises from the insertion of testator's signature in the body of the will, many jurisdictions have provided by statute that a will, to be valid, must be signed by testator at the end thereof.<sup>139</sup>

Where such a statute is in force any question about the effect of testator's signature in the body of the will is summarily settled, but important questions are raised in its place in determining what is the end of the will.

### §183. Signature with reference to attestation clause.

Testator's signature is often followed by an attestation clause. This has been held to be a signature at the end of the will.<sup>140</sup>

The signature of testator is sometimes written after the attestation clause. This has also been held to be a good signature at the end of the will.<sup>141</sup> And where testator wrote his name after the attestation clause on the right, and the witnesses wrote their names opposite on the left, it was said that an objection to such a mode of signing was frivolous.<sup>142</sup> So, where

<sup>137</sup> Catlett v. Catlett, 55 Mo. 330.

<sup>138</sup> Schermerhorn v. Merritt (Mich.) (1900), 82 N. W. 513.

<sup>139</sup> Jones v. Jones, 3 Met. (Ky.) 266; Glancey v. Glancey, 17 O. S. 134; Baker v. Baker, 51 O. S. 217. Under such statutes where testator signs in the middle of the will by mark, the will is invalid.

Margary v. Robinson, 56 L. J. P. 42; 12 P. D. 8; 57 L. T. 281; 35 W. R. 350; 51 J. P. 407.

<sup>140</sup> Goods of Williams, 35 L. J. P. 2; L. R. 1 P. 5; 11 Jur. (N. S.) 982; 13 L. T. 304; 14 W. R. 111; *In re Dayger*, 110 N. Y. 666.

<sup>141</sup> Younger v. Duffie, 94 N. Y. 535; Cohen's Will, 1 Tuck. 286.

<sup>142</sup> Hallowell v. Hallowell, 88 Ind. 253; So Goods of Puddephatt, 39 L. J. P. 84; L. R. 2 P. 97.



testator wrote his name in a blank in the attestation clause it was held to be a signature at the end of the will.<sup>143</sup>

It may be laid down as a general rule that as an attestation clause is not strictly a part of the will, but rather a certificate thereto, and yet a certificate made necessary by statute, the signature of testator may either precede or follow it and still be at the "end" of the will.

#### §184. Effect of blanks in body of the will.

In some cases blanks occur in the body of the will, making interlineations possible. A will signed after the last clause of such a will is held to be signed at the end thereof.<sup>144</sup>

Thus, where each clause of the will was written on a separate sheet of paper, with a blank both above it and below it, it was held valid.<sup>145</sup>

#### §185. Effect of blank immediately before signature.

In other cases the testator signs his name after the body of the will, but leaves a blank of some considerable extent between the body of the will and his signature. The courts are at variance as to whether such a will is signed at the end thereof or not. Some courts look upon the statute requiring the signature to be at the end, as intended only to do away with the difficulty of determining whether a will was signed or not. Under such a theory of the existence of the statute they hold that a signature after the body of the will is at the end, even though a blank space intervenes.<sup>146</sup>

<sup>143</sup> Goods of Walker, 2 Sw. & Tr. 354; 31 L. J. P. 62; 8 Jur. (N. S.) 314; 5 L. T. 766; Goods of Mann, 28 L. J. P. 19; Goods of Pearn, 45 L. J. P. 31; 1 P. D. 70; 33 L. T. 705; 24 W. R. 143; 28 L. J. P. 19; Goods of Cassmore, 38 L. J. P. 54; L. R. 1 P. 653; 20 L. T. 497; 17 W. R. 627; Goods of Harris, 23 W. R. 734; Goods of Huckvale, 36 L. J. P. 84; L. R. 1 P. 375; 16 L.

T. 434; 16 W. R. 64; *In re Acker*, 5 Dem. 19.

<sup>144</sup> *Barnewall v. Murrell*, 108 Ala. 366.

<sup>145</sup> *Barnewall v. Murrell*, 108 Ala. 366.

<sup>146</sup> So it was held where the will ended on one page and the signature of testator was placed on the next page, leaving a blank of from a few lines to half a page interven-

Other courts hold that an additional reason for requiring the signature to be at the end of the will was to prevent fraudulent additions to the will. Such courts, therefore, hold that a signature separated from the body of the will by a blank space is not a signature at the end within the meaning of the statute.<sup>147</sup>

### §186. Additions after signature.

Wills are made in which the testator's signature is followed by additional writing. Is such a will signed at the end?

In discussing this question we must notice:

1. If such writing was added after the execution and attestation were completed it is in legal effect a codicil. If not duly signed and executed itself, such codicil is invalid; but such invalidity can not affect the validity of a will previously signed and executed.<sup>148</sup>

2. The addition to the will may have been written before execution and may be so referred to in the body of the will as to be incorporated by reference therein. What is incorporation by reference has already been discussed. It is sufficient to state here that where the addition below the signature has been incorporated in the will by reference its presence does not invalidate the will, and the will is considered in law as being signed at the end thereof.<sup>149</sup>

ing. *Goods of Archer*, 40 L. J. P. 80; L. R. 2 P. 252; 25 L. T. 274; 19 W. R. 785; *Smee v. Bryer*, 6 Moore, P. C. 404; 13 Jur. 289; *Hunt v. Hunt*, 33 L. J. P. 135; L. R. 1 P. 209; 14 L. T. 859; *Derinzy v. Turner*, 1 Ir. Ch. R. 341; *Gilman's Will*, 38 Barb. 364; *Goods of Horsford*, 44 L. J. P. 9; L. R. 3 P. 211; 31 L. T. 553; 23 W. R. 211.

So, where the will was written on the first page, and the signature was on the third page. *Goods of Williams*, 35 L. J. P. 2; L. R. 1 P. 5; 11 Jur. (N. S.) 982; 13 L. T. 304; 14 W. R. 111.

So where the will ended on the first page and was signed on the fourth. *Goods of Fuller*, 62 L. J. P. 40; (1892) P. 377; 1 R. 453; 67 L. T. 501; 56 J. P. 713; *Goods of Rice, Ir.* R. Eq. 176.

<sup>147</sup> *Soward v. Soward*, 1 Duv. (Ky.) 126. (In this case two blank pages intervened between the signature of testator and the end of the will.)

<sup>148</sup> *In re Jacobson*, 6 Dem. 298; *Heise v. Heise*, 31 Pa. St. 246.

<sup>149</sup> *Baker's Appeal*, 107 Pa. St. 381.

Leaving out of consideration, therefore, wills in which additions are made in the nature of codicils, after execution, and wills in which the additions made below the signature are incorporated in the will by reference, and discussing the effect of additions made below the signature before the execution of the will and not incorporated therein by reference, we must first notice that such additions are divided into two classes as to their effect on the validity of the will.

1. Such additions as invalidate the will.

2. Such additions as do not invalidate the will, but are merely void themselves.

The effect of the addition depends upon its nature.

1. If the addition is a dispositive clause, *i. e.*, one which adds to or revokes previous bequests, such clause invalidates the whole will.<sup>150</sup>

Thus, where the testator signed his will, then said that he would finish it, and added a bequest, after which the witnesses signed their names, it was held that testator's signature was not at the end, and the whole will was invalidated;<sup>151</sup> and the addition below the signature of reasons for making the will has been held to invalidate will where it contained a repetition of the bequest.<sup>152</sup>

A will signed on the first page and written on the second and third pages was held valid upon the ingenious theory that the will could be regarded as beginning after testator's signature, and being carried over to the first page and thence down to the execution;<sup>153</sup> and that the sense of the will and not the order determines what the end is.<sup>154</sup>

But in a recent New York case the will was written upon a

<sup>150</sup> *Andrew's Will*, 162 N. Y. 1, *In re Hewitt's Will*, 91 N. Y. 261; *Hays v. Harden*, 6 Pa. St. 409.

<sup>151</sup> *Glancy v. Glancy*, 17 O. S. 134.

<sup>152</sup> *Hays v. Harden*, 6 Pa. St. 409. In discussing this case some years after, in *Wikoff's Appeal*, 15 Pa. St. 281, the court said that the addition contained reasons for a

precedent devise which might have influenced the construction of it, and also an additional substantive devise.

<sup>153</sup> *Goods of Wotton*, 43 L. J. P. 14; L. R. 3 P. 159; 30 L. T. 75; 22 W. R. 352.

<sup>154</sup> *Goods of Kimpton*, 3 Sw. & Tr. 427; 33 L. J. P. 153; 10 L. T. 137.

blank printed for the purpose, consisting of two sheets connected at the left margin like the leaves of a book. The second page was numbered at the top "3rd page," and upon it were the signatures of testator and the subscribing witnesses. The third page was numbered at the top "2nd page," and contained certain dispositive provisions, no sentence being carried over from the second to the third page. It was held that the will was not subscribed at the end, and was not entitled to be admitted to probate.<sup>155</sup>

The clause added below the signature may appoint an executor. In such case the authorities are at variance as to its effect upon the will. Some courts hold that the addition of such a clause below the signature invalidates the whole will.<sup>156</sup> So, where testator signs in the middle of the clause appointing an executor, his signature is not at the end of the will.<sup>157</sup>

Thus, where a will concluded, "I make, constitute and appoint Edward McCarthy to be executor [J. Kelly] of this my last will and testament, hereby revoking all former wills by me made" it was held that the signature "J. Kelly" was not at the end within the meaning of the statute.<sup>158</sup>

So where, after signing his name, testator added a clause directing the executor to sell certain realty and devote the proceeds to paying the debts and legacies, and then the witnesses signed, it was held that the will was invalid as not signed at the end.<sup>159</sup> Other authorities hold that, while such clause is void, the will above the signature is valid.<sup>160</sup>

As the appointment of an executor is testamentary in its nature, the former opinion seems the better on principle.

A signature written in the final clause of the will has been

<sup>155</sup> *Andrew's Will*, 162 N. Y. 1.

<sup>156</sup> *In re Jacobson*, 6 Dem. 298; *In re Mies*, 13 St. Rep. (N. Y.) 756; *Wineland's Appeal*, 118 Pa. St. 37.

<sup>157</sup> *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Hewitt's Will*, 91 N. Y. 261; *O'Neill's Will*, 91 N. Y. 516.

<sup>158</sup> *Sisters of Charity v. Kelly*, 67 N. Y. 409, distinguishing the En-

glish cases, *In re Woodley*, 3 S. & T. 429; *In re Walker*, 2 S. & T. 354; *In re Cassmore*, 1 L. R. Pro. & Div. p. 653, as being under a more liberal statute.

<sup>159</sup> *In re Blair*, 152 N. Y. 645; 84 Hun, 581.

<sup>160</sup> *McCullough's Estate*, Myr. Prob. (Cal.) 76.

held to be at the end. Thus, a signature partly across the last line but one, all but one letter being above the last line, was held to be at the end.<sup>161</sup>

Where dispositive clauses follow testator's signature the usual rule is that the whole will is invalid.<sup>162</sup> But in a recent English case the attestation clause was placed at the bottom of the first page, and the last sentence of the will was an unfinished direction for settling his estate. The words "all cheques to be paid away shall be" preceded the attestation clause and signature; on the second page followed "signed by my daughter Emma and all accounts shall be settled by her." This will was held valid as to the part preceding the signature, but invalid as to the part on the second page.<sup>163</sup>

If the clause added below the signature neither affects the disposition of the estate nor appoints executor or guardian, the authorities are unanimous that such clause does not invalidate the will, and that within the meaning of the statute the signature is at the end of the will.<sup>164</sup>

Thus, where testator wrote after his signature "My sister in law (the executrix) is not required to give bond when probated," such addition did not invalidate the will;<sup>165</sup> and the addition of some figures below the signature, having no bearing upon the will, does not invalidate it;<sup>166</sup> or an unsigned map referred to in the will;<sup>167</sup> or a memorandum, "This will was commenced in the year of our Lord 1843 and added to as occasion required."<sup>168</sup>

A reference to a schedule which testator failed to annex to the will does not invalidate the will where testator signed at the end of the will as written.

<sup>161</sup> *Goods of Woodley*, 3 Sw. & Tr. 429; 33 L. J. P. 154.

<sup>162</sup> See preceding cases cited in this section.

<sup>163</sup> *In re Anstee* (1893), P. 283; *Goods of Arthur*, L. R. 2 P. 273; 25 L. T. 274; 19 W. R. 1016; *Sweetland v. Sweetland*, 4 Sw. & Tr. 6; 34 L. J. P. 42; 11 Jur. (N. S.), 182; 11 L. T. 749; 13 W. R. 504.

<sup>164</sup> *Flood v. Pragoff*, 79 Ky. 607;

*Wikoff's Appeal*, 15 Pa. St. 281; *Tonnele v. Hall*, 4 N. Y. 140; *Conboy v. Jennings*, 1 S. C. (N. Y.) 622; *Baker v. Baker*, 51 O. S. 517.

<sup>165</sup> *Baker v. Baker*, 51 O. S. 217.

<sup>166</sup> *Fouche's Estate*, 147 Pa. St. 395; or the date, *Flood v. Pragoff*, 79 Ky. 607.

<sup>167</sup> *Tonnele v. Hall*, 4 N. Y. 140.

<sup>168</sup> *Wikoff's Appeal*, 15 Pa. St. 281.

### §187. Signature opposite the end or foot of the will.

Under some statutes, of which the modern English statute is a type, testator's signature is good if placed opposite the end or foot of the dispositive clauses of the will. Where testator signed his name on the left side of the will, and continued the will in short lines on the right side to a point slightly below testator's signature, the will was held to be properly signed.<sup>169</sup>

A signature on the lower edge of the page on which the dispositive part of the will was written,<sup>170</sup> or along the margin of the will opposite the dispositive part of the will is a good signature at the end in the meaning of these statutes.<sup>171</sup>

Where the will is written on the first and third pages of the form, and testator's signature was written on the second page opposite the end of the dispositive part of the will, it is held valid under these statutes.<sup>172</sup>

Where the will covered the first three pages of a form, and was signed at the end of the first page, this was not at the end, or opposite the end, of the will.<sup>173</sup>

## Part IV—Attestation and Subscription.

### §188. Attestation and subscription entirely statutory.

Unless the statute requires it, it is not necessary that a will be attested or subscribed by witnesses.<sup>174</sup> Even where the statutory requirement is that the will be "proved by the oaths

<sup>169</sup> Goods of Ainsworth, L. R. 2 P. 151; 23 L. T. 324.

<sup>170</sup> Goods of Jones, 4 Sw. & Tr. 1; 34 L. J. P. 41; 11 Jur. (N. S.) 118; 13 L. T. 210; 13 W. R. 414.

<sup>171</sup> Goods of Wright, 4 Sw. & Tr. 35; 34 L. J. P. 104; 13 L. T. 195; Goods of Collins, 3 L. R. Ir. 241; Goods of Stoakes, 31 L. T. 552; 23 W. R. 62.

<sup>172</sup> Goods of Powell, 4 Sw. & Tr. 34; 34 L. J. P. 107; 13 L. T.

195; 13 W. R. 996; Goods of Coombs, 36 L. J. P. 25.

<sup>173</sup> Royle v. Harris (1895), P. 163.

<sup>174</sup> *Ex parte* Henry, 24 Ala. 638; Mealing v. Pace, 14 Ga. 596; Leathers v. Greenacre, 53 Me. 561; Marston v. Marston, 17 N. H. 503; Kisecker's Estate, 190 Pa. St. 476; 42 Atl. 886; Orgain v. Irvine, 100 Tenn. 193; Hays v. Ernest, 32 Fla. 18.

or affirmations of two or more competent witnesses," this does not require attestation or subscription, but merely that the signature of testator be proved.<sup>175</sup> But in England and in all American states, with the exception of Pennsylvania, the provisions of the statute require that the ordinary will be attested and subscribed by witnesses.<sup>176</sup> There are special exceptions to this general rule, such as holographic wills, nuncupative wills and the like, which are discussed elsewhere.<sup>177</sup>

In most states the same rules as to attestation and subscription apply to testaments of personalty as to wills of realty. In some states, however, fewer witnesses are necessary in cases of testaments than in those of wills,<sup>178</sup> and in others no witnesses at all are necessary for testaments.<sup>179</sup>

### §189. Distinction between attestation and subscription.

The language of the statutes indicates a distinction between attestation and subscription, as the will is required to be attested and subscribed. Attestation is said by some courts to be the act of perceiving the performance of the various acts necessary to the legal execution of a will.<sup>180</sup> Subscription is the act of the attesting witness in signing his name upon the will to identify the instrument thus attested.<sup>181</sup>

This distinction is repudiated by some well-considered modern cases as being purely verbal, and "attestation" and "subscription" are there said to be practically synonymous terms in-

<sup>175</sup> *Frew v. Clarke*, 80 Pa. St. 170; *Rohrer v. Stehman*, 1 Watts (Pa.) 442; *Rossetter v. Simmons*, 6 S. & R. 452; *In re Kisecker's Estate*, 190 Pa. St. 476. But in Iowa under a statute requiring a will to be "witnessed by two competent witnesses," it was held that the witnesses must subscribe their names. *Boyens' Will*, 23 Io. 354.

<sup>176</sup> *Ex parte Winslow*, 14 Mass. 421; *Bartee v. Thompson*, 8 Bax. 508; and see cases cited in following sections.

<sup>177</sup> See Chap. XIII.

<sup>178</sup> *Hays v. Ernest*, 32 Fla. 18.

<sup>179</sup> *Orgain v. Irvine*, 100 Tenn. 193; *Franklin v. Franklin*, 90 Tenn. 44.

<sup>180</sup> *Swift v. Wiley*, 1 B. Mon. (Ky.) 117, quoted and followed in *Reed v. Watson*, 27 Ind. 448.

<sup>181</sup> See the cases cited in the preceding note, and also *Walker's Estate*, 110 Cal. 387.

volving the same elements.<sup>182</sup> Under this view no change of intention on the part of the legislature can be presumed, because it uses "attest" in one connection and "subscribe" in another.

### §190. Number of subscribing witnesses.

The number of subscribing witnesses necessary to the validity of the will is determined by local statute. Two or three is the number usually required. Whatever the number required by statute, a will attested and subscribed by any less number is invalid.<sup>183</sup>

So, where a will was written in duplicate, and by mistake testator signed one and the subscribing witnesses the other, it was held that the will was not valid.<sup>184</sup> Where two witnesses subscribed the will, one of whom was incompetent, it was held

<sup>182</sup> "It would be difficult, no doubt to satisfactorily define that element in the attestation of a will which is not also present in the mere subscription to a will. No physical act is required in the one which is not also required in the other, and it is not clear what mental act or fact appropriate to the one is absent from the other, and the definitions of the most recent lexicographers do not make it quite perspicuous. The Century Dictionary defines an *attesting witness* to be 'a person who signs his name to an instrument to prove it and for the purpose of identifying the maker or makers.' The Standard Dictionary defines attestation to be 'the subscription by a person of his name to a written instrument to signify that the same was executed in his presence, or that it is correct.' Since it is well settled in this state that it is not necessary to the validity of a will that the witnesses at the time when they *attest* it, shall know the nature of the instrument that they are attesting (Allen v. Grif-

fin, 69 Wis. 529), it is not clear what, if anything, attestation is intended to add to the mere fact of subscription." Skinner v. American Bible Society, 92 Wis. 209.

The Illinois courts repudiate the idea of a distinction between attestation and subscription. "This act of attestation consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature was made or acknowledged in their presence." Drury v. Connell, 177 Ill. 43, quoted with approval in Sloan v. Sloan, 184 Ill. 579.

<sup>183</sup> Garcia y Perea v. Barlea, 5 N. M. 458; 23 Pac. 766; Hays v. Ernest, 32 Fla. 18; Cureton v. Taylor, 89 Ga. 490; Gay v. Sanders, 101 Ga. 601; Peake v. Jenkins, 80 Va. 293; Poore v. Poore, 55 Kan. 687; College v. McKinstry, 75 Md. 188; Simmons v. Leonard, 91 Tenn. 183.

<sup>184</sup> Goods of Hatton, 50 L. J. P. 78; 6 P. D. 204; 30 W. R. 62; 46 J. P. 40.



that the will was invalid, even if other competent witnesses in excess of the requisite number witnessed the facts of execution but did not subscribe their names.<sup>185</sup>

On the other hand, if the number required by law have attested and subscribed the will in due form, the will is not invalidated by the addition of other witnesses who are incompetent, or do not attest or subscribe in the manner required by law;<sup>186</sup> nor even by the addition of the name of one who was not requested by testatrix to sign as a witness.<sup>187</sup>

### §191. What determines competency of subscribing witnesses.

The codes often provide that the attesting witnesses must be "credible" or "competent." These two words are construed to have the same meaning,<sup>188</sup> and that is that the witnesses must be qualified to testify, under the rules of evidence in force at the date of the execution of the will, concerning the proof of execution in probate tribunals.<sup>189</sup>

In these statutes, therefore, the word "credible" is not used with its technical meaning, which is simply worthy of belief. A competent witness in the technical sense is one whose evi-

<sup>185</sup> *Sloan v. Sloan*, 184 Ill. 579.

<sup>186</sup> *Conoly v. Gayle*, 61 Ala. 116; *Ackless v. Seekright*, 1 Ill. 76; *Carroll v. Norton*, 3 Bradf. (N. Y.) 291; *Boone v. Lewis*, 103 N. Car. 40.

<sup>187</sup> *Scattergood v. Kirk*, 192 Pa. St. 263.

<sup>188</sup> *Amory v. Fellowes*, 5 Mass. 219, is one of the leading cases on this point decided in this country. It has been followed and approved in many Massachusetts cases: *Sears v. Dillingham*, 12 Mass. 358; *Hawes v. Humphrey*, 9 Pick. 350; *Haven v. Hilliard*, 23 Pick. 10, and in other jurisdictions. *Hall v. Hall*, 18 Ga. 40; *In re Noble*, 124 Ill. 266; *Fisher v. Spence*, 150 Ill. 253; *Harp v. Parr*, 168 Ill. 459; *Jones v. Larabee*, 47 Me. 474; *Smalley v. Smalley*,

70 Me. 545; *Estep v. Morris*, 38 Md. 417; *Eustis v. Parker*, 1 N. H. 273; *Lord v. Lord*, 58 N. H. 7; *Welch v. Adams*, 63 N. H. 344; *Hodgman v. Kittredge*, 67 N. H. 254; *Comb's Appeal*, 105 Pa. St. 158; *Workman v. Dominick*, 3 Strobb. (S. Car.) 589; *Gamble v. Butchee*, 87 Tex. 643.

Of English authority, *Bettison v. Bromley*, 12 East, 249, supports the text; while *Windham v. Chetwynd*, 1 Burr. 414, holds that 'credible' can not mean competent.

<sup>189</sup> *In re Noble*, 124 Ill. 266; *Harp v. Parr*, 168 Ill. 459; *Fisher v. Spence*, 150 Ill. 253; *In re Noble*, 124 Ill. 266; *Carlton v. Carlton*, 40 N. H. 14; *Smith v. Jones*, 68 Vt. 132 (and see cases cited in preceding note).

dence is admissible. A competent witness may not be credible; a credible witness may not be competent, using the words in their technical sense. But such absurd results would follow from construing "credible" in the Statute of Frauds and the American statutes based thereon, as meaning "worthy of belief" that it has been generally construed as "competent."

The original test of the competency of an attesting witness was his competency to testify upon the facts of execution in the common law courts. This was because subscribing witnesses were required only for wills passing real property, and such wills were not offered for probate, but their validity was tested in common law courts, and the competency of the witnesses was therefore determined by common law rules.<sup>190</sup>

At common law, persons having a direct pecuniary interest in the outcome of the litigation were disqualified on account of interest, as was a husband or wife of such person. In certain cases convicted criminals were incompetent. Persons under certain ages and persons who were *non compos mentis* were incompetent as being unable to understand what had happened, or to relate it accurately.<sup>191</sup>

The tendency of modern legislation has been to abolish the disqualifications growing out of interest or conviction of crime, and to make such witness competent, the matter which formerly made him incompetent now going solely to his credibility.

An interesting question is presented in determining how far a statutory change in the rules of evidence in general affects the prior rules of the competency of subscribing witnesses to wills. It is of course entirely a matter of statutory construction. In some jurisdictions the statute applying to evidence in general is expressly made to include probate tribunals, and thereby to affect the competency of witnesses to wills.<sup>192</sup> In other jurisdictions statutory changes have been made in the rules of evidence in the common law courts so as not to apply

<sup>190</sup> *Hitchcock v. Shaw*, 160 Mass. 140; *Vrooman v. Powers*, 47 O. S. 191. See Chap. XIX, Evidence in Probate and Contest, Part I, Secs. 360-363.

<sup>191</sup> See Sec. 360-363.

<sup>192</sup> *Lippincott v. Wikoff*, 54 N. J. Eq. 107. (The statute here construed applied in terms to "any proceeding in any court" and was held to apply to probate tribunals.)

to probate tribunals; and thus a witness may be competent to testify as to facts in a common law court who is incompetent to act as attesting witness to a will.<sup>193</sup>

Thus, under a Maine statute, which requires the witnesses to be "disinterested," it is said that this means "competent" and is used to prevent general changes in the law of evidence from affecting the law of wills.<sup>194</sup>

### §192. Time at which competency must exist.

The attesting witness must be competent at the time that he attests and subscribes his name. If he is competent then and afterwards becomes incompetent, the will is not thereby invalidated.<sup>195</sup>

If, on the other hand, he is then incompetent, and afterwards becomes competent, the weight of authority is that he can not be counted among the attesting witnesses of the will.<sup>196</sup>

Some jurisdictions, however, hold that a witness who, by reason of being a beneficiary under the will, is incompetent at the time of its execution may, by releasing his interest thereunder, become a competent witness at the probate of the will.<sup>197</sup>

<sup>193</sup> Sparhawk v. Sparhawk, 10 All. (Mass.) 155; Sullivan v. Sullivan, 106 Mass. 474; Hitchcock v. Shaw, 160 Mass. 140.

<sup>194</sup> Jones v. Larrabee, 47 Me. 474; Warren v. Baxter, 48 Me. 193.

<sup>195</sup> Holdfast v. Downing, 2 Strange 1253; Thorpe v. Bestwick, 50 L. J. Q. B. 320; 6 Q. B. D. 311; 44 L. T. 180; Slingloff v. Bruner, 174 Ill. 561; Gill's Will, 2 Dana (Ky.) 447; Patten v. Tallman, 27 Me. 17; Warren v. Baxter, 48 Me. 193; Jenkins v. Dawes, 115 Mass. 599; Sullivan v. Sullivan, 106 Mass. 474; Pease v. Allis, 110 Mass. 157; Sullivan v. Sullivan, 114 Mich. 189; Holt's Will, 56 Minn. 33; Carlton v. Carlton, 40 N. H. 14; Stewart v. Har-

riman, 56 N. H. 25; Morrill v. Morrill, 53 Vt. 74.

<sup>196</sup> Fisher v. Spence, 150 Ill. 253; Morgan v. Ingram, 11 Ired. (N. C.) 368; Warren v. Baxter, 48 Me. 193; Patten v. Tallman, 27 Me. 17; Sparhawk v. Sparhawk, 10 Allen (Mass.) 157; *In re Holt's Will*, 56 Minn. 33; Hine v. McConnel., 2 Jones' Law (N. C.) 455; Carlton v. Carlton, 40 N. H. 14; Vrooman v. Powers, 47 O. S. 191; Workman v. Dominick, 3 Strobb. (S. Car.), 589; Smith v. Jones, 68 Vt. 132.

<sup>197</sup> Lowe v. Joliffe, 1 W. Bla. 365; Goodtitle v. Welford, Dougl. 139; or by statute, Miltenberger v. Miltenberger, 78 Mo. 27; Grimm v. Tittman, 113 Mo. 56.

**§193. Who are competent attesting witnesses.**

The general rule is that any person of sound mind, and old enough to receive a just impression of the facts of execution and to relate them truly, may act as an attesting witness.<sup>198</sup> Thus, a youth of twenty may act as an attesting witness, minority not being a disqualification.<sup>199</sup>

This general rule is so well settled as to be rarely questioned.

By far the greatest amount of litigation on this subject arises over the almost uniform exception to this general rule. This exception is that no person having an immediate beneficial interest under the will can act as an attesting witness thereto.<sup>200</sup>

This is the usual form of stating the disqualification. It is, of course, physically possible for such persons to write their names as subscribing witnesses to the will in which they are beneficially interested. The meaning of the rule is, of course, that even though they act as attesting witnesses, they can not be counted as such witnesses to make up the number required by statute; and if the number is not made up without them the will is invalid.

In Tennessee, however, while a beneficiary can not be a subscribing witness to a will, he may prove an unattested testament of personalty.<sup>201</sup> So, where a testament of personalty is good without subscribing witnesses, a legatee to whom no realty is devised may act as attesting witness to a will disposing of both realty and personalty.<sup>202</sup>

**§194. Who are beneficiaries.—Nature of interest.**

The beneficiaries under a will, within the meaning of this rule, are those who have a direct and immediate beneficial in-

<sup>198</sup> See discussion of subject mostly obiter in *Carlton v. Carlton*, 40 N. H. 14.

<sup>199</sup> *Jones v. Tebbetts*, 57 Me. 574.

<sup>200</sup> *Clark v. Hoskins*, 6 Conn. 106; *Frink v. Pond*, 46 N. H. 125; *Lord v. Lord*, 58 N. H. 7; *Allison v. Allison*, 4 Hawks (N. C.) 141; *Nixon v. Armstrong*, 38 Tex. 296; *Fowler*

*v. Stagner*, 55 Tex. 393. These cases are only a few out of the many that might be cited. The cases on this subject in the following notes all sustain the proposition in the text.

<sup>201</sup> *Franklin v. Franklin*, 90 Tenn. 44.

<sup>202</sup> *Walker v. Skeene*, 3 Head. (Tenn.) 1.

terest therein. This interest must be a real and not an apparent one in order to incapacitate the witness. Thus, an heir could act as attesting witness to a will which gave him a less share of the estate than he would have taken had the ancestor died intestate—a will, in other words, which wholly or partially disinherited the witness.<sup>203</sup>

The interest must further be beneficial. Thus, a trustee can act as an attesting witness to a will whereby a devise is made to him in trust for others.<sup>204</sup> But where trustee was entitled to commissions it was held that these commissions disqualified him as a witness;<sup>205</sup> and a trustee is competent even if the real beneficiaries are his children.<sup>206</sup>

So, a gift to a church "to be disposed of" as A should wish was held not to be a beneficial gift to A.<sup>207</sup>

A beneficial interest further might be so remote that even though some indirect benefit might accrue to the witness, it was not recognized by the common law as a disqualifying interest.

The interest must be one which under the rules of evidence in force in common law jurisdictions was recognized as immediate. Thus, an inhabitant of a town could act as a subscribing witness to a will by which a devise was given to such town,<sup>208</sup> and a member of a religious corporation could act as attesting witness to a will by which a devise was given to such corporation,<sup>209</sup> as could also an employee of such corporation.<sup>210</sup>

<sup>203</sup> Smalley v. Smalley, 70 Me. 545; Sparhawk v. Sparhawk, 10 Allen (Mass.) 157; Grimm v. Tittman, 113 Mo. 56; Moore v. McWilliams, 3 Rich. Eq. (S. Car.) 10; Hoppe's Will, 102 Wis. 54; 78 N. W. 183; Clark v. Clark, 54 Vt. 489; Maxwell v. Hill, 89 Tenn. 594.

*The husband of a disinherited daughter is therefore competent.* Slingloff v. Bruner, 174 Ill. 561.

<sup>204</sup> Loring v. Park, 7 Gray (Mass.) 42; Marston v. Judge of Probate, 79 Me. 25.

<sup>205</sup> Allison v. Allison, 4 Hawks (N. Car.) 141.

<sup>206</sup> Key v. Weatherlee, 43 S. Car. 411.

<sup>207</sup> Creswell v. Creswell, 37 L. J. Ch. 521; L. R. 6 Eq. 69; 18 L. T. 392; 16 W. R. 699. (Hence A's wife could act as a subscribing witness.)

<sup>208</sup> Cornwell v. Isham, 1 Day (Conn.) 35; Jones v. Habersham, 63 Ga. 146; Marston v. Judge of Probate, 79 Me. 25; Hawes v. Humphrey, 9 Pick. (Mass.) 350; Hitchcock v. Shaw, 160 Mass. 140; Eustis v. Parker, 1 N. H. 273.

<sup>209</sup> Jones v. Habersham, 63 Ga. 146; Warren v. Baxter, 48 Me. 193; Haven v. Hilliard, 23 Pick. (Mass.) 10; Will's Estate, 67 Minn. 335.

<sup>210</sup> Comb's Appeal, 105 Pa. St. 155.

So a stockholder in a corporation owning a hall is a competent witness to a will in which a legacy was given to secure the use of such hall for objects of public interest.<sup>211</sup>

This interest is not necessarily an absolute one, however. Thus, where a devise was made to A if he survived testator, and if he died before testator, then to B, it was held that B had an immediate beneficial interest under the will, and could not, therefore, be counted among the subscribing witnesses.<sup>212</sup> By statutes, in some jurisdictions, however, a remainder-man under the will can act as attesting witness.<sup>213</sup>

### §195. Effect of release.

The attempt is often made to restore the competency of an attesting witness who is incompetent because a beneficiary, by having him release all interest under the will.

The weight of authority is, as before said, that the witness must be competent at the time of attestation. From this view it follows that such attempt to restore competency to the witness by a release executed after the attestation, accomplishes nothing, and the beneficiary can not be counted among the subscribing witnesses. Some jurisdictions, however, take the view that if the witness is competent, on the ground of interest, either at the attestation of the will or at the time that it is produced for probate, he can be counted among the attesting witnesses; and accordingly such jurisdictions hold that a beneficiary, on releasing his interest, becomes, as far as interest is concerned, a competent witness.<sup>214</sup>

### §196. Effect of modern statutes.

The competency of a beneficiary as an attesting witness is generally modified by statute. Many jurisdictions have adopted statutes substantially to the effect that if a beneficiary acts as a subscribing witness to a will, and the will can not be proved

<sup>211</sup> *Marston v. Judge of Probate*, 79 Me. 25.

<sup>212</sup> *Trinitarian, etc., Society, Appellant*, 91 Me. 416.

<sup>213</sup> *Kumpe v. Coons*, 63 Ala. 448;

*Garland v. Crow*, 2 Bail. (S. Car.) 24.

<sup>214</sup> So by statute. *Grimm v. Tittman*, 113 Mo. 56, citing and following *In re Wilson*, 103 N. Y. 374.

without his testimony as a subscribing witness, the devise or bequest to him shall be void. A provision is generally added that he shall take of such share as he would have received if the testator had died intestate, so much as does not exceed the interest given him by the will.<sup>215</sup> But where the will can be proved without a certain subscribing witness, a legacy to him is not affected by this statute.\*

Thus, where a legacy was left to a subscribing witness by will, and the will was afterwards republished by a codicil to which legatee was not a witness, it was held that his legacy was not affected by the fact that he acted as a subscribing witness to the will. Nor was his right to take affected by the fact that he subsequently acted as witness to another codicil.<sup>216</sup>

The effect of such statutory provisions is to make such attesting witness competent by preventing him from taking any interest under the will, thus recognizing that the witness must be competent at the time of the attestation.

In other jurisdictions the statute gives to the beneficiary witness the option of renouncing his interest or of invalidating the will.<sup>217</sup>

These statutes are never to be extended beyond their express terms. Thus, a statute of this sort referring to written wills has no application to witnesses to nuncupative wills.<sup>218</sup>

### §197. Husband or wife of beneficiary.—Common law rule.

Under the rules of the common law a husband or wife could not testify when the other would be excluded from testifying by reason of interest. This being the law except where mod-

<sup>215</sup> *In re Trotter* (1899), 1 Ch. 764; *Denne v. Wood*, 4 L. J. Ch. 57; *Perkins v. Windham*, 4 Ala. 634; *Kumpe v. Coons*, 63 Ala. 448; *Clark v. Hoskins*, 6 Conn. 106; *Elliott v. Brent*, 6 Mark. (D. C.) 98; *Harp v. Parr*, 168 Ill. 459; *Fisher v. Spence*, 150 Ill. 253; *In re Noble*, 124 Ill. 266; *Grimm v. Tittmann*, 113 Mo. 56; *Key v. Weatherlee*, 43 S. Car. 414; 49 Am. St. Rep. 846; *Clark v. Clark*, 54 Vt. 489; *Croft v. Croft*, 4 Gratt. (Va.) 103.

\* *Davis v. Davis*, 43 W. Va. 300, 27 S. E. 323.

<sup>216</sup> *In re Trotter* (1899) 1 Ch. 764; *In re Owen*, 56 N. Y. Supp. 853.

<sup>217</sup> *Miltenberger v. Miltenberger*, 78 Mo. 27; *Grimm v. Tittmann*, 113 Mo. 56; *Nixon v. Armstrong*, 38 Tex. 296.

<sup>218</sup> *Vrooman v. Powers*, 47 O. S. 101.

ified by statute, a husband or wife can not act as attesting witness to a will under which the other is a beneficiary.<sup>219</sup>

Since the competency of attesting witnesses is to be determined as of the date of the will, the subsequent intermarriage of a beneficiary and a subscribing witness does not render such witness incompetent or avoid the devise.<sup>220</sup> But there is no rule of law forbidding the husband of testator's sister, who is not a beneficiary under the will, to act as a subscribing witness to the will. Since he is competent, he can testify at probate, and the certificate of his oath can be introduced at contest, even where his wife is a contestant.<sup>221</sup>

### §198. Effect of modern statutes.

This rule of law is affected by statutes of two different classes.

The first class of statutes provides that a husband or wife may be a competent witness in a case where the other is a party in interest. This is generally effected by a sweeping provision that all persons are competent witnesses, with the exceptions therein enumerated.<sup>222</sup>

If such a statute is so drawn as to apply to probate matters, as well as to ordinary common law jurisdictions, its effect is to allow a husband or wife to act as an attesting witness to a will by which the other is a beneficiary; or, if after passage of such

<sup>219</sup> *Hatfield v. Thorp*, 5 B. & Ald. 589; *Fortune v. Buck*, 23 Conn. 1; *Fisher v. Spence*, 150 Ill. 253; *Sullivan v. Sullivan*, 106 Mass. 474; *Winslow v. Kimball*, 25 Me. 493; *Hodgman v. Kittredge*, 67 N. H. 254; *Key v. Weathersbee*, 43 S. Car. 414; 49 Am. St. Rep. 846.

<sup>220</sup> *Thorp v. Bestwick*, 50 L. J. Q. B. 320; 6 Q. B. D. 311; 44 L. T. 180; 29 W. R. 631; 45 J. P. 440.

<sup>221</sup> *Slingloff v. Bruner*, 174 Ill. 561.

<sup>222</sup> *Hawkins v. Hawkins*, 54 Io. 443; *Bates v. Officer*, 70 Io. 343; *Holt's Will*, 56 Minn. 33; *Lippincott v. Wikoff*, 54 N. J. Eq. 107;

*Gamble v. Butcher*, 87 Tex. 643. No distinction is made under these statutes between wills and testaments. The statute applies equally to disposition of personalty, *Hawkins v. Hawkins*, 54 Io. 443; and of realty, *Bates v. Officer*, 70 Io. 343. The legacy given to the spouse of such attesting witness is not held void in all jurisdictions. *Holt's Will*, 56 Minn. 33. And the fact that the spouse is a competent attesting witness does not always render him competent generally on contest if the other spouse is a party. *Holt's Will*, 56 Minn. 33.



a statute, the statutes which control probate matters recognize such rule of competency directly or indirectly, the husband or wife of a beneficiary is rendered competent.<sup>223</sup>

Thus, a statute making husband or wife competent where the other is a party in interest "in any proceeding in any court" is held to make such husband or wife a competent witness to a will by which the other is made a beneficiary.<sup>224</sup> But if the statute refers only to common law tribunals, and is not recognized afterward by the statutes which control probate tribunals, such statute does not alter the common law rule of the incompetency of such husband or wife to act as attesting witness to a will under which the other spouse is a beneficiary.<sup>225</sup>

*b.* The second class of statutes affecting the competency of husband or wife provides that bequests or devises to an attesting witness without whom the will can not be proved, are void. There is a difference of judicial opinion as to the effect of such statutes upon the competency of the husband or wife of a beneficiary as an attesting witness. Some jurisdictions hold that such statutes are not to be extended in meaning beyond their express terms, and hence that they do not make such husband or wife a competent witness.<sup>226</sup>

Other jurisdictions, by a very liberal construction, treat a devise to husband or wife as a beneficial interest of the other. Hence, under such statutes, they hold that the devise to the

<sup>223</sup> See cases in preceding note.

<sup>224</sup> *Lippincott v. Wikoff*, 54 N. J. Eq. 107. (Even if such subscribing witness is also executor.)

<sup>225</sup> *Fisher v. Spence*, 150 Ill. 253; *Sullivan v. Sullivan*, 106 Mass. 474. Thus in Kentucky it was held that the code of civil procedure did not affect the competency of witnesses to a will. *Mercer v. Mackin*, 14 Bush. 434.

<sup>226</sup> *Fortune v. Buck*, 23 Conn. 1; *Sloan's Estate*, 184 Ill. 579; *Fisher v. Spence*, 150 Ill. 253; *Sullivan v. Sullivan*, 106 Mass. 474;

*Kittredge v. Hodgman*, 67 N. H. 254; 32 Atl. 158.

Referring to the opposite view hereinafter given, the court said, in *Sullivan v. Sullivan*, 106 Mass. 474: "It is founded rather upon a conjecture of unexpressed intent of the legislature, or a consideration of what they might wisely have enacted, than upon a sound judicial exposition of the statute by which their intent has been manifested." Quoted in *Fisher v. Spencer*, 150 Ill. 253.

husband or wife is void, and that the attesting witness is competent.<sup>227</sup>

In some jurisdictions statutes have been passed which, in express terms, make void gifts to the husband or wife of an attesting witness.<sup>228</sup>

While some difficulties arise under these statutes, they are only the uniform result of a modification of the common law by statutes which are framed without a full and complete understanding of their bearing and effect upon the pre-existing rules of law. Where the legislature, while modifying the general law of evidence, has expressly provided what effect such statute shall have upon the competency of subscribing witnesses to a will, little or no litigation upon that subject arises.

**§199. Competency of heir of beneficiary.—Probate judge, executor, etc.**

The son of a beneficiary has no immediate interest under the will. Hence he may act as an attesting witness.<sup>229</sup> This is true even where the beneficiary dies before contest, so that such subscribing witness is directly affected by the outcome of the litigation, since he was competent at the execution of the will.<sup>230</sup> So may the probate judge before whom the will is to be proved.<sup>231</sup>

Where the person named in the will as executor subscribes the will as an attesting witness his competency is a subject of some doubt. The objections to his competency rest on two different grounds. First. That he has such an interest in his commissions that he is a beneficiary; second, that where by the law of procedure, the executor is personally liable for costs if the will is refused probate, he has, irrespective of his

<sup>227</sup> *Wigan v. Rowland*, 11 Hare 157; 1 Eq. R. 213; 17 Jur. 910; 1 W. R. 383; *Jackson v. Wood*, 1 Johns. Cas. 163; *Jackson v. Durland*, 2 Johns. Cas. (N. Y.), 314; *Winslow v. Kimball*, 25 Me. 493; *Key v. Weatherslee*, 43 S. Car. 414.

<sup>228</sup> *Giddings v. Turgeon*, 58 Vt. 106; So 1 Vict. C. 26. Sec. 15.

<sup>229</sup> *Nash v. Reed*, 46 Me. 168; *Jones v. Tebbetts*, 57 Me. 572; *Maxwell v. Hill*, 89 Tenn. 584.

<sup>230</sup> *Maxwell v. Hill*, 89 Tenn. 584.

<sup>231</sup> *Panaud v. Jones*, 1 Cal. 488; *M'Lean v. Barnard*, 1 Root (Conn.) 462; *Ford's Case*, 2 Root (Conn.) 232; *Patten v. Tallman*, 27 Me. 17.

commissions a direct interest in the result of the case. Accordingly, in some of the earlier cases it was held that one named as executor had such an interest in his commissions that he was a beneficiary under the will, and thus incompetent as a subscribing witness.<sup>232</sup>

Under this theory the incompetency existed at the time of execution and could not be removed by his subsequent renunciation of his office.<sup>233</sup> While under this ruling an executor was not a competent witness to a testament of personalty, he was treated as a competent witness to a will of realty.<sup>234</sup>

Under the English statute removing the interest of a subscribing witness,<sup>235</sup> it was finally held that an executor was a competent witness to a mixed will of realty and personalty.<sup>236</sup> On account of his liability for costs an executor has been held to be an incompetent subscribing witness.<sup>237</sup>

The reasons given by the older cases for holding an executor to be incompetent have been entirely abandoned by the courts. His commissions are looked upon as merely a compensation for services rendered, and as giving him no financial interest in the probating of the will. He is, as a rule, not personally responsible for costs; and further, in most states this ground for incompetency is removed by statute. Accordingly, it is now held by the great weight of modern authority that an executor has, at the time of the execution of the will, no such beneficial interest thereunder as renders him incompetent.<sup>238</sup> It has been

<sup>232</sup> *Tucker v. Tucker*, 5 Ired. L. (N. Car.) 161; *Morton v. Ingraham*, 11 Ired. L. (N. Car.) 368; *Taylor v. Taylor*, 1 Rich. L. (S. Car.), 531; *Wilkins v. Taylor*, 8 Rich. Eq. (S. Car.) 291.

<sup>233</sup> *Morton v. Ingraham*, 11 Ired. L. (N. Car.) 368.

<sup>234</sup> (Wills of personalty.) *Workman v. Dominick*, 3 Strobb. (S. Car.) 589; *Taylor v. Taylor*, 1 Rich. L. (S. Car.) 531. (Will of realty.) *Henderson v. Kenner*, 1 Rich. L. (S. Car.) 474.

<sup>235</sup> 25 Geo. II, C. 6.

<sup>236</sup> *Noble v. Burnett*, 10 Rich. L.

(S. Car.) 505, modifying *Taylor v. Taylor*, 1 Rich. L. (S. Car.) 531.

<sup>237</sup> *Adams v. Sandige*, 29 Ga. 563. (In this case the executor deposited the money for the costs before he offered himself as a witness; but it was held that he was still disqualified because of his right to recover the costs from the estate, if the will were admitted to probate.)

<sup>238</sup> *Spiegelhalter's Will*, 1 Penn. (Del.) 5; *Meyer v. Fogg*, 7 Fla. 292; *Baker v. Bancroft*, 79 Ga. 672; *Jones v. Larrabee*, 47 Me. 474; *Sears v. Dillingham*, 12 Mass. 358; *Wyman v. Symmes*, 10 All. 153;

said, "This principle is too well settled to justify discussion." <sup>239</sup>

The reason for holding an executor competent has been said in some decisions to be that, as the will is necessarily offered for probate before the executor is appointed, he is not then an executor and may never be.<sup>240</sup>

Where an executor may be competent, his wife is, of course, competent;<sup>241</sup> and his brother is also competent.<sup>242</sup>

One who signs testatrix's name to her will at her request may also act as a subscribing witness to such will.<sup>243</sup>

Originally, a creditor of testator could not act as an attesting witnesses where the will benefited creditors by making the debts a charge upon the real estate.<sup>244</sup> This rule is now practically obsolete, either by statutes expressly making such creditors competent witnesses, or by statutes which charge the real estate of all testators with their debts.<sup>245</sup>

Under modern statutes a convict may act as an attesting witness.<sup>246</sup>

## §200. Husband of testatrix.

Under the policy of the common law a husband could not be an attesting witness to his wife's will; nor could a wife be an attesting witness to her husband's will.<sup>247</sup> This rule has been modified by statute in many jurisdictions.

Holt's Will, 56 Minn. 33; Rucker v. Lambdin, 12 S. & M. (Miss.) 230; Stewart v. Harriman, 56 N. H. 25; Hodgman v. Kittredge, 67 N. H. 254; Society, etc., v. Loveridge, 70 N. Y. 387; Lippincott v. Winkoff, 54 N. J. Eq. 107; Jordan's Estate, 161 Pa. St. 393; Snedekers v. Allen, 1 Penn. 24; Lyon's Will, 96 Wis. 339.

<sup>239</sup> Holt's Will, 56 Minn. 33.

<sup>240</sup> Hawley v. Brown, 1 Root (Conn.) 494 (executor had renounced); Millay v. Wiley, 46 Me. 230.

<sup>241</sup> Stewart v. Harriman, 56 N. H. 25; Piper v. Moulton, 72 Me.

155; Lyon's Will, 96 Wis. 339.

<sup>242</sup> Lord v. Lord, 58 N. H. 7.

<sup>243</sup> *Ex parte* Leonard, 39 S. Car. 518.

<sup>244</sup> Blackstone's Comm., Bk. 3, p. 377.

<sup>245</sup> Young's Will, 123 N. Car. 358, disting. Pepper v. Broughton, 80 N. Car. 251; and see local statutes.

<sup>246</sup> Noble's Estate, 124 Ill. 266; Diehl v. Rogers, 169 Pa. St. 316 (after pardon).

<sup>247</sup> Pease v. Allis, 110 Mass. 157; Dickinson v. Dickinson, 61 Pa. St. 401.

### §201. What subscribing witnesses are required to attest.

The subscribing witnesses are required by statute for the purpose of attesting certain requisites of the will. What these requisites are depends upon the local statute. In most jurisdictions the subscribing witnesses are required for the purpose of attesting: (1), the signature of the testator, and (2), the capacity of the testator to make a will. In a few jurisdictions they are also required to attest the publication of the will.

### §202. The signature of testator to be attested by witnesses.

The subscribing witnesses are required to attest that the signature of the testator was made by him, or by some person lawfully authorized by him, as before explained, in the presence of the witnesses.<sup>248</sup> The only point which needs discussion in this connection is the meaning of the word 'presence'. This will be discussed when the word "presence" is considered as used of witnesses subscribing their names in the presence of testator.<sup>249</sup>

### §203. Acknowledgment of signature by testator to be attested.

Most statutes provide as an alternative to the signature by testator in the presence of the subscribing witnesses, that the testator may acknowledge in the presence of the witnesses, his signature made out of their presence.<sup>250</sup> This alternative is allowed only when the provisions of the statute permit it. In jurisdictions where the statute is modelled upon the Statute of Frauds, 29 Car. II, c. 3, Sec. 5, the requirement of which is that the will be "attested and subscribed in his presence by three or four credible witnesses," it is well settled by judicial construction that testator may, if he chooses, sign his name out of the presence of the witnesses and afterwards make acknowl-

<sup>248</sup> *Ela v. Edwards*, 16 Gray (Mass.) 91; *Jackson v. Jackson*, 39 N. Y. 153; *Woolley v. Woolley*, 95 N. Y. 231; *Keyl v. Feuchter*, 56 O. S. 424; *Simmons v. Leonard*, 91 Tenn. 183.

<sup>249</sup> See Sec. 209, *et seq.*  
<sup>250</sup> *Grimm v. Tittman*, 113 Mo. 56; *Skinner v. Am. Bible Soc.* 92 Wis. 209. See notes to Sec. 202.

edgment before them.<sup>251</sup> But where the statute requires that the will must be attested and subscribed by witnesses who saw testator sign, acknowledgment will not be sufficient unless the statute further adds 'or who heard him acknowledge' his signature, or words substantially equivalent thereto.<sup>252</sup>

As said before, this alternative is added by the codes of most states.<sup>253</sup> If the witnesses neither see the testator subscribe, nor hear him acknowledge, the will is invalid.<sup>254</sup>

## §204. Acknowledgment of signature by other.

This statute allowing testator to acknowledge his signature before attesting witnesses, does not relax the rule as to the actual signing of the will. The will must, in most jurisdictions, as said before, be signed by the testator or by some person in his presence by him duly authorized. If testator acknowledges a signature to attesting witness as his, a *prima facie* presumption arises that the signature was affixed in the form required by law.<sup>255</sup> But if the evidence shows that the will was signed neither by testator nor by some person in his presence, duly authorized, the will is invalid, even though testator has acknowledged such signature as his own before attesting witnesses.<sup>256</sup>

Where the will has been signed in the presence of testator by

<sup>251</sup> *Ellis v. Smith*, 1 Ves. Jr. 11; *Morrison v. Tourman*, 18 Ves. Jr. 183; *O'Neill v. Owen*, 25 Can. L. J. 376; 9 Can. L. J. 297.

<sup>252</sup> So in New Jersey under the act of 1814. *Compton v. Milton*, 12 N. J. L. 70; *Mundy v. Mundy*, 15 N. J. Eq. 290; *McElwaine's Will*, 18 N. J. Ch. 499.

<sup>253</sup> *Canada's Appeal*, 47 Conn. 450; *Crowley v. Crowley*, 80 Ill. 469; *In re Convey's Will*, 52 Io. 197; *Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Hall v. Hall*, 17 Pick. 273; *Nickerson v. Buck*, 12 Cush. 332; *Welch v. Adams*, 63 N. H. 344; *Cravens v. Faulconer*, 28 Mo. 19; *Grimm v. Tittman*, 113 Mo. 56; *Tonnele v. Hall*, 4 N. Y. 140; *Radebaugh v.*

*Shelley*, 6 O. S. 307; *Simmons v. Leonard*, 91 Tenn. 183; *Roberts v. Welch*, 46 Vt. 164; *Allen v. Griffin*, 69 Wis. 529.

<sup>254</sup> *Reed v. Watson*, 27 Ind. 443; *Keyl v. Feuchter*, 56 O. S. 424; *Simmons v. Leonard*, 91 Tenn. 183.

<sup>255</sup> *Toomes's Estate*, 54 Cal. 509; *Cleveland v. Spilman*, 25 Ind. 95; *Walton v. Kendrick*, 122 Mo. 504; *Robins v. Coryell*, 27 Barb. 556; *Haynes v. Haynes*, 33 O. S. 598; *Rosser v. Franklin*, 6 Gratt. (Va.) 1.

<sup>256</sup> *Walton v. Kendrick*, 122 Mo. 504; *Main v. Ryder*, 84 Pa. St. 217.

*Contra.* In the matter of *Merchant's Will*, 1 Tuck. (N. Y.) 17

a person duly authorized by testator, it is not necessary that testator explain the method of the signature to the witnesses when he acknowledges it. All that is necessary is that he indicate to them that the signature to the will is his, as in legal effect it is.<sup>257</sup>

### §205. Form of acknowledgment.

No formal or exact set of words is required by law for the acknowledgment of testator's signature. The express words of testator constitute the best form of acknowledgement as being the least subject to mistake. So, reading the attestation clause in the presence of the witnesses, testator's signature being visible, is a sufficient acknowledgment of his signature.<sup>258</sup>

#### *Informal statements of testator.*

As this acknowledgment need not be in any set form, where testator showed the instrument to witnesses with his signature visible thereon, stated that it was his will, and asked them if they 'recognized his signature,' and they answered 'yes' and he then asked them to sign as witnesses, it was held to be a sufficient acknowledgment of testator's signature.<sup>259</sup>

In Illinois the statute requires the testator to acknowledge the will as his act and deed. It is held that this statute is satisfied by an acknowledgment of the will as testator's act and deed, without his acknowledging his signature, even though the witnesses did not see him sign.<sup>260</sup> If testator declares the instrument to be his free and voluntary act and deed, it is a sufficient acknowledgment in Pennsylvania.<sup>261</sup>

<sup>257</sup> Haynes v. Haynes, 33 O. S. 598; Rosser v. Franklin, 6 Gratt. (Va.) 1.

<sup>258</sup> Allison v. Allison, 46 Ill. 61.

<sup>259</sup> Stewart v. Stewart, 56 N. J. Eq. 761.

<sup>260</sup> Harp v. Parr, 168 Ill. 459.

"Where a testator requests the witness to attest his will, this is suf-

ficient to authorize the inference that he executed the paper as a will, and is equivalent to an acknowledgment that he signed the paper as a will." Harp v. Parr, 168 Ill. 459; Hobart v. Hobart, 154 Ill. 610.

<sup>261</sup> Loy v. Kennedy, 1 W. & S. 396.

*Gestures of testator.*

Acknowledgment may also be made by the acts and gestures of the testator, without using any words about the signature itself. Thus, exhibiting the instrument with testator's signature thereon, and referring to it as testator's will, amounts to an acknowledgment of the signature.<sup>262</sup> Or if without referring to such instrument as his will the testator produce it with his signature visible and request witness to sign it, this has been held to be sufficient acknowledgment.<sup>263</sup> So where testator shows a paper to witnesses with a cross between the words of his name and refers to such paper as his will, this is sufficient acknowledgment of the mark as his signature,<sup>264</sup> and it has been held a sufficient acknowledgment where testator placed before the subscribing witnesses an instrument which was clearly his will and was named as such on the envelope, and was in fact signed by him, when his signature is well known to them.<sup>265</sup>

*Statement of others.*

The statements of others made in testator's presence and hearing, such as the statements of the attorney or scrivener who drafts the will and supervises the execution, may be so acquiesced in and acted upon by testator as to amount to an acknowledgment by him.<sup>266</sup>

<sup>262</sup> *Ilott v. Genge*, 3 Curt. 160; *Smith v. Holden*, 58 Kan. 535; *Gilbert v. Knox*, 52 N. Y. 125.

<sup>263</sup> *In re Porter's Will*, 20 D. C. 493; *Turner v. Cook*, 36 Ind. 129; *Flood v. Pragoff*, 79 Ky. 607; *Tilden v. Tilden*, 13 Gray. 110; *Allen v. Griffin*, 69 Wis. 529.

<sup>264</sup> *Guilfoyle's Will*, 96 Cal. 598; *Cravens v. Faulconer*, 28 Mo. 19; *Grimm v. Tittman*, 113 Mo. 56; *Stephens v. Stephens*, 129 Mo. 422.

<sup>265</sup> *Grimm v. Tittman*, 113 Mo. 56.

<sup>266</sup> *Inglesant v. Inglesant*, L. R. 3 Prob. & Div. 172; *Harp v. Parr*, 168 Ill. 459; *Allison v. Allison*, 46 Ill. 61; *Nickerson v. Buck*, 12 Cush.

(Mass.) 332; *Dewey v. Dewey*, 1 Met. (Mass.) 349; *Ela v. Edwards*, 16 Gray. (Mass.) 91; *Grimm v. Tittman*, 113 Mo. 56; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Peck v. Cary*, 27 N. Y. 9; *Gilbert v. Knox*, 52 N. Y. 125; *In re Nelson*, 141 N. Y. 152; *Radebaugh v. Shelley*, 6 O. S. 307.

"The silence and presence of the testator gave consent to these declarations on the part of the person superintending the execution of the will, and amounted to an acknowledgment by the testator of the will as his act and deed." *Harp v. Parr*, 168 Ill. 459.



*Signature of testator visible.*

In order to constitute a valid acknowledgment, the signature of testator must be visible to the witnesses, so that they can identify it as the signature which testator acknowledged.<sup>267</sup> If the attesting witnesses can not see the signature of testator at the time of the execution of the will, it is not an acknowledgment of the signature within the meaning of the statute.<sup>268</sup> So where testatrix apparently wrote her name at the foot of an instrument in the presence of witnesses, but they could not see whether she was really writing her name or only pretending to do so; and she then handed the paper to them to sign, so covered up that only the place where they were to sign was left exposed, it was held to be neither a valid subscription in their presence, nor a valid acknowledgment of such subscription.<sup>269</sup>

*What is not an acknowledgment.*

In the absence of any acts of testator, however, the mere assumption by the subscribing witnesses that it was in fact testator's will, and was signed by him, is not a substitute for acknowledgment by him.<sup>270</sup> The statement that the instrument was testator's, when made by the person supervising the execution of the will, where testator did not hear it, was not a sufficient acknowledgment by testator.<sup>271</sup>

**§206. Acknowledgment of will instead of signature.**

The Statute of Frauds required the will to be in writing, signed by testator or by some one in his presence and at his direction, and attested and subscribed by three or four credible witnesses in testator's presence. No provision was inserted

<sup>267</sup> Mackay's Will, 110 N. Y. 611; 1 L. R. A. 491; 18 Am. St. Rep. 558; Smith v. Holden, 58 Kan. 535; Stewart v. Stewart, 56 N. J. Eq. 761; Baskin v. Baskin, 36 N. Y. 416; Willis v. Mott, 36 N. Y. 486; *In re Higgins*, 94 N. Y. 554; *In re Phillips*, 98 N. Y. 267; *In re Aus-*

*tin*, 121 N. Y. 664; 45 Hun, 1.

<sup>268</sup> Lewis v. Lewis, 11 N. Y. 220; Mitchell v. Mitchell, 77 N. Y. 596.

<sup>269</sup> Ludwig's Estate, — Minn. —; 81 N. W. 758.

<sup>270</sup> Luper v. Werts, 19 Ore. 122.

<sup>271</sup> Ludlow v. Ludlow, 8 Stew. (N. J.) 480; 9 Stew. (N. J.) 597.

requiring witnesses to see testator sign or hear him acknowledge his signature, nor did the statute specifically provide what the witness was to attest. Where this statute or one like it is in force, it has been held in some jurisdictions that the witnesses need not see testator's signature. If testator acknowledges the instrument as his will, in the presence of the subscribing witnesses, it is sufficient. He does not need to acknowledge his signature to the witnesses.<sup>272</sup>

It has been said in some text-books and *obiter dicta* that under many modern American statutes, the witnesses need not see testator's signature if testator acknowledges the instrument as his will.

Of the cases generally cited in support of this view, some Massachusetts cases are those in which wills were upheld where one or more of the attesting witnesses had no recollection of seeing testator's name before he signed as witness; but the record was consistent with the theory that testator had acknowledged his signature in due form, although the witnesses had forgotten that fact.<sup>273</sup>

'Many American cases which are often cited to sustain the proposition that testator need not acknowledge his signature, but that if he acknowledges his will, the witnesses need not see his signature, are really cases where the signature was plainly visible to the subscribing witnesses.<sup>274</sup> ' In spite, therefore, of occasional obiters it may be said to be the weight of authority under the modern Wills Acts that an acknowledgment of a will by testator is not sufficient unless the witnesses have an opportunity of seeing his signature.

<sup>272</sup> *White v. Trustees of British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457; *Johnson v. Johnson*, 1 Cr. & M. 140.

In the above cases there was a specific finding of fact that the attesting witnesses did not see the signature of testator.

<sup>273</sup> *Dewey v. Dewey*, 1 Met. 349; *Hogan v. Grosvenor*, 10 Met. 54; *Tilden v. Tilden*, 13 Gray. 110.

<sup>274</sup> *Canada's Appeal*, 47 Conn. 450; *Allison v. Allison*, 46 Ill. 61; *Brown v. McAllister*, 34 Ind. 375; *Turner v. Cook*, 36 Ind. 129; *Flood v. Pragoff*, 79 Ky. 607; *Allen v. Griffin*, 69 Wis. 529.

### §207. Effect of failure to sign or acknowledge before witnesses.

It is indispensable to the validity of the will that it be either signed by testator in the presence of witnesses or acknowledged by him in their presence. Where the testator produced his unsigned will and requested the witnesses to sign their names as witnesses to the document, and they signed in his presence, and afterwards in their absence he signed the will, and the attesting witnesses did not see the signature of testator till the will was produced for probate after testator's death, it was held to be invalid.<sup>275</sup>

### §208. Capacity of testator to be attested by witnesses.

Further, the subscribing witnesses are required to attest to the capacity of the testator, including his legal age, sanity and freedom from undue influence.<sup>276</sup> This point is often misunderstood by the witnesses who think that they are attesting only the legal formalities of the execution.<sup>277</sup>

### §209. Presence.—Mental cognition.

The codes generally require the subscribing witness to sign his name in the "presence" of the testator.<sup>278</sup> In the absence of such statutory provision this is not necessary.<sup>279</sup>

<sup>275</sup> Keyl v. Feuchter, 56 O. S. 424; Simmons v. Leonard, 91 Tenn. 183.

<sup>276</sup> Field's Appeal, 36 O. S. 277; Allison v. Allison, 46 Ill. 61; Stephenson v. Stephenson, 62 Io. 163; Withington v. Withington, 7 Mo. 589; Chappell v. Trent, 90 Va. 849; Scribner v. Crane, 2 Paige 147; and see Whitenack v. Stryker, 2 N. J. Eq. 8.

"The witnesses are not called on . . . to attest the mere factum of signing, but the capacity of the testator." . . . "The business, then, of the persons required by statute to be present at executing a will is not barely to attest the corporal act of signing, but to try, judge and determine whether the testator is

*compos* to sign—that is, of sound mind, as every will on the face of it imports." Heyward v. Hazard, 1 Bay (S. Car.) 335, quoted and followed in Kaufman v. Caughman, 49 S. Car. 159.

*Contra*, that the subscribing witnesses do not impliedly attest the mental capacity of testator so as to discredit their subsequent testimony to the contrary. D'Avignon's Will, 12 Colo. App. 489.

<sup>277</sup> See Sec. 374.

<sup>278</sup> Snider v. Burks, 84 Ala. 53; Mays v. Mays, 114 Mo. 536.

<sup>279</sup> Rogers v. Diamond, 13 Ark. 473; *In re Cornelius' Will*, 14 Ark. 675; Abraham v. Wilkins, 17 Ark. 202.

The word 'presence' is used in the Statutes of Wills in three connections. A person signing the will for testator must sign in his presence; a testator must sign the will in the presence of the attesting witnesses, or acknowledge the signature as his own; and the subscribing witnesses must subscribe in the presence of the testator. The word 'presence' has a technical meaning, which is the same in these three contexts. It involves two ideas.

(a) Mental cognition of the act.

(b) Physical contiguity.

The person in whose presence the act is done must be able mentally to know what is being done.<sup>280</sup>

Thus, if he is so faint as not to be able to know what is being done it is impossible within the technical meaning of the term for the act to be done in his presence.<sup>281</sup> So if his inability to know arises from his being asleep, in a stupor or dying.<sup>282</sup>

Further, in addition to his being able mentally to know what is being done, the person in whose presence the act is to be done must be informed of what is taking place, so that he actually does know what is being done.<sup>283</sup> Thus, if the witness sign the will close to testator, but in a surreptitious manner, so that he does not know what they are doing, the act is not done in his presence.<sup>284</sup>

If the person in whose presence the act is to be done is mentally capable of knowing what is being done, and is informed of what is being done, but through inattention or inadvertence does not take notice, at the time, of what is being

<sup>280</sup> *Hill v. Barge*, 12 Ala. 687; *Hall v. Hall*, 18 Ga. 40; *Jackson v. Moore*, 14 La. Ann. 213; *Etchison v. Etchison*, 53 Md. 348; *Watson v. Pipes*, 32 Miss. 451; *Baldwin v. Baldwin*, 81 Va. 405; *Tucker v. Sandige*, 85 Va. 546; *Meurer's Will*, 44 Wis. 392.

<sup>281</sup> *Right v. Price*, 1 Doug. 241.

<sup>282</sup> *Longford v. Eyre*, 1 P. Wms. 740; *Walters v. Walters*, 89 Va. 849.

<sup>283</sup> *Jenner v. Finch*, 49 L. J. P. 25; 5 P. D. 106; 42 L. T. 327; 28 W. R. 520.

<sup>284</sup> *Waite v. Frisbie*, 45 Minn. 361.

done; is the act done in his presence? Upon this point there is a decided difference of judicial opinion chiefly in obiter.<sup>285</sup>

### §210. Presence.—Physical proximity.

Further, the word 'presence' implies that what is to be done in a person's presence must take place in physical proximity to such person.<sup>286</sup>

Exactly what degree of proximity is required has been the subject of a great deal of judicial discussion. The majority of the courts have agreed upon the following principles on this point:

1. Distance is not the test. An act done very near one may not be in his presence, while one done much farther away may be.<sup>287</sup> Nor is it a test that the act be done in the same room. It may not be done in the presence of one, though it be done in the room where he is.<sup>288</sup> While it is possible that an act done in an adjoining room may be done in his presence.<sup>289</sup>

2. However, if the act is done in the same room with a person, it is *prima facie* done in his presence.<sup>290</sup> While if done in another room it is *prima facie* done out of his presence.<sup>291</sup> In either case the presumption is only *prima facie*, and may be rebutted.<sup>292</sup>

<sup>285</sup> In *Robbins v. Robbins*, 50 N. J. Eq. 742, it was said that if a witness does not notice what is done, through inattention, it is not done in his presence. In *Smith v. Holden*, 58 Kan. 535, the opposite view is taken, provided the witness saw the result of the act done, upon the same occasion.

<sup>286</sup> The use of "personal and actual presence" was held to be redundant, but not an erroneous synonym for "presence" in *Green v. Green*, 145 Ill. 264.

<sup>287</sup> *Neil v. Neil*, 1 Leigh (Va.) 6.

<sup>288</sup> *Hamlin v. Fletcher*, 64 Ga. 549; *Walker v. Walker*, 67 Miss. 529.

<sup>289</sup> *Lamb v. Girtman*, 26 Ga. 625; *Ambre v. Weishaar*, 74 Ill. 109; *McElfresh v. Guard*, 32 Ind. 408; *Boldry v. Parris*, 2 Cush. 433; *Mandeville v. Parker*, 31 N. J. Eq. 242; 34 N. J. Eq. 211; *Hopkins v. Wheeler*, R. I. (1900), 45 Atl. 551; *Meurer's Will*, 44 Wis. 392.

<sup>290</sup> *Ayers v. Ayers*, 43 N. J. Eq. 565; *Stewart v. Stewart*, 56 N. J. Eq. 761.

<sup>291</sup> *Lamb v. Girtman*, 26 Ga. 625; *Lamb v. Girtman*, 33 Ga. 289.

<sup>292</sup> *Hopkins v. Wheeler*, R. I. (1900), 45 Atl. 551.

3. For one who can see the test of presence, as far as physical proximity is concerned, is that the act must be done where he can with reasonable effort see what is being done so as to identify the whole act.<sup>293</sup> If he can with reasonable effort see what is being done, it is not necessary that he actually see it.<sup>294</sup> Of course, if the person does actually see the act performed, so as to identify it clearly, such act is done in his presence.<sup>295</sup>

The complicated cases are those in which it can not be shown that such person did actually see what was taking place, so that the courts are obliged to consider his opportunity for seeing what took place at the execution of the will.

### §211. What is a reasonable effort.

What degree of exertion amounts to a reasonable effort is a matter about which there has been considerable discus-

<sup>293</sup> *Hill v. Barge*, 12 Ala. 687; *Reed v. Roberts*, 26 Ga. 294; *Hamlin v. Fletcher*, 64 Ga. 549; *Howard's Will*, 5 T. B. Mon. (Ky.) 199; *Edelen v. Hardy*, 7 Har. & J. (Md.) 61; *Dewey v. Dewey*, 1 Met. (Mass.) 349; *Allen's Will*, 25 Minn. 39; *Compton v. Mitton*, 7 Hal. (N. J.) 70; *Sprague v. Smith*, 8 R. I. 252; *Wright v. Lewis*, 5 Rich. (S. Car.) 212; *Drury v. Connell*, 177 Ill. 43; *Mendell v. Dunbar*, 169 Mass. 74; citing *Boldry v. Parris*, 2 Cush. (Mass.) 433; *Spratt v. Spratt*, 76 Mich. 384; *Maynard v. Vinton*, 59 Mich. 139; *Hopkins v. Wheeler*, R. I. 1900; 45 Atl. 551;

*v. Dewey*, 1 Met. 349; *Aiken v. Weckerly*, 19 Mich. 482; *Maynard v. Vinton*, 59 Mich. 139; *Allen's Wills*, 25 Minn. 39; *Rucker v. Lambdin*, 12 S. & M. 230; *Watson v. Pipes*, 32 Miss. 451; *Campbell v. McGuiggan* (N. J. Prer.), 34 Atl. 383; *Reynolds v. Reynolds*, 1 Speer (S. Car.) 253.

"Contiguity with an uninterrupted view between testator and the subscribing witnesses is the indispensable element of the physical signing in the testator's presence. It is immaterial that he does not see if he might have done so, but no mere contiguity of the witnesses will be sufficient, if the testator can not see them sign. Nothing will constitute a 'presence' within the meaning of the statute unless the testator can from his actual position see the act of attestation." *Drury v. Connell*, 177 Ill. 43.

<sup>294</sup> *Baldwin v. Baldwin*, 81 Va. 405. *Hill v. Barge*, 12 Ala. 687; *Robinson v. King*, 6 Ga. 539; *Hamlin v. Fletcher*, 64 Ga. 549; *Turner v. Cook*, 36 Ind. 129; *McElfresh v. Guard*, 32 Ind. 408; *Bundy v. McKnight*, 48 Ind. 502; *Shafer v. Smith*, 7 H. & J. (Md.) 67; *Dewey*

<sup>295</sup> *Bundy v. McKnight*, 48 Ind. 502; *Allen's Will*, 25 Minn. 39.

sion. An analysis of the adjudicated cases will show that the weight of authority establishes the following propositions:

1. If the person in whose presence the act is to be done can see what is taking place by changing the direction of his gaze, without moving from the place where he is at the time; and he is able to change the direction of his gaze without pain, discomfort or danger, the act thus done is done in his presence.<sup>296</sup>

2. If testator is so situated that he can not see what is taking place without leaving his place, and he does not leave it, the act is not done in his presence; even though he was able to move with comfort.<sup>297</sup> Thus, where a door-shutter was partially closed so that testator could not see the witnesses sign without moving, and he did not move, it was held that the act was not done in his presence.<sup>298</sup> Where the witnesses signed in an adjoining room, and testator could have seen them sign by walking to the door and looking into the next room, which he did not do, the will was not attested in his presence.<sup>299</sup>

3. If the exertion necessary for such person to change the direction of his gaze, is painful but not dangerous, it seems that the act is not done in his presence, unless it is done where he can see the transaction without making such painful exertion to change the direction of his gaze.<sup>300</sup>

4. Likewise, if the exertion necessary for him to change the direction of his gaze is dangerous to his life, an act done where he does not in fact see it, but where he could see it by changing the direction of his gaze, can not be said to be done in his presence.<sup>301</sup>

5. If it is physically impossible for him to move, so as to

<sup>296</sup> *Campbell v. McGugin* (N. J. Prer.) 34 Atl. 383; *Maynard v. Vinton*, 59 Mich. 139; *Walker v. Walker*, 67 Miss. 529.

<sup>297</sup> *Brooks v. Duffell*, 23 Ga. 441; *Downie's Will*, 42 Wis. 66.

<sup>298</sup> *Brooks v. Duffell*, 23 Ga. 441;

<sup>299</sup> *Doe d Wright v. Manifold*, 1 M. & S. 294.

<sup>300</sup> *Reed v. Roberts*, 26 Ga. 294.

<sup>301</sup> *Witt v. Gardiner*, 158 Ill. 176. In this case testator had physical strength enough to lean on his bed and thus watch the witnesses sign the will in the adjoining room, or even go into such room; but such exertion would have been at the risk of his life. *Held*, the attestation was not in his presence.

see the act done, such act can not be said to be done in his presence.<sup>302</sup>

### §212. What testator or witness must be able to see.

In order to identify the act, it is necessary that the testator be able to see either the paper on which the writing is done,<sup>303</sup> or the motion of the pen as the letters are formed, where he subsequently sees the signature as thus written.<sup>304</sup> It is not necessary that he be able to see the letters as they are formed.<sup>305</sup> But where the witnesses see the motion of testatrix's hand, apparently writing her name, but do not see the name while being written, and do not see it afterwards, it is not written in their presence.<sup>306</sup> On the other hand, if he is not able to see either the paper or the motion of the pen, it is not in his presence even though he can see the parties while they write their names.<sup>307</sup>

### §213. Minority view of meaning of presence.

In some recent cases the settled meaning of presence, as stated in the text, has been attacked and condemned as too narrow. As we have seen,<sup>308</sup> the majority rule is that the ability to see constitutes "presence" where testator has physical ability to see at all. The rule suggested by the cases referred to seems to be substantially the same rule as in the case of the blind,<sup>309</sup> namely, that if, by the exercise of all his available faculties, the person in whose presence the act

<sup>302</sup> *Drury v. Connell*, 177 Ill. 43. The court said in this case: "It would not be attestation in the presence of the testator if he could not see the act of attestation, but merely understood from the surrounding circumstances that the act was taking place."

<sup>303</sup> *Nock v. Nock*, 10 Gratt. (Va.) 106; *Burney v. Allen*, 125 N. C. 315.

<sup>304</sup> *Ayres v. Ayres*, 43 N. J. Eq. 565; *Maynard v. Vinton*, 59 Mich. 139.

<sup>305</sup> *Ayers v. Ayers*, 43 N. J. Eq. 565.

<sup>306</sup> *Ludwig's Estate*, — Minn. —; 81 N. W. 758.

<sup>307</sup> *Graham v. Graham*, 10 Ired. (N. C.), 219.

<sup>308</sup> See Sec. 210.

<sup>309</sup> See Sec. 214.



is to be done knows what is taking place, the act is done in his presence, whether he sees it done or not.\*

### §214. What is presence of one who is blind.

In the case of those who can not see two different tests have been suggested:

*a.* It has been held by some authorities that the act, if done so that it would be in the presence of one who could see situated in the place of the blind person, is done in the presence of such person.<sup>310</sup>

*b.* A safer test and one indorsed by the better line of au-

\* *Gallagher v. Kinkeary*, 29 Ill. App. 415; *Smith v. Holden*, 58 Kan. 535; *Riggs v. Riggs*, 135 Mass. 238; *Cook v. Winchester*, 81 Mich. 581.

In *Riggs v. Riggs*, 135 Mass. 238, the witnesses signed in the same room with the testator about nine feet away from him. He lay on the bed flat on his back and by reason of an injury to his neck could not turn his head so as to see the witnesses sign the will, though his sight was unimpaired. He knew what was taking place and had requested the witnesses to sign.

*Held*, such signature was in his presence, citing and refusing to follow *Aiken v. Weckerly*, 19 Mich. 482; *Downie's Will*, 42 Wis. 66; *Jones v. Tuck*, 3 Jones (N. Car.), 202; *Graham v. Graham*, 10 Ired. 219.

On similar facts the same view of what 'presence' means was taken in *Cook v. Winchester*, 81 Mich. 581; 8 L. R. A. 822.

In *Smith v. Holden*, 58 Kan. 535, the evidence developed that a witness had been inattentive and apparently had gone into an adjoining room at the moment of sig-

nature by testatrix and returning had found the act done. The court held that even if the witness did not see the signature written and heard no acknowledgment thereof, it was nevertheless signed in his presence. Speaking of the witnesses, the court said: "If not at all times within her (the testatrix's) sight and hearing, they were within the circle and contiguity of her presence."

In *Cunningham v. Cunningham*, 83 N. W. (Minn.) (1900) 58, testator signed the will in the presence of the witnesses. They then stepped into the next room to a table and subscribed their names to the will. Testator could have seen them sign by arising from the chair in which he was sitting and stepping forward about three feet; but by preference he remained in the chair from which he could not see the table. In less than two minutes the witnesses returned with the will and pointed out their signatures to testator who looked over and pronounced it "all right." This was held to be a valid attestation in the presence of testator.

<sup>310</sup> *In re Piercy*, 1 Rob. 278.

thorities is that the act must be done in such proximity to the blind person that he can, by means of his remaining senses, know what is being done.<sup>311</sup>

**§215. Effect of acknowledgment by witness of his signature not made in presence of testator.**

Most statutes require the witness to sign in the presence of the testator, and make no mention of any acknowledgment by the witness of his signature made without testator's presence. Where the statutory provisions are of this nature the requirement that the witnesses sign in the presence of the testator is imperative.<sup>312</sup> If they sign out of his presence and afterwards acknowledge in his presence that they signed their names, the will is invalid.<sup>313</sup> Retracing their signatures with a dry pen is nothing more than an acknowledgment. Retracing a former signature with a dry pen is not a signing by the witness;<sup>314</sup> nor is adding a cross stroke to change a T to an F.<sup>315</sup> These acts amount to nothing more than an acknowledgment of such signature.

**§216. Presence of each other.**

Unless the statute expressly requires it, the witnesses are not required to sign in the presence of each other, but may sign at different times and places.<sup>316</sup> In some few jurisdic-

<sup>311</sup> See *dicta* in *Riggs v. Riggs*, 135 Mass. 238; *Ray v. Hill*, 3 Strobb. (S. Car.), 297; *Reynolds v. Reynolds*, 1 Spears (S. Car.), 253.

<sup>312</sup> See cases cited in following notes.

<sup>313</sup> *Duffie v. Corridon*, 40 Ga. 122; *Lamb v. Girtman*, 33 Ga. 289; *Mendell v. Dunbar*, 169 Mass. 74; *Chase v. Kittredge*, 11 Atl. (Mass.) 49; *Pawtucket v. Ballou*, 15 R. I. 58.

*Contra*, *Sturdivant v. Birchett*, 10 Gratt. (Va.), 67; *Parramore v. Taylor*, 11 Gratt. (Va.), 220.

<sup>314</sup> *Goods of Maddock*, 43 L. J. P. 29; L. R. 3 P. & M. 169; 30 L. T. 696; 22 W. R. 741. *Goods of Cunningham*, 4 Sw. & Tr. 194; 29 L. J. P. 71; *Horne v. Featherstone*, 73 Law. T. 32.

<sup>315</sup> *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; 7 Jur. (N. S.), 611; 4 L. T. 125; 9 W. R. 521.

<sup>316</sup> *Grayson v. Atkinson*, 2 Ves. 454; *Ellis v. Smith*, 1 Ves. Jr. 11; *Hoffman v. Hoffman*, 26 Ala. 535; *Moore v. Spie*, 80 Ala. 129; *Rogers v. Diamond*, 13 Ark. 474; *Porter's Estate*, 9 Mackey (D. C.), 493;

tions the presence of all the subscribing witnesses together is required by statute.<sup>317</sup> The English statute requires that the signature be "made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator." This has been construed to require that the witnesses subscribe in the presence of each other.<sup>318</sup> A similar statute in Virginia has been construed not to require witnesses to subscribe in the presence of each other.<sup>319</sup>

However, when the will has been changed between the time that the first witness signed it and the time when the others sign, it is not properly attested. The same instrument must be attested by the proper number of witnesses as a prerequisite to its validity.<sup>320</sup>

### §217. *Animus attestandi*.

The witness must act with the intention of being a witness—with the *animus attestandi*. This is always necessary,<sup>321</sup> but it becomes important only when he has subscribed his name to the will, as without such subscription his intention is immaterial.

So where one signs the will as an amanuensis to indicate that he wrote testator's name, as "A B by C D," he does not sign *animo attestandi*, and he must sign again with such in-

Webb v. Fleming, 30 Ga. 808; Flinn v. Owen, 58 Ill. 111; Johnson v. Johnson, 106 Ind. 475; Grubbs v. Marshall, Ky., no off. rep.; 13 S. W. 447; Hogan v. Grosvenor, 10 Met. (Mass.), 54; Dewey v. Dewey, 1 Met. 349; Cravens v. Faulconer, 28 Mo. 19; Grimm v. Tittman, 113 Mo. 56; Welch v. Adams, 63 N. H. 344; Haysradt v. Kingman, 22 N. Y. 372; Willis v. Mott, 36 N. Y. 486; Raudebaugh v. Shelley, 6 O. S. 307; Simmons v. Leonard, 91 Tenn. 183; Logue v. Stanton, 5 Sneed 97; Beane v. Yerby, 12 Gratt.

(Va.), 239; Smith's Will, 52 Wis. 543.

<sup>317</sup> *In re Simmons*, 3 Curt. 79; Moore v. King, 3 Curt. 243; Lane's Appeal, 57 Conn. 182; 4 L. R. A. 45; Roberts v. Welch, 46 Vt. 164.

<sup>318</sup> Moore v. King, 3 Curt. 243; Wyatt v. Berry (1893), P. 5.

<sup>319</sup> Green v. Crain, 12 Gratt. (Va.), 252.

<sup>320</sup> Patterson v. Ransom, 55 Ind. 402.

<sup>321</sup> Boone v. Lewis, 103 N. Car. 40; Fowler v. Stagner, 55 Tex. 393; Peake v. Jenkins, 80 Va. 293.

tent in order to be an attesting witness.<sup>322</sup> So where he attempts to write his name as an attesting witness and abandons the attempt, or where, in order to deceive, he writes an assumed name.<sup>323</sup> So where one writes his name as a witness to certain interlineations, and not to the will, he does not thereby become a subscribing witness.<sup>324</sup> So where a testator indorsed on his will "The within is the basis on which I wish to have my affairs disposed of, should no other will be made by me," and a witness attested this indorsement, it was held that such attestation was evidently not made with the intent of witnessing the will, and that parol evidence would not be admissible to show such intention.<sup>325</sup>

Also, where the receiver who was nominated executor writes his name upon the will as an indication of his acceptance he was held not to be a subscribing witness.<sup>326</sup> But where a testator, through a mistake in the law, formally acknowledges the instrument as his will before a magistrate, who adds his official certificate of such fact, such magistrate may be counted as an attesting witness.<sup>327</sup>

### §218. Request of testator.

The statutes generally require that the witness sign at the request of the testator, omitting the word express.<sup>328</sup> The request of testator is undoubtedly made in the best way by the express words of the testator himself;<sup>329</sup> but a request made by some other person in the presence of testator and assented to by testator is sufficient.<sup>330</sup> Thus it was held a good request

<sup>322</sup> *Burton v. Brown*, —Miss. —; 25 So. 61; *Peake v. Jenkins*, 80 Va. 293, distinguishing *Pollock v. Glassell*, 2 Gratt. (Va.), 439.

<sup>323</sup> *Goods of Leverington*, 55 L. J. P. 62; 11 P. D. 80.

<sup>324</sup> *In re Cunningham*, 1 S. & S. 132.

<sup>325</sup> *Patterson v. Ransom*, 55 Ind. 402.

<sup>326</sup> *Snelgrove v. Snelgrove*, 4 De Saus. 274.

<sup>327</sup> *Payne v. Payne*, 54 Ark. 415; *Murray v. Murphy*, 39 Miss. 214.

<sup>328</sup> The Nebraska Statute does not make the request of the testator necessary. *Thompson v. Thompson*, 49 Neb. 157.

<sup>329</sup> *Bundy v. McKnight*, 48 Ind. 502; *Dyer v. Dyer*, 87 Ind. 13; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Combs v. Jolly*, 3 N. J. Eq. 625.

<sup>330</sup> *Huff v. Huff*, 41 Ga. 695;

of testator when his attorney said to him in the presence of A and B: "Do you wish A and B to witness your will?" and the testator answered "Yes."<sup>331</sup> And the request may be implied from the acts, conduct and gestures of the testator, as well as from his words.<sup>133</sup> So testator may make his request by acquiescence in the suggestion of a witness.<sup>333</sup> But as the necessity of testator's request is created by statute, where the statute omits the requirement of testator's request it is not necessary.<sup>334</sup>

### §219. Signature by witness.

The witness is required by the statute to "subscribe" the will. This subscription should be his full name, but such formality is not indispensable. The witness may sign his initials<sup>335</sup> or an assumed name,<sup>336</sup> unless such name is assumed to deceive the court into believing that another person signed

Bundy v. McKnight, 48 Ind. 502; Dyer v. Dyer, 87 Ind. 13; Elkin-ton v. Brick, 44 N. J. Eq. 154; Peck v. Carey, 27 N. Y. 9; Coffin v. Coffin, 23 N. Y. 9; Gilbert v. Knox, 52 N. Y. 125; Nelson's Will, 141 N. Y. 152; Whitenack v. Stryker, 2 N. J. Eq. 8; Combs v. Jolly, 3 N. J. Eq. 625; Mundy v. Mundy, 15 N. J. Eq. 290; Burney v. Allen, 125 N. C. 315; Cheatham v. Hatcher, 30 Gratt. (Va.), 56.

<sup>331</sup> Mullin's Estate, 110 Cal. 252.

<sup>332</sup> Payne v. Payne, 54 Ark. 415;

Higgins v. Carleton, 28 Md. 115;

<sup>333</sup> Allen's Will, 25 Minn. 39; Whitenack v. Stryker, 2 N. J. Eq. 8; Raudebaugh v. Shelley, 6 O. S. 307; Meurer's Wills, 44 Wis. 392.

<sup>334</sup> Coffin v. Coffin, 23 N. Y. 9.

<sup>335</sup> Mulligan v. Leonard, 46 Io. 692; Thompson v. Thompson, 49 Neb. 157.

<sup>336</sup> *In re* Christian, 2 Rob. Ecc.

Rep. 110; Jackson v. Van Duzen, 5 Johns. (N. Y.), 144; Adams v. Chaplin, 1 Hill Eq. (S. Car.), 265.

<sup>336</sup> *In re* Olliver, 2 Spinks, 57.

*Contra*, where witness by inadvertence wrote testator's name instead of his own. *In re* Walker's Estate, 110 Cal. 387.

In this case the will was attested under a statute requiring each witness to "sign his name."

The court distinguished the following cases as decided under statutes that merely required each witness to 'subscribe.' Goods of Eynon, 3 L. R. Pro. & D. 92; Goods of Christian, 2 Rob. Ecc. 110; *In re* Olliver, 2 Spinks, 57; and distinguished the following case under a statute like the California Statute, as one where the witness signed by a mark and another wrote the correct name of the witness. Meehan v. Rourke, 2 Bradf. 385.

the will, in which case the *animus attestandi* is lacking.<sup>337</sup> A witness may sign by his mark.<sup>338</sup> Where the statute allows a witness to "attest by his mark provided he can swear to the same" a competent witness is not disqualified by inability to identify his mark when the will is offered for probate,<sup>339</sup> and even if the wrong name is written by the mark by mistake the signature is good.<sup>340</sup> As in the case of the testator, the witness' hand may be guided by some other person while he holds pen.<sup>341</sup> It has been held to be a good signature by the witness where he touches the pen with which another writes his name.<sup>342</sup>

## §220. Signature of witness by another.

But there is this difference between the signature of the testator and that of the witness: The codes generally provide that some other person may sign for testator if duly authorized. No such provisions are made for the signature of a witness. Where no such provision is made the signature of a witness made by some other person is of no effect, even though the witness and the testator are both present and request such signature, and the will is invalid unless, excluding such witness, it is subscribed by the required number of witnesses.<sup>343</sup>

<sup>337</sup> *Pryor v. Pryor*, 29 L. J. P. 114; *Goods of Leverington*, 55 L. J. P. 62; 11 P. D. 80.

<sup>338</sup> *Goods of Enyon*, 42 L. J. P. 52; L. R. 3 P. 92; 29 L. T. 45; 21 W. R. 856; *Doe d Davis v. Davis*, 9 Q. B. 648; 16 L. J. Q. B. 97; 11 Jur. 182; *In re Amiss*, 2 Rob. Rep. 116; *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, 8 Ves. 504; *Wright v. Wakeford*, 17 Ves. 459; *Grayson v. Atkinson*, 2 Ves. 454; *Dick*, 158; *Garrett v. Heflin*, 98 Ala. 615; *Davis v. Semmes*, 51 Ark. 48; *Thompson v. Davitte*, 59 Ga. 472; *Gilis v. Gilis*, 96 Ga. 1; *Needham v. Needham*, 3 Dane. Abr. 452; *Compton v. Mitton*, 12 N. J. L. 70; *Meehan v. Rourke*, 2 Bradf.

385; *Prigden v. Prigden*, 13 Ired. (N. Car.), 259; *Ford v. Ford*, 7 Humph. (Tenn.), 92; *Rose v. Allen*, 1 Cold. (Tenn.), 23.

<sup>339</sup> *Gillis v. Gillis*, 96 Ga. 1.

<sup>340</sup> *In re Ashmore*, 3 Cush. 756.

<sup>341</sup> *Lewis v. Lewis*, 2 Sw. & Tr. 153; 4 L. T. 583; *Goods of Lewis*, 31 L. J. P. 153; 7 Jur. (N. S.), 688; *Goods of Frith*, 1 Sw. & Tr. 8; 27 L. J. P. 6; 4 Jur. (N. S.), 288; 6 W. R. 262; *Harrison v. Elvin*, 3 Q. B. 117; 6 Jur. 849; *Campbell v. Logan*, 2 Brad. 90.

<sup>342</sup> *Bell v. Hughes*, 5 L. R. Ir. 407. This, however, has been doubted in *In re Kelcher*, 6 No. Cas. 15.

<sup>343</sup> *In re White*, 7 Jur. 1045; *In*

In some states, however, a contrary view is taken. It is a well-recognized principle of common law that where A signs or seals for B in B's presence and by B's direction, this is, in legal effect, B's act. This principle applies to contracts and conveyances. And the states which entertain this contrary view and hold that a witness' name may be written by another reach their conclusion by extending this common law principle to wills.<sup>344</sup>

### §221. Place of signature of witness.

The statutes of wills generally require the attesting witnesses to "subscribe" their names to the will as such witnesses. The weight of authority is that the word "subscribe" has not the same meaning when used in the Wills Act of the signature of the subscribing witnesses, that it has when used in the Statute of Frauds of the signature "of the party to be charged therewith." In the latter case "subscribe" means to write beneath, *i. e.*, at the end of the document. But when the witnesses are required by the Wills Act to subscribe their names it is held that they may write them in any part of the will so that it appears on the face of the will that they were written *animo attestandi*.<sup>345</sup> Thus the subscribing witnesses may write their names above the attestation clause,<sup>346</sup> or where the will recites the presence of the witnesses, each witness may sign his name where it appears in the body of the will,<sup>347</sup> or the names of the witnesses may appear on the back of the will.<sup>348</sup>

*re* Leverington, 11 Pro. Div. 80; Goods of Duggins, 39 L. J. P. 24; Riley v. Riley, 36 Ala. 496; Horton v. Johnson, 18 Ga. 396; *In re* Lossee's Will, 34 N. Y. S. 1120; Simmons v. Leonard, 91 Tenn. 183; McFarland v. Bush, 94 Tenn. 538; 27 L. R. A. 662.

<sup>344</sup> Schnee v. Schnee (Kan.) (1900), 60 Pac. 738; Upchurch v. Upchurch, 16 B. Mon. (Ky.), 102; Lord v. Lord, 58 N. H. 7; *In re* Strong, 39 St. Rep. (N. Y.), 852;

Crawford's Will, 46 S. Car. 299; Jesse v. Parker, 6 Gratt. (Va.), 57; 52 Am. Dec. 102.

<sup>345</sup> Goods of Streaily (1891), Pr. 172; Potts v. Felton, 70 Ind. 166; Heady's Will, 15 Abb. Pr. (N. S.), 211.

<sup>346</sup> Moale v. Cutting, 59 Md. 510. <sup>347</sup> Franks v. Chapman, 64 Tex. 159.

<sup>348</sup> Goods of Braddock, 1 Pro. Div. 433.

A considerable space between the signature of testator and those of the witnesses, as where testator signed his will at the end of the dispositive part on the first page, and the attestation clause was at the top of the fourth page, two blank pages intervening between the signature and the attestation clause, does not invalidate such will.<sup>349</sup> Where a will and codicil were executed at the same time and were written on the same piece of paper, it was held, where the witnesses signed their names under the will only, that it was a good attestation as to both will and codicil.<sup>350</sup> Where witnesses wrote their names on the margins of the first and second sheets of the will, opposite certain alterations, this was held to be a valid attestation and subscription, since the evidence showed that they signed as witnesses to the signature of the testator, and not as witnesses merely to the alterations.<sup>351</sup>

*Contrary view.*—But where the will was folded and sealed up after it was written and signed by the testator, and the subscribing witnesses, at the request of testator, wrote their names on the back of the will, it was held not to be a good subscription.<sup>352</sup>

*Statutory Rule.*—In some jurisdictions by special statute the witnesses are required to subscribe their names at the end of the will.<sup>353</sup> Hence a will signed by the testator before a notary and then placed in an envelope, which was sealed, and on the back of which the witnesses wrote their names, was held not to be signed at the end thereof.<sup>354</sup>

## §222. Order of signing.

If subscribing witnesses sign their names to a will before testator signs it, and leave while the will is still unsigned, it is

<sup>349</sup> *Singer's Will*, 44 N. Y. Supp. 606.

<sup>350</sup> *Fowler v. Stagner*, 55 Tex. 393.

<sup>351</sup> *In re Streatley* (1891), P. 172.

<sup>352</sup> *Soward v. Soward*, 1 Duv. (Ky.), 126.

<sup>353</sup> *Conway's Will*, 124 N. Y. 455.

<sup>354</sup> *Vogel v. Le Ritter*, 139 N. Y. 223. This case differs from *Soward v. Soward*, *supra*, in that it was decided under a statute which required the witnesses to sign at the end of the will, while in *Soward v. Soward* the statute only required the witnesses to subscribe the will.



evident that the will is not executed in compliance with law, for the witnesses neither saw testator sign the will nor heard him acknowledge his signature thereto. In such cases the will is held not to be executed in compliance with the law.<sup>355</sup> A different case, however, is presented where one or more of the witnesses sign the will before the testator; but immediately afterwards and as a part of the same transaction the testator signs his name to the will. In this latter case the attesting witnesses see testator sign his name. The only question to determine is whether the fact that the witnesses signed before testator invalidates the will. Upon this question there is some difference in judicial decision and still greater confusion in discussing the question. The view that seems to have the weight of modern authority is that "in acts substantially contemporaneous it can not be said that there is any substantial priority,"<sup>356</sup> and that where the execution is completed at one transaction it can not be held that the will is rendered invalid because one or more of the witnesses signed before testator.<sup>357</sup>

It must be admitted that there is a line of cases in which it is held, contrary to the weight of authority, that if the witnesses or one of them sign before testator, even at the same transaction,

<sup>355</sup> *Duffie v. Corridon*, 40 Ga. 122. (In this case three witnesses were necessary. Two signed the will before testator. At a subsequent occasion testator and the third witness signed in the presence of one of the first two witnesses. The other witness did not see testator sign the will nor hear him acknowledge his signature. The will was held to be invalid.) *Reed v. Watson*, 27 Ind. 443 (one of two witnesses neither saw testator sign the will nor heard him acknowledge his signature); *Chisholm v. Ben*, 7 B. Mon. 408; *Keyle v. Feuchter*, 56 O. S. 424 (neither witness saw testator sign or heard him acknowledge his signature).

<sup>356</sup> *Kaufman v. Caughman*, 49 S. Car. 159.

<sup>357</sup> *O'Brien v. Gallagher*, 25 Conn. 229; *Swift v. Wiley*, 1 B. Mon. (Ky.) 114; *Upchurch v. Upchurch*, 16 B. Mon. (Ky.), 102; *Gibson v. Nelson*, 181 Ill. 122; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Moale v. Cutting*, 59 Md. 510; *Miller v. McNeil*, 35 Pa. St. 217; *Kaufman v. Caughman*, 49 S. Car. 159; *Rosser v. Franklin*, 6 Gratt. (Va.), 1.

There seems to be no distinction between such cases as *Mundy v. Mundy*, 15 N. J. Eq. 290; where one witness signed before testator and one after, and cases where both witnesses signed before testator.

the will is not properly executed, and should be refused admission to probate.<sup>358</sup>

In another line of cases the question of the effect of the witnesses' signing before the testator is indeed presented, but with the additional fact that the witnesses left before testator signed. These cases are undoubtedly correct in holding that the will is not properly executed, but are not precedents against the weight of authority, though often cited as such.<sup>359</sup>

So another line of cases presents the question of the validity of a will, where the witnesses sign before testator and not in his presence, and afterwards testator signs in their presence, and they then acknowledge their signatures. These wills are held to be invalid in most jurisdictions, as it is settled by the weight of authority that a witness must sign in the presence of testator, and that his acknowledgment is not a substitute for such signature.<sup>360</sup> But these cases are not in support of the view here given as the minority view, though often cited in support of it.<sup>361</sup>

<sup>358</sup> *Goods of Olding*, 2 Curt. Ecc. 865; *Cooper v. Bockett*, 3 Curt. Ecc. 643; *Shaw v. Neville*, 1 Jur. (N. S.), 408; *Brooks v. Woodson*, 87 Ga. 379; 14 L. R. A. 160; *Marshall v. Mason* [Mass. 1900], 57 N. E. 340; *Jackson v. Jackson*, 39 N. Y. 153; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Knapp v. Reilly*, 3 Dem. 427; *In re McMulkin*, 6 Dem. 347; *Simmons v. Leonard*, 91 Tenn. 183.

These cases are squarely on this point. In deciding them, however, the courts have rested on the supposed authority of other cases which do not turn upon this point, though some *obiter dicta* in the opinions of the courts discuss it. Among the latter are some cases in which the question has merely been raised. *Lewis's Will*, 51 Wis. 101, or in which it is a pure *obiter*, *Welty v. Welty*, 8 Md. 15.

<sup>359</sup> See the first note in this section.

<sup>360</sup> *Chase v. Kittredge*, 11 All. (Mass.), 49.

<sup>361</sup> Another case sometimes cited on this subject is one in which a witness signed testator's name, then the witnesses wrote their names and then the testator made his mark, it was held that the will was valid, on the theory that as the testator authorized the writing of his name, the signature was complete before the witnesses signed and his mark was superfluous. *Sechrest v. Edwards*, 4 Met. (Ky.), 163. While correctly decided, this case has evidently no bearing upon the topic under discussion, since testator actually signed before the witnesses.

## §223. Necessity and value of attestation clause.

Under the statutes in force in most states a formal attestation clause is not necessary.<sup>362</sup> Any form of signing which shows that it is done *animo attestandi* is sufficient.<sup>363</sup> It is sufficient for the witnesses to subscribe their names after the word "witnesses."<sup>364</sup> So an incomplete attestation clause, such as "signed and sealed in the presence of," does not render the will invalid.<sup>365</sup> The signatures of the witnesses, without any additional word explanatory of their purpose in signing is held sufficient.<sup>366</sup>

But while not indispensable, a full attestation clause is of the highest value. It removes all doubt as to the *animus attestandi*, and on proof of the signatures is *prima facie* evidence that the acts therein recited have all been properly done.<sup>367</sup> This is true even where the subscribing witnesses have forgotten what took place at the time of executing the will.<sup>368</sup>

<sup>362</sup> Berberet v. Berberet, 131 Mo. 399; Forsaith v. Clark, 21 N. H. 409; Allaire v. Allaire, 37 N. J. L. (8 Vr.), 312; 39 N. J. L. (10 Vr.), 113; Baskin v. Baskin, 36 N. Y. 416.

<sup>363</sup> Roberts v. Phillips, 4 El. & Bl. 450; Bryan v. White, 5 E. L. & Eq. 579; Pots v. Felton, 70 Ind. 166; Olerick v. Ross, 146 Ind. 282; Robinson v. Brewster, 140 Ill. 649; Ela v. Edwards, 16 Gray (Mass.), 91; Osborn v. Cook, 11 Cush. (Mass.), 532; Fatheree v. Lawrence, 33 Miss. 585; Jackson v. Jackson, 39 N. Y. 153; Waddington v. Buzby, 45 N. J. Eq. 173; Fry's Will, 2 R. I. 88.

<sup>364</sup> Olerick v. Ross, 146 Ind. 282.

<sup>365</sup> Herbert v. Berrier, 81 Ind. 1; Hallowell v. Hallowell, 81 Ind. 251.

<sup>366</sup> Berberet v. Berberet, 131 Mo. 399; See Sec. 221.

<sup>367</sup> Deupree v. Deupree, 45 Ga. 415; Swain v. Edmunds, 54 N. J. Eq. 438; 53 N. J. Eq. 142; Darnell v. Buzby, 50 N. J. Eq. 725; Far-

ley v. Farley, 50 N. J. Eq. 434; Ayers v. Ayers, 43 N. J. Eq. 565; Allaire v. Allaire, 37 N. J. La. 312; Mundy v. Mundy, 15 N. J. Eq. 290; McCurdy v. Neal, 42 N. J. Eq. 333; Turnure v. Turnure, 35 N. J. Eq. 437; Mandeville v. Parker, 31 N. J. Eq. 242; Boylan Ads. Meeker, 4 Dutch. 274; Compton v. Mitton, 7 Hal. 70; Tappen v. Davidson, 27 N. J. Eq. 459; Jackson v. Jackson, 39 N. Y. 153; Rugg v. Rugg, 83 N. Y. 592; *In re Cottrell*, 95 N. Y. 329; *In re Hunt*, 110 N. Y. 278; Clark v. Dunnivant, 10 Leigh (Va.), 13.

Thus an attestation clause which recites the facts is *prima facie* evidence that testator signed the will in due form; Alpaugh's Will, 23 N. J. Eq. 507; and that the witnesses were present. Kirkpatrick's Will, 22 N. J. Eq. 463.

<sup>368</sup> Thompson v. Owen, 174 Ill. 229; Barnes v. Barnes, 66 Me. 236; Farley v. Farley, 50 N. J. Eq. 434; Tappen v. Davidson, 12 C. E. Gr. 459.

## §224. Residence of witnesses.

In some states it is required by statute that the witness write his place of residence opposite his name. Such provisions are held to be directory only, and the omission of the place of residence does not invalidate the will unless the statute expressly gives such effect to the omission.<sup>369</sup>

## PART V—PUBLICATION.

### §225. Publication.—Definition.

Publication is the act of making it known in the presence of witnesses that the instrument to be executed is the last will and testament of the testator.<sup>370</sup>

### §226. Form of publication.

It is not necessary to constitute publication that the contents of the will be made known to the witnesses,<sup>371</sup> nor is it material whether publication precedes or follows the signing of the will.<sup>372</sup> Publication may be made before the will is signed, if it is signed as part of the same transaction,<sup>373</sup> and it may also be made while the witness is in the act of signing his name.<sup>374</sup> But if made after execution is complete, at another time, it is not sufficient.<sup>375</sup>

Publication may be made by the express declaration of the testator that the instrument is his will, or by that of some third person, as the attorney who draws the will, in the presence of testator when adopted by the words or acts of testator as his

<sup>369</sup> Succession of Justus, 47 La. Ann. 302; *In re Phillips*, 98 N. Y. 267; *Dodge v. Finlay*, 57 N. Y. Supp. 791.

<sup>370</sup> *Hildreth v. Marshall*, 51 N. J. Eq. 241; *Gilbert v. Knox*, 52 N. Y. 125; *Thompson v. Stevens*, 62 N. Y. 634; *In re Beckett*, 103 N. Y. 167.

<sup>371</sup> *Coffin v. Coffin*, 23 N. Y. 9; Voorhis's Will, 125 N. Y. 765.

<sup>372</sup> *Ayres v. Ayres*, 43 N. J. Eq. 565; *Jackson v. Jackson*, 39 N. Y. 153.

<sup>373</sup> *Errickson v. Fields*, 30 N. J. Eq. 634; *Mickle v. Matlack*, 17 N. J. L. 86.

<sup>374</sup> *In re Phillips*, 98 N. Y. 267.

<sup>375</sup> *In re Dale*, 56 Hun, 169.

own.<sup>376</sup> Thus where the scrivener told testatrix in the presence of the attesting witnesses that he had brought them to witness her will, and she thereupon signed it in their presence, with full knowledge of its contents, it was held to be a valid execution including publication.<sup>377</sup> It may be made by reference to the instrument as a "will" without any formal declaration.<sup>378</sup> Or such description of the scope of the instrument as shows that it is testamentary in its nature has been held a valid publication.<sup>379</sup> It is also a good publication when made by the acts and gestures of testator, as well as by his words. Any method whereby he communicates to the witnesses that the instrument is his last will and testament is sufficient.<sup>380</sup> And where testator asks the subscribing witnesses to meet him at a certain place to witness his will, and on their meeting at such place testator's acts in having them sign as witnesses, will, together with his previous conversation, be a sufficient publication.<sup>381</sup> But a declaration that leaves the nature of the instrument in doubt will not be a sufficient publication. Thus, where the testator said to the witnesses "I declare the within to be my will and deed," such declaration was held not to be a sufficient publication.<sup>382</sup> So where testatrix concealed from the witnesses the fact that the instrument was a will, and always referred to it a "a writing."<sup>383</sup> The witnesses before whom publication is required to be made are by statute required to be the witnesses who attest and subscribe the will.<sup>384</sup>

<sup>376</sup> *Mundy v. Mundy*, 15 N. J. Eq. 290; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Hildreth v. Marshall*, 51 N. J. Eq. 241; *Voorhis's Will*, 125 N. Y. 765.

<sup>377</sup> *Hildreth v. Marshall*, 51 N. J. Eq. 241; *Denny v. Pinney*, 60 Vt. 524; 12 Atl. 108.

<sup>378</sup> *Porter v. Ford*, 82 Ky. 191.

<sup>379</sup> *Beckett's Will*, 103 N. Y. 167; *In re Hunt*, 110 N. Y. 278.

<sup>380</sup> *Compton v. Mitton*, 7 Hal. 70; *Buzby v. Darnell*, 52 N. J. Eq. 337; *Mickle v. Matlock*, 17 N. J.

L. 86; *Elkinton v. Brick*, 44 N. J. Eq. 154; 1 L. R. A. 161; *Lane v. Lane*, 95 N. Y. 494; *In re Hunt*, 110 N. Y. 278; *In re Beckett*, 103 N. Y. 167; *Coffin v. Coffin*, 23 N. Y. 9.

<sup>381</sup> *Robbins v. Robbins*, 50 N. J. Eq. 742.

<sup>382</sup> *Lewis v. Lewis*, 11 N. Y. 220.

<sup>383</sup> *Darnell v. Buzby*, 50 N. J. Eq. 725.

<sup>384</sup> *Darnell v. Buzby*, 50 N. J. Eq. 725; *In re Phillips*, 98 N. Y. 267.

## §227. Necessity of publication.

In some jurisdictions publication is expressly required by statute as a requisite to the validity of a will. States of this class are New York and New Jersey.<sup>385</sup>

In the absence of a statute requiring publication is it necessary that the attesting witnesses know that the instrument to which they subscribe their names is a will?

While there is some diversity of judicial opinion on this point, especially in the *obiter dicta*, the great weight of authority is that in the absence of express statute it is not necessary that witnesses be informed that the instrument attested is a will.<sup>386</sup> Thus, where the testator showed witnesses a paper with his signature and asked them to attest it, it was held to be a sufficient acknowledgment of the signature and a valid attestation.<sup>387</sup> The fundamental reason for this rule is that the legislature has prescribed in full all the formalities neces-

<sup>385</sup> Mundy v. Mundy, 2 McCart. 290; Combs v. Jolly, 3 N. J. Eq. 625; Swain v. Edmunds, 54 N. J. Eq. 438; 53 N. J. Eq. 142; Seymour v. Van Wyck, 6 N. Y. 120.

<sup>386</sup> Wyndham v. Chetwynd, 1 Bur. 414; Bond v. Seawell, 3 Bur. 1773; Trimmer v. Jackson, reported 4 Burns Ecc. Law, 9th ed. 102; Moodie v. Read, 7 Taunt. 361; Leverett v. Carlisle, 19 Ala. 80; Barnewall v. Murrell, 108 Ala. 366; Canada's Appeal, 47 Conn. 450; Porter's Estate, 9 Mackey, 493; Dichie, v. Carter, 42 Ill. 376; Brown v. McAllister, 34 Ind. 375; Turner v. Cook, 36 Ind. 129; Scott v. Hawk, 107 Io. 723; Convey's Will, 52 Io. 199; Hulse's Will, 52 Io. 662; Flood v. Pragoff, 79 Ky. 607; Welty v. Welty, 8 Md. 15; Watson v. Pipes, 32 Miss. 451; Tilden v. Tilden, 13 Gray, 110; Osborn v. Cook, 11 Cush. 532 (modifying Swett v. Boardman, 1 Mass. 258); Cilley v. Cilley, 34 Me. 162; Linton's Appeal,

104 Pa. St. 228; Gable v. Rauch, 50 S. Car. 95; Verdier v. Verdier, 8 Rich. 135; Dean v. Dean, 27 Vt. 746; Allen v. Griffin, 69 Wis. 529; Skinner v. American Bible Society, 92 Wis. 209. (This point was queried in Downie's Will, 42 Wis. 66.)

"Neither is it necessary, as has been insisted, that there should be proof of formal publication of the will by the testator. The will may be good without any words of the testator declaratory of the nature of the instrument or any formal recognition of the instrument or allusion to it." Verdier v. Verdier, 8 Rich. 135, quoted in Gable v. Rauch, 50 S. Car. 95.

<sup>387</sup> *In re* Porter's Will, 20 D. C. 493; citing and following White v. Trustees, 6 Bing. 310; Osborn v. Cook, 11 Cush. (Mass.), 532; Hogan v. Grosvenor (10 Metc.), 54; Canada's Appeal, 47 Conn. 450; Tilden v. Tilden, 13 Gray, 110.

sary to a valid will, and the courts can not add to such requisites.<sup>388</sup>

It has been claimed that the word "attestation" implies that the subscribing witnesses must know the nature of the instrument which they attest.<sup>389</sup> This meaning of the word "attest" is not, however, the one usually accepted.<sup>390</sup> Some doubt has been raised upon this point in Ohio by a recent decision of the Supreme Court. The Ohio statute does not expressly require publication, but the court held that "one essential to the admission of a writing purporting to be a written will to probate is that it shall have been acknowledged by the maker as his will, and his signature acknowledged in the presence of two subscribing witnesses."<sup>391</sup> This is quoted from the syllabus, which under the rule in force in Ohio is "confined to the points of law arising from the facts of the cause that have been determined by the court."\* In spite of this rule, analysis of this case shows that the syllabus is an *obiter dictum*. The facts were that the witnesses signed a will before the testator signed it, and that they never saw him sign, or heard him acknowledge the will or his signature. Under the Ohio statute there was clearly no valid execution, irrespective of the question of publication, which question was not presented by the record as necessary to the determination of the case. Accordingly in a later Ohio case decided by a trial court, the court held that a will was valid where the testator signed in the presence of the subscribing witnesses, but did not notify them that the instrument was a will.<sup>392</sup> In some other states it has been held that, even though the statute does not require publication, the attesting witnesses must be informed that the instrument is a will.<sup>393</sup>

<sup>388</sup> "The legislature has prescribed such formalities as it deemed proper, and we ought not to add to them formalities by construction." *Flood v. Pragoff*, 79 Ky. 607; quoted in *Allen v. Griffin*, 69 Wis. 529.

<sup>389</sup> *Roberts v. Welch*, 46 Vt. 164.

<sup>390</sup> *Canada's Appeal*, 47 Conn. 450; See Sec. 189.

<sup>391</sup> *Keyl v. Feuchter*, 56 O. S. 424.

\* Rule VI. Rules of Supreme Court.

<sup>392</sup> *Williamson's Will*, 6 Ohio, N. P. 79.

<sup>393</sup> *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Roberts v. Welch*, 46 Vt. 164. (Compare *Dean v. Dean*, 27 Vt. 746.)

It is well settled that the subscribing witnesses need not know the contents of the instrument.<sup>394</sup>

**§228. Publication not a substitute for acknowledgment of signature.**

Publication is not a substitute for the acknowledgment of the signature by a testator who has not signed in the presence of the attesting witnesses. Where the statute requires both, both must be done.<sup>395</sup> It is possible, however, for one statement to constitute both acknowledgment and publication. Thus, where testator produces the instrument already signed, shows it to the witnesses in such a way that they can see his signature and declares that it is his will, such acts and declaration will constitute an acknowledgment of the signature and a publication of the will.<sup>396</sup> But where, under similar circumstances, the will is so presented to the witnesses that they can not see the signature of testator, such declaration is a good publication but not a good acknowledgment of the signature of the testator.<sup>397</sup>

<sup>394</sup> *Leverett v. Carlisle*, 19 Ala. 80; *Barker v. Bell*, 49 Ala. 284; *Grimm v. Tittman*, 113 Mo. 56.

<sup>395</sup> *Laing's Will*, 17 N. J. L. J. 266; *Den v. Mitton*, 12 N. J. L. 70; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Robbins v. Robbins*, 50 N. J. Eq. 742.

<sup>396</sup> *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Baskin v. Baskin*, 36 N. Y. 416; *Gilbert v. Knox*, 52 N. Y. 125; *In re Higgins*, '94 N. Y. 544; *In re Phillips*, 98 N. Y. 267; *In re Hunt* 110 N. Y. 278.

<sup>397</sup> *Lewis v. Lewis*, 11 N. Y. 220; *Baskin v. Baskin*, 36 N. Y. 418.



## CHAPTER XIII.

### EXTRINSIC ELEMENTS OF HOLOGRAPHIC, MYSTIC AND NUNCUPATIVE WILLS.

#### PART I—HOLOGRAPHIC WILLS.

##### §229. General nature of Holographic wills.

The holographic or olographic will is a will written entirely by testator and signed by him.<sup>1</sup> It is valid where written by testator, even though the handwriting is disguised.<sup>2</sup>

It is a type of will which in the main originates in those states of the Union in which the Roman law was once in force. From these states it has been adopted by statute into other states. Its origin may also be found in the law of testaments in England before the legislation of this century added to the extrinsic elements of the will.

The holographic will, arising from these two sources, is by statute merged into a common type, which is found, with slight variations, in about a third of the American states. The holographic will is not different in its inherent elements from the formally executed wills. No set form of words is necessary

<sup>1</sup> Pearson's Estate, 99 Cal. 30; Soher's Estate, 78 Cal. 477; *In re Shillaber*, 74 Cal. 144; 5 Am. St. Rep. 433; Toeble v. Williams, 80 Ky. 661; Baker v. Dobyns, 4 Dana, 221; Robertson's Succession, 49 La. Ann. 868; Wilborn v. Shell, 59 Miss. 205; Alston v. Davis, 118 N. Car. 202; White v. Helmes, 1 McC. 430.

<sup>2</sup> Hannah v. Peake, 2 Mar. (Ky.), 133.

to express testamentary intent, but it must appear from the instrument that testator's intention was to make a testamentary disposition.<sup>3</sup>

If testamentary intent is plain on the face of the instrument it may be in the form of a letter, and need not term itself a will.<sup>4</sup> Thus, an informal instrument reciting "This is to serifey that ie levet to mey wife Real and persnal and she to dispose for them as she wis" was held to be a valid holographic will.<sup>5</sup> And a clause in a letter, "If I should die or get killed in Texas the place must belong to you and I should not wish you to sell it" was held a good holographic will, although part of the letter in which this clause was found was not testamentary in its nature.<sup>6</sup> But where the instrument is a narrative of what disposition testator intends to make, and not or itself purporting to dispose of his property, it is not entitled to probate as a will.<sup>7</sup>

### §230. Formalities of Holographic wills.

The peculiarities of the holographic will lie entirely in the extrinsic elements of execution, attestation and the like.

#### *Witnesses.*

First. In most states the holographic will needs no witnesses as requisite to its validity.<sup>8</sup>

#### *Handwriting.*

Second. The holographic will must be entirely in the handwriting of testator, at least as to every part necessary to its

<sup>3</sup> *In re Spratt* (1897), P. 28; 66 L. J. P. D. & A. N. S. 25; 75 Law T. Rep. 518; *Mitchell v. Donahue*, 100 Cal. 202; *Pena v. New Orleans*, 13 La. Ann. 86; *Morvaut's Succession*, 45 La. Ann. 207; *Alston v. Davis*, 118 N. Car. 202.

<sup>4</sup> *In re Shillaber*, 74 Cal. 144; 5 Am. St. Rep. 433; *Alston v. Davis*, 118 N. Car. 202.

<sup>5</sup> *Mitchell v. Donahue*, 100 Cal. 202. In this case the trial court admitted evidence to the effect that the paper was not intended as a will but as a certificate that the signer had made a will. The jury

found that it was a will, and the question of the admissibility of evidence was not passed upon by the Supreme Court.

<sup>6</sup> *Alston v. Davis*, 118 N. Car. 202.

<sup>7</sup> *Easton's Estate* (D. C.), 23 Wash. L. Rep. 789.

<sup>8</sup> *Morris v. Morton*, — Ky. —; 20 S. W. 287; and see the cases cited in this chapter. *McIntire v. McIntire*, 8 Mackey (D. C.), 482.

*Contra*, in *Wyoming*, *Neer v. Cowhick*, 4 (Wyom.) 49; 31 Pac. 862; 18 L. R. A. 588.

validity. A will written on the printed form by filling in blanks is not a good holographic will;<sup>9</sup> nor is a will a good holograph where written under a printed heading where the figures "189—" were printed and testator completed the date by filling in the blank.<sup>10</sup> But the addition in the handwriting of another, of words which can be rejected, leaving the residue in the handwriting of testator a valid will, does not prevent the will from being a good holograph.<sup>11</sup> And, while the will must be written, it is proper to use figures instead of words to indicate the amount of the legacy, and the will is not thereby invalidated.<sup>12</sup> As in other wills the writing may be in lead pencil.<sup>13</sup>

#### *Date.*

Third. It is generally provided that a holographic will must be dated. The date must show the year, month and day in order to make the will valid.<sup>14</sup> The date may appear anywhere upon the will. It may appear at the beginning of the will or in the body of it,<sup>15</sup> or it may follow the signature of testator;<sup>16</sup> and the fact that a holographic will is composed of two parts each signed by testator, but the whole dated only once, does not raise a presumption that the two parts were written on different days.<sup>17</sup>

#### *Place of signature.*

If the statute specifically requires testator's signature to be placed at the end of the holographic will, a will headed with testator's name and entirely in his handwriting, but not signed by him at the end thereof, is invalid.<sup>18</sup> Unless the statute specifically require it, the signature is not necessarily at the

<sup>9</sup> Rand's Estate, 61 Cal. 468; Billing's Estate, 64 Cal. 427.

<sup>10</sup> Robertson's Succession, 49 La. Ann. 868.

<sup>11</sup> McMichael v. Bankston, 24 La. Ann. 451.

<sup>12</sup> Vanhille's Succession, 49 La. Ann. 107.

<sup>13</sup> Philbrick v. Spangler, 15 La. Ann. 46.

<sup>14</sup> Martin's Estate, 58 Cal. 530;

Heffner v. Heffner, 48 La. Ann. 1088; Fuentes v. Gaines, 25 La. Ann.

85.

<sup>15</sup> Zerega v. Percival, 46 La. Ann. 590.

<sup>16</sup> Fuqua's Succession, 27 La. Ann. 271.

<sup>17</sup> Lagrave v. Merle, 5 La. Ann. 278.

<sup>18</sup> Armant's Will, 43 La. Ann. 310; 26 Am. St. Rep. 183.

end of the will, but may appear in the body of the will as well, if inserted there with intent to make such name a signature.<sup>19</sup>

But the insertion of testator's name in such place is an ambiguous act at the most, and is *prima facie* not a final signature.<sup>20</sup> Nor is an endorsement by a testator named Roy on the back of his will "Roy's will" a sufficient signing where it does not appear from the will that testator intended such name as a signature.<sup>21</sup>

While a holographic will does not need witnesses, the addition of the names of witnesses to a holographic will does not thereby invalidate it as a holographic will.<sup>22</sup>

On the other hand, a will which is entirely in the handwriting of testator and signed by him is a good holographic will, although an unsigned attestation clause follows his signature.<sup>23</sup>

### §231. Place of deposit of Holographic will.

In some states it is provided by statute that, in order to be valid, a holographic will must be found at testator's death among his "valuable papers;"<sup>24</sup> and in such jurisdictions when found among articles and papers of small value it is not a valid holographic will.<sup>25</sup> And the sending of a letter containing holographic testamentary provisions to the person indicated therein as the beneficiary was a placing it in the hands of such person "for safe keeping" within the meaning of the statute.<sup>26</sup>

<sup>19</sup> Tate v. Tate, 11 Humph. (Tenn.) 465.

<sup>20</sup> Ramsey v. Ramsey, 13 Gratt. (Va.) 664.

<sup>21</sup> Roy v. Roy, 16 Gratt. (Va.) 418.

<sup>22</sup> Langley v. Langley, 12 La. Rep. 114; Roth's Succession, 31 La. Ann. 315; 38 La. Ann. 320; Brown v. Beaver, 3 Jones (N. Car.) 516.

<sup>23</sup> Allen v. Jeter, 6 Lea (Tenn.) 672; Perkins v. Jones, 84 Va. 358; Hill v. Bell, Phil. L. (N. Car.) 122.

So where testator thought that witnesses were necessary to the validity of the will. Toebe v. Williams, 80 Ky. 661.

<sup>24</sup> Hughes v. Smith, 64 N. Car. 493; Winstead v. Bowman, 68 N. Car. 170; Hooper v. McQuary, 5 Coldw. (Tenn.) 129.

<sup>25</sup> Little v. Lockman, 4 Jones (N. Car.) 494.

<sup>26</sup> Alston v. Davis, 118 N. Car. 202.

The fact that after testator's death attorney opened the envelope in which the holographic will was sealed at the request of the custodian of such will, does not invalidate it.<sup>27</sup>

## PART II—NUNCUPATIVE WILLS AT COMMON LAW.

### §232. Definition and history of law of nuncupative will.

The term nuncupative will at the Roman law denoted a will which was published orally in the presence of witnesses. It may be questioned if the term was originally used of oral wills. It is contended that the primary meaning was that of a written will published orally.<sup>28</sup>

The nuncupative will at common law is a very different thing from the nuncupative will of Louisiana. At common law it is an oral testament made under such circumstances that it is enforceable at law.<sup>29</sup> What the circumstances are which make an oral will enforceable is the subject of discussion in the following sections.

At the common law, as we have seen, no will could be made whereby real property was devised before the Statute of Wills, except by special custom. The statement sometimes made, that at the common law no oral will of lands could be made is true, but as no written will could be made, either, it does not add much to the history of the oral will. The Statute of Wills provided that lands might be devised 'by will and testament in writing.'<sup>30</sup> Under such statute there was no opportunity for an oral will; and no land could, of course, be devised except by writing. But by special custom in some isolated cases land might pass by a nuncupative will at the common law. "In some cities and boroughs lands may pass as chattels by will nuncupative or parol without writing."<sup>31</sup>

<sup>27</sup> Stewart's Succession, 51 La. Ann. 1553.

<sup>28</sup> Maine's Ancient Law, p. 212; Schouler on Wills, Sec. 361.

While a nuncupative instrument could not in most jurisdictions pass realty, and therefore was technic-

ally a testament, it is very generally spoken of as a nuncupative will, and this term is accordingly here employed.

<sup>30</sup> 32 Hen. VIII, C. 1. See Sec. 15

<sup>31</sup> Coke on Littleton, Sec. 167; citing Britton, fol. 164, 212, b.

The ecclesiastical law, as we have seen, did not require any formalities in the execution of a testament passing personalty.<sup>32</sup> It seems to be the general opinion of writers that originally the ecclesiastical law did not require the formality of writing in any case, but that nuncupative testaments were as valid for all purposes as written ones.<sup>33</sup>

This was possibly a necessary rule of law in a community where but few could write. Any other rule would no doubt have resulted in almost universal intestacy. But as the act of writing became generally known the ecclesiastical courts began to look with suspicion upon oral testaments, where no good reason existed for not having them in writing. The exact time at which this feeling of distrust developed into a rule of law forbidding nuncupative testaments, except in certain cases, is hard to determine. It is generally placed from the reign of Henry VIII to that of Elizabeth.<sup>34</sup>

Other writers appear to take the view that a nuncupative testament might be valid generally in the reign of James I. Thus, Swinburne said of nuncupative testaments merely: "This kind of testament is commonly made when the testator is now very sick, weak and past all recovery."<sup>35</sup>

The Statute of Wills, 32 Hen. VIII, c. 1, did not affect testaments of personal property in any way; and the law developed by gradually restricting nuncupative testaments to cases where the testator was *in extremis*, but not attempting to control them further.

The case of *Cole v. Mordaunt*, 4 Ves. 196, called the attention of the public to the great danger of so lax a rule. In that case testator when advanced in years had married a young woman. Her conduct during her married life was imprudent if not depraved. He died leaving a written will by which a considerable part of his property was bequeathed to charitable purposes. The widow by subornation of perjury induced nine witnesses to swear that testator had made a nuncupative testa-

<sup>32</sup> See Sec. 157.

Hazeltan, 20 Johns. (N. Y.) 502.

<sup>33</sup> Kent's Commentaries, Vol. IV, p. 516.

<sup>35</sup> Swinburne, pt. 1, Sec. 12, par. 1.

<sup>34</sup> Perkins, Sec. 476; *Prince v.*

ment *in extremis*, by which he revoked his written testament and bequeathed his property to his widow. The conspiracy failed, and the fictitious testament was defeated. At the hearing of this case Lord Nottingham made the famous remark, that it was his hope "to see one day a law, that no written will should ever be revoked except by writing."

The next year was passed the Statute of Frauds, 29 Car. II, c. 3. The question as to who was the author of this famous statute is involved in much dispute; but it seems extremely probable that Lord Nottingham's support greatly facilitated its passage; and that certain sections of that statute were formed to meet the case of *Cole v. Mordaunt*.<sup>36</sup>

<sup>36</sup> 29 Car. II, C. 3. *And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury*, be it enacted by the authority aforesaid, that from and after the aforesaid four and twentieth day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; not unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present or some of them, bear witness that such was his will or to that effect; nor unless such nuncupative will were made at the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

Sec. 20. And be it further enacted, That after six months passed

after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

Sec. 21. And be it further enacted, That no letters testamentary or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved unless process have first issue to call in the widow or next of kindred to the deceased, to the end that they may contest the same if they please.

Sec. 23. Provided always, That notwithstanding this act, any sole heir being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages and personal estate as he or they might have done before the making of this act.

The Wills Act of 1837, 1 Vict. C. 26, also provided for nuncupative testaments.

These statutes have been reenacted with variations throughout the United States. Their general effect is to forbid all oral testaments except such as are specifically provided for by the terms of the statute. The common law rules as to when an oral testament may be held valid are abrogated. The only effect of the old rules is to modify the construction of the statute in certain cases. Since this is the case, any attempt to make an exact statement of the rules as to nuncupative testaments, which are in force in each jurisdiction, would be useless. The general provisions of the statutes are, however, substantially the same in England and the United States. The difference between the different statutes is that some statutes include more classes of nuncupative testaments than others. The provisions controlling each class are substantially uniform.

### §233. Nuncupative wills made by testators of favored classes.

The first classification in nuncupative wills is that of favored and unfavored classes of testators. Testators of the favored class may make nuncupative wills without regard to the surrounding circumstances or to the specific form of the will.<sup>37</sup>

#### *Soldiers and sailors.*

The first class of favored testators is composed of 'soldiers' and 'sailors' or 'mariners' in 'actual service,' and testators who dispose of estates below a certain value. A soldier is any person serving the government in a military capacity irrespective of rank. In an English case, an army surgeon in the employment of the East India Company was held to be a 'soldier' within the meaning of the statute.<sup>38</sup> So volunteers in the service of the government are 'soldiers'.<sup>39</sup> But between the time that a volunteer enters his name as offering his services to the government, and the time that he is formally accepted and mus-

<sup>37</sup> In some jurisdictions these favored classes do not exist. Since nuncupative wills now exist only where specifically allowed by statute, these favored classes have no existence where not created by statute.

<sup>38</sup> *Goods of Donaldson*, 2 Curt. 386.

<sup>39</sup> *Leathers v. Greenacre*, 53 Me. 561; *Van Deuzer v. Gordon*, 39 Vt. 111.



tered in, such volunteer is not a 'soldier' in the sense of the statute.<sup>40</sup>

'Actual service' undoubtedly includes every military movement against the enemy. It begins at least upon entering the country of the enemy, or reaching the neighborhood of the enemy so that the army has begun the campaign.<sup>41</sup> It probably begins upon the commencement of the movement which has for its object the attack upon the enemy, whether such movement is within or without the country of the testator and whether the army has reached the neighborhood of the enemy or not. Thus, it was held that the Union army was 'in actual service,' in 1864 as soon as the movement on Richmond began.<sup>42</sup>

'Actual service is not confined to "those excursions from camps and quarters in the enemy's country, which are designed to bring on an immediate engagement."'<sup>43</sup>

*Testators owning small estates.*

In some jurisdictions nuncupative wills were good to dispose of a limited amount of property.<sup>44</sup> Under this statute if a testator attempted to dispose of an indivisible chattel, such as a promissory note, the value of which was in excess of the amount fixed by law, the will was invalid as a whole,<sup>45</sup> while if the property given was divisible, it was good as to the amount allowed by statute.<sup>46</sup>

#### §234. When nuncupative wills can be made by testators of unfavored classes.

In jurisdictions where others than the especially favored classes are allowed to make nuncupative wills at all, these others are nearly always allowed to make them only in their 'last ill-

<sup>40</sup> Pierce v. Pierce, 46 Ind. 86.

<sup>44</sup> Mulligan v. Leonard, 46 Io.

<sup>41</sup> Leathers v. Greenacre, 53 Me. 561; Van Deuzer v. Gordon, 39 Vt. 111; Gould v. Safford, 39 Vt. 498.

692.

<sup>45</sup> Stricker v. Oldenburgh, 39 Io. 653.

<sup>42</sup> Botsford v. Krake, 1 Abb. Pr. N. S. (N. Y.), 112.

<sup>46</sup> Mulligan v. Leonard, 46 Io. 692.

<sup>43</sup> Leathers v. Greenacre, 53 Me. 561.

ness.' By 'last illness' is undoubtedly meant the illness of which testator actually dies. If he makes an oral will in what he thinks at the time is his last illness, and recovers therefrom, such will is invalid as not being made in the last illness of testator.<sup>47</sup> These cases are chiefly *obiter dicta* upon this point; but they seem to show the current of judicial opinion.

A 'last illness' furthermore, is not merely a delicate physical condition in which death may at any time intervene as a result of further development. Thus, where decedent was a consumptive, but was still able to go about, he was not in his 'last illness' in the sense of the statute so that he could make a nuncupative will even where he died on the following day of a sudden hemorrhage.<sup>48</sup> It is therefore an acute disease, or the last stage of a chronic disease in which it assumes the form in which death directly ensues, that is meant by a 'last illness,' and not the entire duration of a progressive disease which ultimately results in death.<sup>49</sup>

The discussion of the meaning of 'last illness' is complicated, as will be seen in the opinions of the court in the cases already cited, by the question whether a nuncupative will made by a testator in the acute disease from which death ensues is valid where the testator lived so long after making his nuncupative will that he could have made a written will had he so desired.

Undoubtedly the provision of the statute allowing nuncupative wills to be made in testator's last illness was meant only to prevent an enforced intestacy in cases where approaching death made it impossible to reduce testator's wishes to writing in legal form. But as the question in construing a statute is not what did the legislature mean to say, but what does it mean by what it has said, the question is really one of the meaning of the term 'last illness'.

<sup>47</sup> *Morgan v. Stevens*, 78 Ill. 287; *Donald v. Unger*, 75 Miss. 294; *Sadler v. Sadler*, 60 Miss. 251; *Carroll v. Bonham*, 42 N. J. Eq. 625; *Martinez v. Martinez*, 19 Tex. Civ. App. 661; 48 S. W. 532.

<sup>48</sup> *Werkheiser v. Werkheiser*, 6

W. & S. (Pa.), 184. On this point see *O'Neil v. Smith*, 33 Md. 569; *Donald v. Unger*, 75 Miss. 294; *Harrington v. Stees*, 82 Ill. 50.

<sup>49</sup> *Donald v. Unger*, 75 Miss. 294; *Carroll v. Bonham*, 42 N. J. Eq. 625; *Jones v. Norton*, 10 Tex. 120.

Upon this question there is a difference of judicial opinion. In the majority of states it is held that the term 'last illness' means an illness so violent that testator had not the time, opportunity and means at hand, after making his oral will, to make a written will in legal form.<sup>50</sup>

Thus, testatrix had been sick for two or three months. She gave verbal directions for the disposition of her property which were subsequently offered as a nuncupative will. She lived about ten days longer in possession of her faculties, with ample opportunity to make a written will. It was held that this will was not made during the 'last sickness' of testatrix within the meaning of the statute.<sup>51</sup> So where the evidence disclosed that after making a nuncupative will testatrix lived twenty hours in possession of her faculties, that she then became unconscious and died the following day, the trial court, on this point, charged: "A nuncupative will must be made in the last sickness, and if you believe from the evidence that (the alleged testatrix) after making the alleged nuncupative will, had the time and opportunity and means at hand to have reduced it to writing, but failed to do so, then said alleged will is invalid."

The Supreme Court, Lumpkin, J., said: "We think the charge actually given, is about as accurate and proper an instruction as the court could well have given."<sup>52</sup>

In other states it is held that a will made during the 'last illness,' as already defined, is a valid nuncupative will even though testator had opportunity after making such will, and before his death, to make a written will.<sup>53</sup> It is apparently not neces-

<sup>50</sup> Johnston v. Glasscock, 2 Ala. 218; Scaife v. Emmons, 84 Ga. 619; Ellington v. Dillard, 42 Ga. 361; Bellamy v. Peeler, 96 Ga. 467; O'Neill v. Smith, 33 Md. 569; Donald v. Unger, 75 Miss. 294; Lucas v. Goff, 33 Miss. 629; Parkison v. Parkison, 12 Smed. & M. (Miss.), 672; Carroll v. Bonham, 42 N. J. Eq. 625; Dockum v. Robison, 26 N. H. 372; Prince v. Hazelton, 20 Johns. (N. Y.), 502 (the leading American case upon this

point). Jones v. Norton, 10 Tex. 120; Reese v. Hawthorne, 10 Gratt. (Va.), 548.

<sup>51</sup> Donald v. Unger, 75 Miss. 294.

<sup>52</sup> Bellamy v. Peeler, 96 Ga. 467.

<sup>53</sup> Bradford v. Clower, 60 Ill. App. 55; Harrington v. Stees, 82 Ill. 50, qualifying Morgan v. Stevens, 78 Ill. 287; Wiley's Estate, 187 Pa. St. 82; Nolan v. Gardner, 7 Heisk. (Tenn.) 215; Gwin v. Wright, 8 Hump. (Tenn.) 639.

sary to the validity of the will that testator should believe that he was about to die. Thus where testator was warned by his doctor to make a will and after attempting to make a nuncupative will omitted to make a written will, through undue confidence in his ultimate recovery, it was held that the nuncupative will would be valid if made in due form.<sup>54</sup>

**§235. Place where nuncupative wills can be made by member of unfavored class.**

A member of the unfavored class can, under many statutes, make his nuncupative will only when he is at his own home, unless he is surprised or taken sick away from home, and dies before returning. The Statute of Frauds defined his home as his dwelling house or where he had resided ten days previous to making his will.<sup>55</sup> Under similar statutes from which the word 'surprised' is omitted, it is held that a testator who leaves his home when seriously ill, and becomes worse and dies on the way, may make a valid nuncupative will at the place of his death.<sup>56</sup>

**§236. The inherent elements of the nuncupative will.**

As in the case of written wills the elements of a nuncupative will may be divided into the inherent and the extrinsic. Of the inherent elements the *animus testandi*, the intention to make a will, is of course indispensable. The same general principles that govern this subject in written wills apply in cases of nuncupative wills and need not be repeated.<sup>57</sup> Accordingly, expressions of regret that testator had not made a will together with a statement of what sort of will he would have made, do not amount to a nuncupative will.<sup>58</sup> As in written wills, it is not necessary for the intention to make a will to be formally expressed. If it appears from the evidence that testator when *in extremis*, expressed his wish as to the disposition of his prop-

<sup>54</sup> Wiley's Estate, 187 Pa. St. 82.

<sup>57</sup> See Ch. V.

<sup>55</sup> 29 Car. II, c. 3, Sec. 19.

<sup>58</sup> Wiley's Estate, 187 Pa. St.

<sup>56</sup> Gwin v. Wright, 8 Hump. (Tenn.) 639; Marks v. Bryant, 4 Hen. & M. (Va.) 91.

82; Ridley v. Coleman, 1 Sneed. (Tenn.) 616.

erty after his death, the intention to make a testamentary disposition sufficiently appears.<sup>59</sup>

*Animus nuncupandi.*

In order to show testamentary intent the words of testator must show that he intends that his words shall stand as his will; that is, that he intends to make a nuncupative will. This is meant when it is said that the *animus nuncupandi*, must exist as well as the *animus testandi*.<sup>60</sup> But it seems clear that the intention to make a testamentary disposition by the words used is necessarily the "intention to nuncupate"; that the one can not exist without the other; and that apt words for one idea will express the other.<sup>61</sup>

Since the intention to make a nuncupative will is necessary to its validity, it follows that the oral declarations of testator as to the disposition of his property which he intends to make by a written will, do not constitute a nuncupative will.<sup>62</sup>

In a recent Illinois case the alleged testator A was taken suddenly ill, and an operation was decided on. The physicians, assured testator that there would be no danger of death for twenty-four hours. A's brother asked him if he wished to make any disposition of his property. A said: "All right; you can take a statement of how I want it fixed." And the brother took down the instructions and said: "I will make a memorandum, and fix it up in shape. If you think it is proper you can sign it and make a kind of will of it." A assented. The next morning the brother received a telephone message that A was sinking fast. He at once wrote out the will and hurried to the hospital, arriving there after A's death. It was held that A's declaration did not amount to a nuncupative will.<sup>63</sup>

<sup>59</sup> Mulligan v. Leonard, 46 Io. 692.

<sup>60</sup> "There ought . . . to be present in order to constitute a nuncupative will, not only the *animus testandi* but the intention to nuncupate." Porter's Appeal, 10 Pa. St. 254.

<sup>61</sup> Bradford v. Clower, 60 Ill. App. 55.

<sup>62</sup> Knox v. Richards (Ga.) (1900), 35 S. E. 295; Askins' Estate, 20 D. C. 12; Grossman's Estate, 175 Ill. 425; Lucas v. Goff, 33 Miss. 629; Dockum v. Robinson, 26 N. H. 372; Male's Will, 49 N. J. Eq. 266; Porter's Appeal, 10 Pa. St. 254.

<sup>63</sup> Grossman's Estate, 175 Ill. 425.

Even where all the formalities of a nuncupative will were present the fact that testator intended to have it reduced to writing in order that it might take effect was held to prevent it from being a valid nuncupative will.<sup>64</sup> So, on the same principle, a defectively executed written will can not be given validity as a nuncupative will.<sup>65</sup>

The courts are not unanimous upon this last point, however, and in some jurisdictions it is held that an attempt to execute a written will which was not completely executed on account of an 'act of God' may be a good nuncupative will.<sup>66</sup> This view of the law which apparently ignores an essential element of nuncupative wills, is due in part to a desire to enforce the wishes of testator, and in part to the influence of the old rule that bequests of personalty were valid if shown to be testator's wishes, without regard to their form.

**§237. The extrinsic formalities of the nuncupative will.—The rogatio testium.**

The nuncupative will made by one of the unfavored class must possess certain formalities, in accordance with the local statute.<sup>67</sup> Most statutes allowing nuncupative wills, agree that in order to make a valid will, testator must call upon the witnesses to the requisite number, and in the presence of the requisite number, to bear witness that the words spoken by him

<sup>64</sup> Porter's Appeal, 10 Pa. St. 254.

<sup>65</sup> Stamper v. Hooks, 22 Ga. 603; Ellington v. Dillard, 42 Ga. 361; Tabler v. Tabler, 62 Md. 601; Hebden's Estate, 20 N. J. Eq. 473; Male's Will, 49 N. J. Eq. 266; Hunt v. White, 24 Tex. 643; Reese v. Hawthorne, 10 Gratt. (Va.) 548.

Computations by testator as to how much of his estate is due to each child is not valid as a nuncupative will. Williams v. Pope, Wright (Ohio) 406.

<sup>66</sup> Green v. Shipworth, 1 Phill.

53; Thomas v. Wall, 3 Phill. 23; Lewis v. Lewis, 3 Phill. 109; Offut v. Offut, 3 B. Mon. (Ky.) 163; Guthrie v. Owen, 10 Yerger, 339.

<sup>67</sup> The conversations "it is true, go to show the intent of decedent. But this is not enough. Every one who undertakes to make a testamentary disposition of his property must conform to the law regulating such disposition, and if he does not take care to do so the law can not uphold it." Werkheiser v. Werkheiser 6 Watts & S. (Pa. St.) 184.

are his last will. This formal calling upon the witnesses to bear witness to this fact is known as the *rogatio testium*, and is a necessary element of a nuncupative will. Without this the will is invalid no matter how clear the testamentary intent.<sup>68</sup>

"The *rogatio testium*, the calling on persons to bear witness to the act must also be done at the time of the nuncupation, and must be proved by two or three witnesses who were present at the time."<sup>69</sup>

No set phrase is necessary, however, for a valid *rogatio testium*. While it is desirable that testator should in clear and unmistakable language formally ask the witnesses to bear witness that his words are his last will, this request may be made informally. In an Illinois case testator who was about to marry, was taken ill suddenly, and was advised by A, who was present with B, that he could not marry owing to the approach of death. A said: "If you tell us as witnesses what disposition you want to make of your property, we will testify to that fact in the probate court, and that will do as well as a written will." Testator then spoke of his intended wife and said: "It has been my intention all along that she should have everything I have, real and personal, and that is my will now." B. said: "This is your last will and testament made in our presence as witnesses. Testator said "yes," and then after a pause added: "I want my life insurance policy to go direct to her without going through a course of administration." The court held that this was a sufficient *rogatio testium*, though informal, since testator might adopt the language of the witnesses in his conversation

<sup>68</sup> Askins's Estate (D. C.), 9 Mackey, 102, 12; 19 Wash. L. Rep. 260; Sampson v. Browning, 22 Ga. 293; Grossman's Estate, 175 Ill. 425, affirming 75 Ill. App. 224; Arnett v. Arnett, 27 Ill. 247; Bid-  
dle v. Biddle, 36 Md. 630; Broach v. Sing, 57 Miss. 115; Garner v. Langsford, 12 Smed. & M. (Miss.) 558; Brown v. Brown, 2 Murph. (N. Car.) 350; Seever v. Seever, 2 Ohio C. C. 298; Male's Case, 49 N. J. Eq. 266; Bundrick v.

Haygood, 106 N. Car. 468; Wiley's Estate, 187 Pa. St. 82; Taylor's Appeal, 47 Pa. St. 31; Gwin v. Wright, 8 Hump. (Tenn.) 639; Baker v. Dodson, 4 Hump. (Tenn.) 342; Winn v. Bob, 3 Leigh. (Va.) 140; Page's Will, 23 Wis. 69; Pritchard's Will, 37 Wis. 68.

<sup>69</sup> Yarnall's Will, 4 Rawle. (Pa.) 46.

*Contra*, Mulligan v. Leonard, 46 Io. 692.

with them; and his desire that they bear witness to his will appeared clearly.<sup>70</sup>

But though an informal *rogatio testium* may be valid, its absence will invalidate the will. Thus a statement by alleged testator to his brother: "You can take a statement of how I want it fixed," followed by instructions for a will and assent to the brother's proposition to put it in writing by the next day, and have testator sign it, was held not to be a valid nuncupative will, not only as lacking the intention to make a nuncupative will, but also as lacking the *rogatio testium*.<sup>71</sup>

Where decedent said: "I was to be married next Thursday. Tell my folks to give Martha Jane Wade—my intended wife—one thousand dollars of my money," there was no *rogatio testium*, and the will was therefore invalid.<sup>72</sup> And where decedent said repeatedly: "Everything is to go to Willie—everything is Willie's. I want brother Willie to have everything. It has been put off. I intended to fix it so that there would be no trouble, but it has been put off," there was no sufficient *rogatio testium*.<sup>73</sup> Nor is a request to witnesses to pay attention to what testatrix says a sufficient *rogatio testium*.<sup>74</sup> Under some statutes only one person need be called on to bear witness to the execution of the will; and the will may be proved by the requisite number of witnesses who were not called on to bear witness to testator's will.

### §238. Number and competency of witnesses to nuncupative wills.

The number of witnesses to a nuncupative will is fixed by statute and is different in different states. Two is a favorite number. A nuncupative will executed before a less number of competent witnesses than that fixed by statute is of no validity.<sup>75</sup>

<sup>70</sup> *Harrington v. Stees*, 82 Ill. 50.

<sup>71</sup> *Grossman's Estate*, 175 Ill. 425.

<sup>72</sup> *Seever v. Seever*, 2 Ohio C. C. 298.

<sup>73</sup> *Wiley's Estate*, 187 Pa. St. 82.

<sup>74</sup> *Page's Will*, 23 Wis. 69.

<sup>75</sup> *Emeric v. Alvarado*, 64 Cal. 529; *Biddle v. Biddle*, 36 Md. 630; *Long v. Foust*, 109 N. Car. 114; *Vrooman v. Powers*, 47 O. S. 191; *Wiley's Estate*, 187 Pa. St. 82; *Mitchell v. Vickers*, 20 Tex. 377.



Where the statute requires the testator to specially request at least two competent witnesses to bear witness to his will, the statute is complied with where testator calls all of those present to bear witness to his will, although he does not name any of them.<sup>76</sup>

Under the statute requiring the witnesses to bear witness to the execution of the nuncupative will, it is necessary that the witnesses be present simultaneously at the execution of such nuncupative will.<sup>77</sup>

The general rule as to the witnesses to a nuncupative will is that they must be competent and disinterested. Unless modified by statute, the rules of common law control the competency of witnesses and the question of interest.<sup>78</sup> A beneficiary can not act as an attesting witness to a nuncupative will; and one to whom a sum of money is bequeathed if the son of testatrix shall die before he is twenty-one, is a beneficiary in this sense.<sup>79</sup> Nor will a release of his interest, after the will is probated, restore his competency.<sup>80</sup> Nor will a statute making void bequests to subscribing witnesses to written wills, be extended by forced construction to nuncupative wills, so as to make such witnesses competent.<sup>81</sup>

### §239. Reduction to writing.

It is generally provided as essential to the validity of a nuncupative will, that it be reduced to writing and subscribed by the requisite number of competent witnesses within the time fixed by statute, which is generally a very short one. Omission to comply with this provision renders the will a nullity.<sup>82</sup> Even if reduced to writing within the time limit, the will is avoided

<sup>76</sup> Long v. Foust, 109 N. Car. 114.

<sup>77</sup> Wester v. Wester, 5 Jones (N. Car.) 95.

<sup>78</sup> Vrooman v. Powers, 47 O. S. 191; Haus v. Palmer, 21 Pa. St. 296; Baker v. Dodson, 4 Humph. (Tenn.) 342.

<sup>79</sup> Vrooman v. Powers, 47 O. S. 191.

<sup>80</sup> Vrooman v. Powers, *supra*.

<sup>81</sup> Vrooman v. Powers, *supra*.

<sup>82</sup> Askins's Estate, 9 Mackey (D. C.) 12; Taylor's Appeal, 47 Pa. St. 31; George v. Greer, 53 Miss. 495; Martinez v. Martinez, 19 Tex. Civ. App. 661; 48 S. W. 532.

if not also subscribed by the required number of witnesses within the time fixed by statute.<sup>83</sup>

In view of the necessities of the case it is held that the exact words used by testator need not be reduced to writing. It is sufficient if their substance can be thus reduced.<sup>84</sup> But if the words of testator are not reduced to writing, at least substantially, his will can not be probated,<sup>85</sup> and if probated can be contested on the ground of the failure to reduce the will substantially to writing.<sup>86</sup>

#### §240. What can pass by nuncupative will.

Under a few of the earlier statutes real as well as personal property might pass by a nuncupative will.<sup>87</sup> In most states it is provided that real property can not pass by a nuncupative will;<sup>88</sup> nor can the income of realty be devised by a nuncupative will.<sup>89</sup>

It has been held, however, that a nuncupative will may give a legacy chargeable on realty.<sup>90</sup> But it is held that a nuncupative will of all the property which testator owned, will pass the personal property, though not the realty; and where the debts are equal to the personal estate, that such will can charge the payment of testator's debts upon the realty, exonerating the personalty.<sup>91</sup>

<sup>83</sup> *Welling v. Owings*, 9 Gill. (Md.) 467.

<sup>84</sup> *Bolles v. Harris*, 34 O. S. 38.

<sup>85</sup> *Bolles v. Harris*, *supra*.

<sup>86</sup> *Bolles v. Harris*, *supra*.

<sup>87</sup> *Gillis v. Weller*, 10 Ohio, 462; *Ashworth v. Carleton*, 12 Ohio St. 381.

But this has since been changed in Ohio by statute. R. S. of Ohio, Sec. 5991.

<sup>88</sup> *McLead v. Dell*, 9 Fla. 451; *Pierce v. Pierce*, 46 Ind. 86; *Cooke v. Cooke*, 3 Litt. (Ky.) 238; *Palmer v. Palmer*, 2 Dana. (Ky.) 391; *McCans v. Board*, 1 Dana. (Ky.), 341; *Campbell v. Campbell*, 21

*Mich.* 438; *Sadler v. Sadler*, 60 Miss. 251; *Smithdeal v. Smith*, 64 N. Car. 52; *Skinner v. Blackburn*, 4 Ohio C. C. 325; *Cooper v. Pogue*, 92 Pa. St. 254; 37 Am. Rep. 681; *Johnson v. Johnson*, 92 Tenn. 559; *Lewis v. Aylott*, 45 Tex. 190; *Moffett v. Moffett*, 67 Tex. 642; *Page v. Page*, 2 Rob. (Va.) 424; *Davis's Will*, 103 Wis. 455.

<sup>89</sup> *Page v. Page*, 2 Rob. (Va.) 424.

<sup>90</sup> *Seever v. Seever*, 2 Ohio C. C. 298.

<sup>91</sup> *Skinner v. Blackburn*, 4 Ohio C. C. 325.

### PART III—NUNCUPATIVE TESTAMENTS AT LOUISIANA LAW.

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#### §241. Nuncupative testaments by public act.

In Louisiana the expression 'nuncupative testament' is always used by the statute. A nuncupative testament in Louisiana is a very different thing from a nuncupative will at common law, as in Louisiana it is of two kinds, nuncupative testament by public act, and nuncupative testament by private act. They may be best defined separately.

A nuncupative will by public act is one dictated by testator to a notary public, and written down by him from such dictation. This must be done in the presence of three witnesses residing in the place where the will is executed, or of five not residing in such place. It must be read to testator in the presence of the witnesses, and testator must in their presence declare that he understands it perfectly, and that he persists therein.<sup>92</sup>

A will is not invalidated by the fact that the notary omitted to record his bond in the auditor's office, a fact which was ground for suspension, when he was not in fact suspended.<sup>93</sup>

It is sufficient if the notary takes down the substance of the will as dictated to him. He must "put down all of her intentions expressed by her, with a due regard to identity of thoughts, and not of words."<sup>94</sup> And if the notary suggests the appropriate language in which to express the intent of testator, it does not invalidate the will.<sup>95</sup> So if counsel suggests expressions understood and adopted by testator, the will is valid.<sup>96</sup>

<sup>92</sup> La. Code 1808, p. 288, art. 92; Civ. Code-La. 1571; Monroe v. Liebman, 47 La. Ann. 155.

<sup>93</sup> Monroe v. Liebman, 47 La. Ann. 155.

<sup>94</sup> Cauvien's Succession, 46 La. Ann. 1412.

<sup>95</sup> Hennessy v. Woulfe, 49 La.

Ann. 1376; Saux's Succession, 46 La. Ann. 1423.

<sup>96</sup> Landry v. Tomatis, 32 La. Ann. 113. So if the notary questions testator to discover his exact meaning. Saux's Succession, 46 La. Ann. 1423.

The addition by the notary of an omitted word on the margin of the will does not invalidate the will, where such word may be rejected and the will is clear without it.<sup>97</sup> The will must then be signed by testator if he can write. If he can not, the notary certifies such fact, and signature or mark by testator is then unnecessary.<sup>98</sup> The will must be signed by the witnesses, or at least one for all, if the others can not. Express mention must be made in the will by the notary of the performance of these necessary acts.<sup>99</sup>

The notary's certificate must show the presence of witnesses when the will was dictated;<sup>100</sup> and that it was written down by the notary from dictation;<sup>101</sup> and the reading of the will in the presence of witnesses;<sup>102</sup> and the facts that constitute competency of the witnesses.<sup>103</sup> But it does not have to show affirmatively that the witnesses were not disqualified, as being women, children under sixteen, insane and the like.<sup>104</sup>

All this must be done at one time, and without turning aside to any other act; but this fact does not have to be certified in the will, but its absence is a matter to allege and prove in order to set the will aside.<sup>105</sup>

Where the notary interrupted the execution of the will to insist that the witnesses should remain in the room till the will was executed, this was held not to be a turning aside to another act.<sup>106</sup> The fact of signature of the will need not be stated in the certificate.<sup>107</sup>

<sup>97</sup> Dupuy v. Esnard, 51 La. Ann. 797.

<sup>98</sup> Hennessy v. Woulfe, 49 La. Ann. 1376.

<sup>99</sup> Civ. Code. 1578; Dalton v. Wickliffe, 35 La. Ann. 355; Dorries's Succession, 37 La. Ann. 833.

<sup>100</sup> Connor v. Brashear, 25 La. Ann. 663; Wilkin's Succession, 21 La. Ann. 115.

<sup>101</sup> Miller v. Shumaker, 42 La. Ann. 398.

<sup>102</sup> Wilkin's Succession, 50 La. Ann. 115.

<sup>103</sup> Vollmer's Succession, 40 La.

Ann. 593 (not simply his opinion and legal conclusion that they were 'competent').

<sup>104</sup> Marquez's Succession, 50 La. Ann. 66; Del Escobal's Succession, 42 La. Ann. 1086; 9 L. R. A. 829.

<sup>105</sup> Featherstone v. Robinson, 7 La. 596; Keller v. McCalop, 12 Rob. 638; Saux's Succession, 46 La. Ann. 1423.

<sup>106</sup> Dupuy v. Esnard, 51 La. Ann. 797.

<sup>107</sup> Saux's Succession, 46 La. Ann. 1423.

### §242. Nuncupative testaments by private act.

A nuncupative will by private act is one written either by testator or by some one else at his dictation in the presence of five witnesses residing in the place where the will is made, or of seven residing elsewhere; or by testator's presenting to the above number of witnesses his will written out of their presence and declaring it to be his last will.<sup>108</sup> This will must then be read to the witnesses by testator or by one of the witnesses; and must be signed by testator if he can write; and by the witnesses, if they can write. At least two of them must write their names and the others must sign by mark.<sup>109</sup> The amanuensis may act as one of the witnesses.<sup>110</sup>

The declaration that it is testator's will may be made informally. Thus, where the amanuensis reads the paper and then says to testator: "Is this paper that has just been read your will?" and the testator says: "It is," this is a good declaration by him that it is his will.<sup>111</sup>

Publication is all that is necessary where the will is written out of the presence of the witnesses. It need not be shown whether testator wrote it or dictated it.<sup>112</sup>

A witness who can not understand the language in which the will is written, and is read, is not a competent witness to such a will; and the fact that the will was translated to him by an interpreter does not render him competent.<sup>113</sup>

## PART IV—MYSTIC TESTAMENTS.

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### §243. Mystic testaments.

A mystic will is one which is signed by testator, whether written by himself or another, which is then placed in a paper

<sup>108</sup> Civil Code, Sec. 1574.

<sup>109</sup> Civil Code, Sec. 1576.

<sup>110</sup> Wood v. Roane 35 La. Ann. 865.

<sup>111</sup> Bourke v. Wilson, 38 La. Ann. 320.

<sup>112</sup> Pfarr v. Belmont, 39 La. Ann. 294.

<sup>113</sup> Dauterive's Succession, 39 La. Ann. 1092.

or envelope. This paper or envelope is then closed and sealed; and as thus closed and sealed is presented to the notary and to seven witnesses, unless the act of enclosing and sealing was done in their presence. Testator then declares to the notary in the presence of the witnesses that the paper contains his testament, written by himself or by another at his direction and signed by him, the testator. The notary must then draw up the act of superscription upon the paper or envelope in which the testament is enclosed, which act is to be signed by testator, notary and the witnesses.<sup>114</sup>

The act of superscription must recite the facts necessary under the statute to the validity of the mystic will. Thus, if it does not show testator's declaration that the will was signed by him and written by him, or by another by his direction,<sup>115</sup> or if it does not show that it was presented to the notary or closed or sealed by testator,<sup>116</sup> the will is invalid.

While the will must be "sealed" the use of a wax seal is not imperative. The sealing may be done with wafers.<sup>117</sup> So the use of an ordinary mucilaged envelope is a compliance with the statute.<sup>118</sup>

<sup>114</sup> Civ. Code La. Sec. 1584.

<sup>115</sup> Broutin v. Vassant, 2 Martin, 432; Lewis v. Lewis, 5 Louisiana Reports, 387.

<sup>116</sup> Stafford v. Villain, 10 Louisiana Reports, 319.

<sup>117</sup> Hart v. Thompson, 15 Louisiana Reports, 88. (In this case the witnesses signed their names

across and between the wafers, so that it was difficult to open the will unobservedly.)

<sup>118</sup> Saint v. Charity Hospital, 48 La. Ann. 236. (In this case the superscription was written across the flap of the envelope where it adhered to the paper.)

## CHAPTER XIV.

## REVOCATION.

## §244. Nature of revocation and history of doctrine of revocation.

As we have seen already<sup>1</sup> revocability is an inherent and essential element of a will, without which the instrument in question can not properly be classed as a will.

Revocation is avoiding, and invalidating an instrument, which but for revocation would have been the last will and testament of the party by whom it was executed. A revoked will is of no legal effect whatever. It can not be used as a method of transferring testator's property to the beneficiaries named therein,<sup>2</sup> and it has been held that a revoked will can not be used as a written declaration of a trust.<sup>3</sup> A revoked will may, however, be used as evidence of a contract to make a will, if its contents show such contract.<sup>4</sup>

The Statute of Wills contained no provisions on the subject of revocation. The courts proceeded to build up a set of rules partly based on the ecclesiastical law, and partly by pure judicial legislation. These rules had for their general foundation the theory that the intention of the testator to re-

<sup>1</sup> See Sec. 50.

<sup>2</sup> This elementary proposition is sustained by any of the cases of revocation cited in the following sections.

<sup>3</sup> Davis v. Stambaugh, 163 Ill. 557.

<sup>4</sup> See Sec. 74.

voke should be given effect by the courts, and that the form of the revocatory act was immaterial. It was accordingly held that the declaration of testator that he regarded his will as revoked, would be sufficient to effect a revocation.<sup>5</sup> Thus, where devisee prevented testator from destroying his will by falsely and fraudulently representing it to be destroyed, it was held that testator's intention and declarations operated as a revocation.<sup>6</sup> This laxity of judicial view had its natural result in bold attempts to defeat wills by fabricating evidence of the declarations of testator. The history of one of the most glaring of these conspiracies is given in a note to *Mathews v. Warner*.<sup>7</sup>

This particular attempt to defeat justice met with disastrous failure; but the wish already quoted that there should some day be "a law that no written will shall be revoked but by a writing" was entertained by the whole English bar; and soon found expression in the Statute of Frauds.<sup>8</sup> This statute has been

<sup>5</sup> 6 Cruise's Dig., 79 tit. 38, c. 6, Sec. 2; *Burton v. Gowell*, Cro. Eliz. pt. 1, 306; *Ash v. Abdy*, 3 Swanst. 664; *Mathews v. Warner*, 4 Ves. Jr. 186, note; *Card v. Grinman* 5 Conn. 164; *Prince v. Hazleton*, 20 Johns. 502; *Clark v. Eborn*, 2 Murph. (N. C.) 234.

<sup>6</sup> *Card v. Grinman*, 5 Conn. 164.

<sup>7</sup> *Mathews v. Warner*, 4 Ves. Jr. 186, and see Sec. 232.

<sup>8</sup> 29 Car. II, c. 3, Sec. 6 (wills); Sec. 22 (testaments).

Sec. 6. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests

of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing, of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

Sec. 22. And be it further enacted, That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or by will, by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him and proved to be done by three witnesses at the least.



copied with variations in every American state. While different in detail, these statutes agree in this: that apart from the methods of revoking a written will laid down by the statutes, no revocation is possible. Accordingly, the mere wishes and declarations of testator can never effect a revocation,<sup>9</sup> no matter how clear may be testator's intention to revoke his will.<sup>10</sup> So where a testator declared his intention to execute certain conveyances of his real estate, and then revoke his will, but he never in fact did so, his will was held not to be revoked by such statements of his intention.<sup>11</sup> But a verbal agreement made between testator and a beneficiary under his will that in consideration of a provision in the will for such beneficiary the latter would pay a certain sum to a third person, is a valid contract enforceable at law, and not an attempt to revoke the will by parol evidence.<sup>12</sup>

These statutes, however, prescribe formalities only for revocation by act manifest on the will. They do not affect the other classes of revocations, as by later instrument, by alteration of testator's estate, and by change of circumstances.<sup>13</sup>

## §245. Classes of revocation.

At modern law the methods of revocation may be grouped under four general classes. The first two of these classes re-

<sup>9</sup> *Atkinson v. Morris*, (1897), P. 40; *Slaughter v. Slaughter*, 81 Ala. 418; *Barnewell v. Murrell*, 108 Ala. 366; *Taylor v. Cox*, 153 Ill. 220; *Kent v. Maliaffey*, 10 O. S. 204, and see Sec. 255.

<sup>10</sup> *Taylor v. Pegram*, 151 Ill. 106; *Belshaw v. Chitwood*, 141 Ind. 377; *Woodfill v. Patton*, 76 Ind. 575; *Forbing v. Weber*, 99 Ind. 588; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 459; *Herbert v. Long*, 15 Ky. Law Rep. 427; 23 S. W. (Ky.) 658; *Collagan v. Burns*, 57 Me. 449; *Succession of Hill*, 47 La. Ann. 329; *Byers v. Hoppe*, 61 Md. 206; *Sewell v. Slingsluff*, 57 Md. 537; *Brewer v. Barrett*, 58 Md. 587;

*Boylan ads. Meeker*, 4 Dutch. 274; *Shaw v. Shaw*, 1 Dem. 21; *Coe v. Kniffen*, 2 Johns. 31; *Dan v. Brown*, 4 Cow. 483; *McCune v. House*, 8 Ohio 144; *Boudinot v. Bradford*, 2 Dall. (Pa.) 266; 2 *Yeates* (Pa.) 170; *Clark v. Morrison*, 25 Pa. St. 453; *Kirkpatrick's Will*, 96 Tenn. 85; *Greer v. McCrackin Peck* (7 Tenn.) 301; *Allen v. Huff*, 1 Yerg. (9 Tenn.) 404; *Marr v. Marr*, 2 Head (Tenn.) 303; *Allen v. Jeter*, 6 Lea (Tenn.) 672.

<sup>11</sup> *Belshaw v. Chitwood*, 141 Ind. 377.

<sup>12</sup> *Lawrence v. Oglesby*, 178 Ill. 122.

<sup>13</sup> See Sec. 262 *et seq.*

voke the will by reason of the actual intention of the testator to do so, accompanied by the required legal formalities. They are:

(1) The doing of some specified act manifest on the will, with the intention of revoking the same.

(2) Revocation of a will by a later will, codicil or other instrument.

The two remaining classes revoke the will in disregard of the actual intention of the testator, and sometimes in defiance of it. They are often spoken of as revocation by operation of law. They consist of:

(3) Certain specified changes in the domestic relations of testator, and

(4) Alterations in the estate of testator.

#### **§246. Revocation by means of acts manifest on the face of the will.**

The acts, manifest on the face of the will, which may revoke the will, may, under modern statutes, be one or more of the following: burning, tearing, cancelling, obliterating or destroying. Not all of these are included in every statute, cancelling being the one most frequently omitted. As the statutes generally provide that a will shall not be revoked in any method except as therein provided, the omission from the statute of any one of these methods generally makes it impossible to revoke a will by such omitted method. However, as will appear from a discussion of the meanings of the separate terms, the courts do not distinguish sharply between these methods, and often class under one heading facts which might seem appropriately to belong under another.

#### **§247. Act manifest on instrument.—Burning.**

The act of burning must at least consist in burning a portion of the paper upon which the will is written, so that such burning is visible. It is not necessary that any part of the writing be burned or rendered illegible, but the mark of fire must appear upon the paper itself.<sup>14</sup>

<sup>14</sup>*Bibb v. Thomas*, 2 W. Bl. quoted case the testator crumpled 1043. In this celebrated and most the will up so as to tear it slight-

Where the envelope in which the instrument is contained is burnt, but the will itself is untouched, this is not burning the will in compliance with the statute.<sup>15</sup> And where the will is not touched by fire, but another paper is burned by mistake, this is not a burning within the meaning of the statute. This is true even where the mistake of testator was caused by the fraud and deceit of other persons who represented to him that the paper burned was his will.<sup>16</sup>

### §248. Tearing.

Tearing the paper or parchment on which the will is written with intention of revoking the will, is, by the terms of these statutes, a revocation. As has been often said, tearing in the Wills Act includes cutting.<sup>17</sup> Any act of tearing which is manifest upon the paper on which the will is written, however slight it may be, is an act of tearing within the meaning of the statute, if done with the intention of revoking the will.<sup>18</sup> This is equally true whether a necessary part of the will is torn off, like the signature of testator or of witnesses,<sup>19</sup>

ly and threw it on the fire where it was scorched. It was surreptitiously removed without his knowledge before it burned. It was held that this amounted to a revocation.

Another case in point is *White v. Casten*, 1 Jones's Law (N. Car.) 197.

<sup>15</sup> *Doe d. Read v. Harris*, 6 Ad. & El. 209; 33 E. C. L. 57; 8 Ad. & El. 1; 35 E. C. L. 290; 1 N. & P. 405; W. W. & D. 106; 6 L. J. K. B. 84.

<sup>16</sup> *Graham v. Burch*, 47 Minn. 171; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Kent v. Maffey*, 10 O. S. 204; *Clingan v. Micheltree*, 31 Pa. St. 25; *Hise v. Fincher*, 10 Ired. (N. C.) 139.

*Contra*, *Pryor v. Coggin*, 17 Ga. 444; *Smiley v. Gambill*, 2 Head (Tenn.) 164.

<sup>17</sup> *Goods of Harris*, 3 Sw. &

Tr. 485; 10 Jur. (N. S.) 684; *Hobbs v. Knight*, 1 Curt. 768; *Clarke v. Scripps* 2 Rob. 563; *Goods of Marshall*, 17 W. R. 687; *Maynes v. Hazleton*, 44 L. T. 586; 45 J. P. 816; *Brown's Will*, 1 B. Mon. (Ky.) 56; *Smock v. Smock*, 3 Stock. (N. J.) 156.

<sup>18</sup> *Bibb v. Thomas*, 2 W. Bl. 1043; *Sanders v. Babbitt*, Ky. (1899) 51 S. W. 163; *Evan's Appeal*, 58 Pa. St. 238.

<sup>19</sup> *Maynes v. Hazleton*, 44 L. T. 586; 45 J. P. 816; *Goods of Marshall*, 17 W. R. 687; *Goods of Lewis*, 1 Sw. & Tr. 31; 27 L. J. P. 31; 4 Jur. N. S. 243; *Youse v. Foreman*, 5 Bush (Ky.) 337; *Sanders v. Babbitt*, Ky. 1899; 51 S. W. 163; 21 Ky. L. R. 240; *White's Will*, 25 N. J. Eq. 501; *Smock v. Smock*, 3 Stock. (N. J.) 156; *Jones's Estate*, 2 Ohio N. P. 209.

or a part of the dispositive part of the will, leaving the residue;<sup>20</sup> or whether tears are made in the paper on which the will is written without taking away any of the words,<sup>21</sup> or whether an unnecessary part of the will is torn away, such as a seal, where a will need not be under seal,<sup>22</sup> or unnecessary signatures from separate sheets.<sup>23</sup> Where testator has scratched out an essential part of the will by means of a knife, this has been held to be a revocation on the theory that it is a "lateral cutting."<sup>24</sup>

### §249. Cancelling.

Cancelling originally meant drawing crossed lines upon the paper, so as to deface the writing thereon.<sup>25</sup> The courts have held that this original meaning is too narrow for the sense of the statute.<sup>26</sup> Under the view of modern law a will may be cancelled by drawing an ink line through sufficient words

<sup>20</sup> *Brown's Will*, 1 B. Mon. (Ky.) 56; *Varnon v. Varnon*, 67 Mo. App. 534.

<sup>21</sup> *Goods of White*, 3 L. R. Ir. 413; *Evan's Will*, 58 Pa. St. 238.

<sup>22</sup> *Price v. Price*, 3 H. & N. 341; 6 W. R. 597; *Avery v. Pixley*, 4 Mass. 460; *White's Will*, 10 C. E. Gr. (N. J.) 501; *Johnson v. Brailsford*, 2 Nott & McC. (S. Car.) 272.

<sup>23</sup> *Williams v. Tyley*, Johns. 530; 5 Jur. (N. S.) 35; 7 W. R. 116; *Goods of Harris*, 3 Sw. & Tr. 485; 10 Jur. N. S. 684.

<sup>24</sup> *Goods of Morton*, 12 P. D. 141; 56 L. J. P. 96; 51 J. P. 580.

<sup>25</sup> *Warner v. Warner*, 37 Vt. 356.

<sup>26</sup> "The statute does not declare what shall amount to cancellation. The word is not a technical one and therefore the legislature must be presumed to have used it in its ordinary and commonly understood sense. It amounts to nothing to show what the original etymological meaning of the word

'cancel' was. Long before the statute was passed it had acquired an accommodated meaning plain to the common understanding. . . Revocation by cancellation is not then to be understood to mean exclusively drawing crossed lines upon the paper, but it means any act done to it which in common understanding is regarded as cancellation when done to any other instrument." *Evan's Appeal*, 58 Pa. St. 238.

"In its primal significance the word means a lattice work. As applied to writings it means the nullification of a writing by drawing upon its face lines in the form of lattice-work, "criss-cross." Usually, in legal as well as in common acceptance, cancellation is accomplished by the drawing of any lines over or across words with the intent to nullify them. It is common business practice to cancel negotiable instruments and

thereof with intent to revoke,<sup>27</sup> or by drawing lead pencil lines.<sup>28</sup> In England drawing a lead pencil line through a will written in ink has always been held to be *prima facie* a deliberative act, and not a finality, and hence not a revocation.<sup>29</sup> In some English cases, where the signature of a witness was cancelled, a fac-simile probate was ordered.<sup>30</sup>

Erasure of the words of a will, when done with intent to revoke, may constitute a cancellation;<sup>31</sup> and tearing off an unnecessary seal, with part of testator's signature, and erasing the rest of testator's name and the names of the witnesses, has been called a "cancellation."<sup>32</sup>

In a recent California case<sup>33</sup> testator made a will, in 1893, which he enclosed in an envelope. On his death there was found written on this envelope, in the handwriting of testator: "July 4.—Make over;" on the other side of the envelope was, "This has not been renewed up to this 15th day of October, 1895. Neglected it, thinking I would sell something." Testator's seven signatures on margin of each page and at foot of will were cancelled by two ink lines drawn through the length of each. On the last page, under signature of wit-

other written contracts by drawing such lines through the signatures of the makers. Such was the method adopted in this case. It is a well recognized method, as has been said, and one clearly within the letter and spirit of the statute." *Olmstead's Estate*, 122 Cal. 224.

<sup>27</sup> *Goods of Harris*, 3 Sw. & Tr. 485; 10 Jur. (N. S.) 684; *In re Godfrey*, (1893), 1 Rep. 484; 69 Law. T. 22; *Olmstead's Estate*, 122 Cal. 224; *Glass's Estate*, (Colo. App. 1900), 60 Pac. 186; *Succession of Batchelor*, 48 La. Ann. 278; *Müh's Succession*, 35 La. Ann. 394; *Danimann v. Danimann* (Md.), 28 Atl. 408; *Bigelow v. Gillott*, 123 Mass. 102; *Baptist Church v. Robbarts*, 2 Pa. St. 110; *Evan's Appeal*, 58 Pa. St. 238; *Kirkpatrick's Will*, 7 C. E. Gr. 463.

<sup>28</sup> *Townshend v. Howard*, 86 Me. 285; *Tomlinson's Appeal*, 133 Pa. St. 245.

<sup>29</sup> *Francis v. Grover*, 5 Hare 39; 15 L. J. Ch. 99; 10 Jur. 230.

<sup>30</sup> *Goods of Smith*, 3 Sw. & Tr. 589; 10 Jur. (N. S.) 1243; 34 L. J. P. 19; *Goods of Raine*, 34 L. J. P. 125; 11 Jur. (N. S.) 587.

<sup>31</sup> *Goods of Morton*, 12 Prob. Div. 141; 56 L. J. P. 96; 51 J. P. 580; *Miles's Appeal*, 68 Conn. 237.

<sup>32</sup> *White's Will*, 25 N. J. Eq. 501, citing *Avery v. Pixley*, 4 Mass. 460; *Hobbs v. Knight*, 1 Curteis 768; *Goods of James*, 7 Jur. N. S. 52; *Price v. Powell*, 3 H. & N. 341; *Smock v. Smock*, 3 Stockt. 156.

<sup>33</sup> *Olmstead's Estate*, 122 Cal. 224.

nesses, was written by testator: "Owing to the depreciation in my property I will make a new will."

Some of the clauses were cancelled by ink lines drawn the full length of every line, and by cross lines extending from top to bottom. Several changes were made in amount of legacies. Testator had often, and within fifteen days of his death, declared that he had made an iron-clad will that could not be broken. The Probate Court found as a fact that he intended to cancel his will, and on this record the Supreme Court affirmed decision.

Drawing an ink line through an indorsement, "last will and testament" upon the envelope in which the will was contained, and writing "superseded by a later will," does not of itself constitute a cancellation of the will;<sup>34</sup> nor does a change of the date of the will.<sup>35</sup>

In some cases wills have been presented on which the word "cancelled" was written by testator with the intention of revoking it, and the question is presented if this is a cancellation within the meaning of the statute. The decisions are reconcilable, though not reconciled by the courts. Where the word is written across the writing on the face of the will it is held to amount to a cancellation. "A repeal is effected by the act of writing upon the will itself a word that manifests an intention to annul it."<sup>36</sup>

In an earlier Pennsylvania case<sup>37</sup> the testator wrote upon the margin of the will, so as not to cover any of the writing, the

<sup>34</sup> *Grantley v. Garthwaite*, 2 Russ. 90.

<sup>35</sup> *Averall v. Averall*, Lit. Sel. Cas. (Ky.) 503.

<sup>36</sup> *Evan's Estate*, 58 Pa. St. 238, citing and following *Warner v. Warner*, 37 Vt. 356; so *Kirkpatrick's Will*, 22 N. J. Eq. 463; 7 C. E. Green. But in these cases there were acts of tearing and the like, which might have constituted a revocation without relying upon the word 'cancelled' as a cancellation.

So in *Goods of Harris*, 3 Sw. & Tr. 485; 10 Jur. (N. S.) 684, a will was found with the signatures cut off from the first five sheets, the final signature struck through with a pen, and upon the will the words: "Cancelled, A. D. H., 15th September, 1857." It was held that the will was revoked. It was not necessary to decide whether this constituted a technical cancellation.

<sup>37</sup> *Lewis v. Lewis*, 2 W. & S. 455.

word "obsolete." This was held not to revoke the will. This case was distinguished in Evans' estate, *supra*, upon two grounds: first, that the word "obsolete" did not necessarily import a revocation, while the word "cancelled" did; second, that in the early case the word did not cover any of the writing of the will, thus appearing as a memorandum on the margin, while in the later case it covered the writing, and appeared more as an intended cancellation.

In a later Wisconsin case<sup>38</sup> testatrix wrote on the back of the fourth page of her will: "I revoke this will." This was signed by testatrix, but not witnessed. The entire will was written on the first page, so that the sheet of which the third and fourth pages consisted formed a cover to the will. It was held that these words did not constitute a cancellation, and the court, while holding that, while on the facts it might be distinguished from Warner v. Warner and Evans' Estate, and be classed with Lewis v. Lewis, preferred to decide upon the theory that the former cases named were incorrectly decided.

In some jurisdictions the statute on the subject of "Revocation" omits the word "cancellation." In such jurisdictions, drawing lines through words do not effect a revocation; not because it is not a cancellation, but because cancellation alone does not revoke under these statutes.<sup>39</sup> The effect of the partial destruction of a will which is sometimes spoken of as cancellation is discussed under "Partial Revocation."<sup>40</sup>

## §250. Mutilation.

Where the statute provides that if a will is "mutilated" with intent to revoke it, such will is revoked; drawing pencil lines across the signature, so as to deface, but still leaving the signature legible, was held to constitute a "mutilation."<sup>42</sup>

<sup>38</sup> Ladd's Will, 60 Wis. 187.

<sup>39</sup> *In re Godfrey* (1893), 1 Rep. 484; 69 L. T. 22; *Bethell v. Moore*, 2 Dev. & B. 311; *Ladd's Will*, 60 Wis. 187; *Gay v. Gay*, 60 Io. 415; *Grace v. Association*, 87 Wis. 562;

*Lovell v. Quitman*, 88 N. Y. 377; *Law v. Law*, 83 Ala. 432.

<sup>40</sup> See Sec. 254.

<sup>42</sup> *Woodfill v. Patton*, 76 Ind. 575.

### §251. Obliterating.

Under some statutes obliterating a will, with the intention of revoking, will operate as a revocation. But elsewhere, by statute, obliteration has been withdrawn from the methods of revoking a will, and the will as originally executed must be admitted to probate, if it is possible to distinguish the original words, unless it was re-executed or re-published subsequently to the alteration.<sup>43</sup>

Where such provisions are contained in the statute it is held that if an expert can, with the help of a microscope, decipher the writing, as it stood before alteration, such writing as it stood is "apparent" within the meaning of the statute and must be regarded as part of the will.<sup>44</sup> But where the writing of a material part of the will is so obliterated as to be illegible, it may be regarded as a "destruction," and hence a revocation.<sup>45</sup>

### §252. Destruction.

The destruction of a will by testator, with intent of revoking it, operates as a revocation under all the codes, and needs no further discussion where the destruction is actual and total. The doctrine of constructive destruction, however, is one of considerable importance, especially in jurisdictions where the statute on the subject of revocation omits the methods of cancellation, obliteration and the like, referred to in this chapter. In some jurisdictions it is held that the word "destroy" includes burning, tearing, cancelling and the like. "A will burnt, cancelled, or torn, *animo revocandi*, is destroyed,"<sup>46</sup> and, con-

<sup>43</sup> *Ffinch v. Combe* (1894), P. 191; *Goods of Godfrey*, 69 L. T. 22; *Pringle v. McPherson*, 2 De S. (S. Car.) 524.

<sup>44</sup> *Brasier's Estate* (1899), P 36; 68 L. J. P. D. & A., N. S. 6.

<sup>45</sup> *Goods of Morton*, 56 L. J. P. 96; 51 J. P. 680; *Goods of James*, 7 Jur. (N. S.) 52.

<sup>46</sup> *Johnson v. Brailsford*, 2 Nott & McC. (S. Car.) 272. In this case the testator tore off the seals, inter-

lined and crossed out a considerable part of the will and wrote upon the will "I think my will at this time unequal; with God's permission I mean to alter it," etc. This was held to amount to a "destruction." But while this is true, where the burning and the like affect substantially the whole will, it is, as a general statement, somewhat more extreme than is warranted by the adjudicated cases.



versely, the words "burning, tearing, cancelling, or obliterating" in the statute were held to be included and summed up in the word "destroyed."<sup>47</sup> Tearing a will "into fragments is unquestionably destruction," even though the fragments are not destroyed.<sup>48</sup> So apparently is tearing or burning an essential part of the will, such as testator's signature.<sup>49</sup> So is such cancellation or obliteration of an essential part of the will as makes it impossible to decipher the original writing, or "entirely obliterates" it.<sup>50</sup>

But anything short of this, such as a cancellation or partial crasure, which leaves the original writing legible, is not a destruction within the meaning of the statute.<sup>51</sup> Thus, drawing a pen through part of the will, writing upon it, "This is revoked," and throwing it away, was held not to amount to "otherwise destroying" it within the statute.<sup>52</sup> Still less does an intention to destroy not manifest by any act upon the will, but by some extrinsic act, such as throwing the will among waste papers and intending to destroy it afterwards, amount to a destruction.<sup>53</sup> The destruction of a document which was by reference incorporated in the will does not operate as a revocation of the will.<sup>54</sup>

### §253. Destruction of duplicate will.

Where a will has been executed in duplicate, the destruction by testator of that copy which he retains in his possession, with intent to revoke the will, operates as a revocation. \*

<sup>47</sup> *Barksdale v. Davis*, 114 Ala. 623; 22 So. 17.

<sup>48</sup> *Evan's Appeal*, 58 Pa. St. 244.

<sup>49</sup> *Goods of Gullon*, 1 Sw. & Tr. 31; 4 Jur. (N. S.) 243; *Gay v. Gay*, 60 Io. 415.

<sup>50</sup> *Goods of Morton*, 56 L. J. P. 96; 51 J. P. 680; *Goods of James*, 7 Jur. (N. S.) 52, *obiter*; *Gay v. Gay*, 60 Io. 415, citing *Hobbes v. Knight*, 1 Curt. 779; *Price v. Powell*, 3 H. & N. 341; *In re Harris*, 3 S. & T. 485; *Goods of Gullan*, 1 S. & T. 23; *Goods of Coleman*, 2 S. & T. 314.

<sup>51</sup> *Cheese v. Lovejoy*, 46 L. J. P.

66; 2 Prob. Div. 251; 25 W. R. 853; *Law v. Law*, 83 Ala. 432; *Gay v. Gay*, 60 Io. 415; *Lovell v. Quitman*, 88 N. Y. 377.

<sup>52</sup> *Cheese v. Lovejoy*, 46 L. J. P. 66; 2 P. D. 251; 25 W. R. 853.

<sup>53</sup> *Cheese v. Lovejoy*, 46 L. J. P. 66; 2 Prob. Div. 251; 25 W. R. 853; *Blakemore's Succession*, 43 La. Ann. 845; *Succession of Hill*, 47 La. Ann. 329; *Hoit v. Hoit*, 63 N. H. 475; *Fellows v. Allen*, 60 N. H. 439.

<sup>54</sup> *In re Coyte*, 56 L. T. 510.

\* *Paige v. Brooks*, 75 Law T. Rep. 455.

### §254. Partial revocation by act manifest on the will.

The Statute of Frauds provided that a will devising land, "or any part thereof," might be revoked by the acts there specified, with intention to revoke the same. Under statutes containing similar provisions, it is held that a will may be partially revoked by cancelling or burning, etc., one or more clauses, with intention to revoke such clause or clauses, provided that such cancellation and the like merely revokes previous devises, and does not make a new devise.<sup>55</sup> Thus a devise of a fee could be cut down to a life estate by striking out the words "her heirs and assigns forever" after execution.<sup>56</sup> But where the words cancelled or cut out are so connected with the rest of the will that if such a partial revocation were allowed it would effect a new devise without any re-publication, such partial revocation is not allowed unless the statutes permit revivor of a will without re-publication.<sup>57</sup>

The act of erasing or cancelling one or more clauses of a will, with intent to revoke them alone, does not as a rule revoke the will as a whole, as the intention to revoke is clearly wanting.<sup>58</sup>

<sup>55</sup> *Swinton v. Bailey*, 48 L. J. Ex. 57; 4 App. Cas. 70; *Goods of Leach*, 63 L. T. 111; *Goods of Woodward*, L. R. 2 P. 206; 19 W. R. 448; 40 L. J. P. 17; 24 L. T. 40; *Sutton v. Sutton*, Cowp. 812; *Larkins v. Larkins*, 3 Bos. & P. 16; *Roberts v. Round*, 3 Hagg. 548; *Short v. Smith*, 4 East, 418; *Martins v. Gardner*, 8 Sim. 73, 5 L. J. Ch. 305; *Swinton v. Bailey*, 45 L. J. Ex. 427; *Mence v. Mence*, 18 Ves. Jr. 348; *Francis v. Grover*, 5 Hare 39 (*obiter*); *Miles's Appeal*, 68 Conn. 237; *Wolf v. Bollinger*, 62 Ill. 368; *Brown's Will*, 1 B. Mon. (Ky.) 56; *Wells v. Wells*, 4 T. B. Mon. (Ky.) 152; *Tudor v. Tudor*, 17 T. B. Mon. (Ky.) 383; *Batchelor's Succession*, 48 La. Ann. 278; *Bigelow v. Gillott*, 123 Mass. 102; *Eschback v. Collins*, 61 Md. 478; *Varnon v. Varnon*, 67 Mo. App.

534; *In re Kirkpatrick*, 22 N. J. Eq. 463; *Tomlinson's Appeal*, 133 Pa. St. 245; *Johnson v. Brailsford*, 2 Nott & M. 272.

<sup>56</sup> *Swinton v. Bailey*, 48 L. J. Ex. 57; 4 App. Cas. 70.

<sup>57</sup> *Larkins v. Larkins*, 3 Bos. & P. 16; *Miles's Appeal*, 68 Conn. 237; *Eschback v. Collins*, 61 Md. 478 (where the words cancelled would have enlarged a life estate to a fee.)

<sup>58</sup> *Goods of Woodward*, L. R. 2 P. 206; *Hesterberg v. Clark*, 166 Ill. 241; *Wheeler v. Bent*, 7 Pick. (Mass.) 61; *Goods of Penniman*, 20 Minn. 229; *Simrell's Estate*, 154 Pa. St. 604; *Pringle v. McPherson*, 2 Desaus. (S. Car.) 524; *Stover v. Kendall*, 1 Cold. (Tenn.) 557; *Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467.

A cancelation of parts of a will which leaves the remainder unintelligible is held to operate as a revocation of the entire will.<sup>59</sup>

This exception to the general rule rests on the theory that testator intended a revocation of the clauses cancelled at least; and that he could not have intended the remainder of his will to be enforced in the condition assumed. Furthermore, the courts will not enforce a vague and uncertain will, whether it is so because of cancellations or because of defects in the original scheme of disposition.

Recent statutes either expressly provide that no alteration in the contents of a will shall have any effect unless executed with the formalities required for the execution of a will, or omit all reference to revocation of a part of a will.

Under such statutes it is held that if the words sought to be cancelled are still legible no partial revocation of the will can be permitted even if the testator intended such revocation.<sup>60</sup>

Thus, testator pasted pieces of paper over parts of his will and on his death the will was admitted to probate in 1874, with the parts thus covered probated in blank. In 1893 it was found that these parts could be read, and as experts testified that they could be read without resort to artificial means these parts were admitted to probate.<sup>61</sup> But if the words cancelled are illegible, and can not be proved otherwise, the court will necessarily be unable to probate them; and as it does not appear to be the in-

<sup>59</sup> *Olmstead's Estate*, 122 Cal. 224; *Müh's Succession*, 35 La. Ann. 394. (Where sixteen out of twenty legacies were cancelled and testator's signature was so blotted as to be legible only by experts.) *Damman v. Damman* (Md.) 1894, 28 Atl. 408. (One-third of the items were erased, the remainder being thus left in part unintelligible; testator's signature not canceled.)

<sup>60</sup> *Burgoyne v. Showler*, 1 Rob.

Ecc. 5; *Cooper v. Brockett*, 4 Moore, P. C. 419; *Goods of Greenwood* (1892), Prob. 7; *Ffinch v. Combe* (1894), Prob. 191; 6 Rep. 545; *Locke v. James*, 13 Law J. Ex. 186; *Law v. Law*, 83 Ala. 432; *Lovell v. Quitman*, 88 N. Y. 377; *Giffin v. Brooke*, 48 O. S. 211.

<sup>61</sup> *Ffinch v. Combe* (1894), Prob. 191; 6 Rep. 545.

tention of the testator to revoke the entire will, it must be probated with the cancelled parts blank.<sup>62</sup>

The only point upon which there seems to be actual conflict of authority in this connection is where the statute omits all reference to the revocation of part of a will, neither expressly permitting it nor expressly prohibiting it. The weight of authority seems to be that under such statute a partial revocation of a will is impossible in law, if the words sought to be revoked are still legible.<sup>63</sup>

A contrary view is entertained in Massachusetts. In that state their statute of 1783 permitted expressly a revocation of a devise of land "or of any clause thereof" in the manner specified. The revision of 1836 omitted the words "or of any clause thereof." The court held that under the revision the right of partial revocation still existed, saying: "The power to revoke a will includes the power to revoke any part of it. If we were to hold that, under this provision, a testator could not revoke a part of a will by cancelling or obliterating it, we should be obliged by the same rule of construction to hold that he could not revoke a part by a codicil, which would be against the uniform practice of this commonwealth, sanctioned by numerous decisions. We are therefore of the opinion that, in this case, the cancellation by the testator of the sixth and thirteenth clauses of his will by drawing lines through them, with intention of revoking them, was a legal revocation of those clauses."<sup>64</sup>

## §255. Revocation prevented by fraud.

As we have seen,<sup>65</sup> prior to the Statute of Frauds, or American statutes of revocation based thereon, a written will might be revoked by the acts and declarations of testator, whether apparent on the will or not. Where the law was in such con-

<sup>62</sup> *Hobbs v. Knight*, 1 Curt. 768; *Townley v. Watson*, 3 Curt. 761; *In re Brewster*, 29 L. J. P. 69; *Goods of James*, 1 S. & T. 238.

<sup>63</sup> *Law v. Law*, 83 Ala. 432; *Gardiner v. Gardiner*, 65 N. H. 230;

8 L. R. A. 383; *Giffin v. Brooke*, 48 O. S. 211.

<sup>64</sup> *Bigelow v. Gillott*, 123 Mass. 102.

<sup>65</sup> See Sec. 244.

dition testator's attempt to destroy his will, which was frustrated by the fraud of devisee, who represented that the will was already destroyed, might act as a revocation of such will.<sup>66</sup>

Subsequent to the passage of these statutes, since their provisions require that one of the specified acts be manifest upon the will in order to effect a revocation, a question of considerable difficulty is presented where testator intends to and wishes to revoke his will, but is prevented from so doing by fraud, deceit and the like. The weight of authority is that, in the absence of all the acts specified as necessary in the statute, to be manifest on the will, the will can not be revoked at law by testator's intention alone, no matter by what deceit this intention may be prevented from manifesting itself by one of the required acts.<sup>67</sup>

This rule is followed even where the testator is by fraud and deceit induced to believe that his will has actually been destroyed in obedience to his instructions.<sup>68</sup>

Thus, a blind testator ordered his will to be brought to him, felt it and recognized it by the seals on it, and then ordered his grandson to destroy it; and the grandson threw another paper into the fire, and the testator heard the noise of the burning and observed the smell, and was assured by his grandson that the will was burning, and was thus induced to believe that his will was destroyed, in which belief he died. It was held that such acts did not amount to a revocation.<sup>69</sup>

<sup>66</sup> Card v. Grinman, 5 Conn. 164.

<sup>67</sup> Doe v. Harris, 8 Ad. & El. 1; 35 E. C. L. 299; Gains v. Gains, 2 A. K. Marsh. (Ky.) 190; Graham v. Burch, 47 Minn. 171; Hise v. Fincher, 10 Ired. (N. Car.) 139; Giles v. Giles, (N. C.) Taylor's Conf. Rpt. 290, 174; Delafield v. Parish, 25 N. Y. 9; Kent v. Mahaffey, 10 O. S. 204; Boyd v. Cook, 3 Leigh (Va.) 32; Malone v. Hobbs, 1 Rob. (Va.) 346; Blanchard v. Blanchard, 32 Vt. 62.

Doe v. Harris, *supra*, is probably

to be explained fully as much on the theory that testator abandoned his intention to revoke at the present time and merely intended to revoke in the future; for it appears very doubtful if testator was deceived into thinking his will was destroyed, though devisee undoubtedly tried so to deceive him.

<sup>68</sup> Hise v. Fincher, 10 Ired. (N. Car.) 139; Kent v. Mahaffey, 10 O. S. 204; Boyd v. Cook, 3 Leigh (Va.) 32; Marlowe v. Hobbs, 1 Rob. (Va.) 346.

<sup>69</sup> Kent v. Mahaffey, 10 O. S. 204.

So, where testator put his will in a stove upon the kindlings, which were not yet set on fire, meaning to burn it, and testator's daughter, a beneficiary under the will, removed it before the fire was started, this was held not to be a revocation.<sup>70</sup>

Some of the cases often cited on this point are hardly applicable. Thus, where testator's wife informed him that she had burned his will without his authority, and thereby induced him to desist from searching for it to destroy, it was held that fraud could not operate as a revocation, and that, furthermore, even if the statements of the wife were true they would not amount to a revocation, as the destruction alleged was neither by testator nor by his previous authority.<sup>71</sup>

A few jurisdictions hold, contrary to the weight of authority, that where testator is deceived into thinking that his will is destroyed, it operates as a revocation.<sup>72</sup> Thus, in a case where testatrix kept a red ribbon tied around her will and in some way, probably by fraud, this ribbon was transferred to another document, which latter document testatrix burned without looking at it, it was held that if testatrix believed she was burning her will it would operate as a revocation.<sup>73</sup>

The last case well illustrates the danger of attempting by judicial legislation to add to the statutory requirements for revoking a written will.

An attempt has been made to treat such acts as practically effecting a revocation in equity though not in law, and to work out this theory by holding the beneficiary as a trustee for those who would have taken the property had the will been revoked. Obiter are found to this effect in cases where the only point

<sup>70</sup> *Graham v. Burch*, 47 Minn. 171.

<sup>71</sup> *Mundy v. Mundy*, 15 N. J. Eq. 290; *Clingan v. Mitcheltree*, 31 Pa. St. 25.

<sup>72</sup> *Card v. Grinman*, 5 Conn. 168. (A case decided before the statute upon revocation was passed.)  
*Pryor v. Coggin*, 17 Ga. 444 (448).

In this case the court said: "The Judge . . . should have told the jury in effect that if Matthews had

practiced this deceit (i. e., substituting an old letter for the will) upon the old man and the latter had destroyed the letter thinking it was the will, such circumstances were equivalent to a destruction or revocation of the will itself; and have left it to the jury to say whether or not such facts were in proof."

<sup>73</sup> *Smiley v. Gambill*, 2 Head (Tenn.) 164.

presented for adjudication was the effect of these acts in law.<sup>74</sup> But where the question has been presented squarely by the record the courts have held that equity could not ignore the words of the statute of revocation. "The statute was designed to prevent the frauds and perjuries arising out of mere parol revocations, and to sanction a recovery in this case would open the door for the very evils which the statute intended to exclude."<sup>75</sup>

In all the cases cited, however, testator was under no coercion or restraint whereby he was prevented from revoking his will by making a new will or resorting to other statutory methods. As to what view the courts would take of a case where testator was not only misled into thinking his will revoked, but also prevented by actual coercion from doing some further act which would revoke it in any event, we have only a few scattered obiters to guide us. While these seem adverse to giving any remedy not specified by statute, it seems difficult to believe that a wrong so extreme will not in some way be remedied by the law.

### §256. *Animus revocandi*.—In general.

In revocation by a specific act manifest upon the will, the statutes provide that such act shall be a revocation only when done *animo revocandi*, with intent to revoke the will. If such intention is absent, the mere act of tearing, cancelling and the like has no effect to revoke the will.<sup>76</sup>

<sup>74</sup> Card v. Grinman, 5 Conn. 168; Gaines v. Gaines, 2 A. K. Marsh. (Ky.) 190; Blanchard v. Blanchard, 32 Vt. 62. In Graham v. Burch, 47 Minn. 171, the question was raised in argument, but the court refused to consider it in a proceeding to contest a will as "not properly before us for our consideration."

<sup>75</sup> Kent v. Mahaffey, 10 O. S. 204.

<sup>76</sup> "Mere physical destruction, however complete it may be, is not

sufficient, for that may have been occasioned by mistake or fraud, or as in the case of a testator who since the making of his will has become insane, it may be accomplished without any lawful intent whatever. Again, the mere intent, without some physical act tending to the destruction of the will, and sufficient to fulfill the requirements of the statute, for very obvious reasons is insufficient, since the Statute expressly requires the joint

§257. *Animus revocandi*.—Who is capable of revoking a will.

The act of revocation may take place without the intention to revoke in any one of several different ways.

First. The testator may not, at the time that he performs the act, be competent to make a will; and in such case he can not form the intention to revoke a will. A will can be revoked only by a person of sufficient age, mind and memory to make a valid will. The rules already given as to capacity for making a will apply here fully.<sup>77</sup>

Thus, where a person suffering from softening of the brain tore his will in five pieces, it was held that these pieces constituted his valid will, it appearing that he did not at that time possess sufficient mind and memory to make a valid will.<sup>78</sup>

So the act of an insane man can not revoke a will,<sup>79</sup> nor the act of one who is suffering from delirium tremens.<sup>80</sup>

Since the intention to revoke is an essential element of revocation by act manifest on the will, it follows that where such outward act is caused by the undue influence of another, it is not a revocation.<sup>81</sup>

It is possible for a testator under guardianship to possess testamentary capacity.<sup>82</sup> Accordingly, when one under guardianship destroys his will with the intention of revoking it,

union of act and intent." *Olmstead's Estate*, 122 Cal. 224; *Potter's Will*, 33 N. Y. S. R. 936; 12 N. Y. Supp. 105.

<sup>77</sup> *Brunt v. Brunt*, L. R. 3 P. 37; 21 W. R. 392, 28 L. T. 368; *Goods of Hine* (1893), Prob. 282; *Lang's Estate*, 65 Cal. 19; *Johnson's Will*, 40 Conn. 587; *Linkmeyer v. Brandt*, 107 Io. 750; *Forbing v. Weber*, 99 Ind. 588; *Allison v. Allison*, 7 Dana (Ky.) 94; *Gregory v. Oates*, 92 Ky. 532; *Connelly v. Beal*, 77 Md. 116; *Rhodes v. Vinson*, 9 Gill. (Md.) 169; *McIntire v. Worthington*, 68 Md. 203; *Waldron's Will*, 44 N. Y. Supp. 353; *Delafield v. Parish*, 25 N. Y. 9; *Gardner v. Gardner*, 177

Pa. St. 218; *Ford v. Ford*, 7 Hump. (Tenn.) 92; *Jones v. Roberts*, 84 Wis. 465.

<sup>78</sup> *Goods of Hine* (1893), Prob. 282.

<sup>79</sup> *Lang's Estate*, 65 Cal. 19; *Forbing v. Weber*, 99 Ind. 588; *Ford v. Ford*, 7 Hump. 92 (26 Tenn.).

<sup>80</sup> *Brunt v. Brunt*, L. R. 3 P. 37; 28 L. T. 368; 21 W. R. 392.

<sup>81</sup> *Batton v. Watson*, 13 Ga. 63; *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Rich v. Gilkey*, 72 Me. 595; *McIntire v. Worthington*, 68 Md. 203; *Vorhees v. Vorhees*, 73 Me. 595.

<sup>82</sup> See Sec. 115.



this effects a revocation if such person had at that time capacity to make a will.<sup>83</sup>

**§258. Animus revocandi.—Mistake of fact.**

Second. The act of revocation may be done by a competent testator under a mistake of fact. If testator acts through a mistake of fact as to the identity of the paper or as to the nature of the act he does, no revocation is effected, even though there is such act manifest upon the paper as would constitute a revocation if done with intent to revoke.<sup>84</sup> So, where the act manifest upon the instrument is done unintentionally, no revocation is effected.

Thus, in an early English case a testator threw ink upon his will by mistake instead of sand, to blot it. It was held that this was not such a cancellation as would revoke the will.<sup>85</sup>

Conditional revocation is really a branch of this subject; but as it applies to wills revoked by a later instrument, as well as by acts manifest upon the face of the will, it will be discussed subsequently.<sup>86</sup>

**§259. Animus revocandi.—Mistake of law.**

Where the will is cancelled, torn, etc., by reason of a mistake of law, the weight of authority is that this does not effect a revocation if the evidence shows that the revoking act was done solely by reason of the mistake of law.<sup>87</sup>

So, where testator revokes a later will, the destruction of which under the law then in force does not revive the earlier will, under a mistake of law, thinking that such earlier will will thereby be revived, it is held that the intention to revoke

<sup>83</sup> Linkmeyer v. Brandt, 107 Io. 750.

<sup>84</sup> Goods of Wheeler, 49 L. J. P. 29; 44 J. P. 285; Smock v. Smock, 3 Stock. 156; Beauchamp's Appeal, 4 Mar. (Ky.) 363; Burns v. Burns, 4 S. & R. (Pa.) 295;

Smiley v. Gambill, (39 Tenn.) 2 Head. (Tenn.) 164.

<sup>85</sup> Burtenshaw v. Gilbert, Cowp. 52; Löffl, 465.

<sup>86</sup> See Secs. 275-277.

<sup>87</sup> Semmes v. Semmes, 7 H. & J. (Md.) 388.

the later will was conditioned upon the revivor of the earlier, and the condition failing, the intention to revoke does not exist.<sup>88</sup>

Thus, where the testator believed that the will was invalid, and for that reason alone tore it, it was held that such acts did not of themselves amount to a revocation. In this case, however, the intention to revoke was caused by a mistake of fact, and, furthermore, was abandoned before the act of revocation was completed.<sup>89</sup>

So, where a will was cancelled by testator by reason of a mistake as to the legal effect of a deed, it was held that such will was not revoked, though probate should be in solemn form.<sup>90</sup>

#### §260. *Animus revocandi*.—Attempt to alter will.

The act of revocation may be done by testator as a part of an unsuccessful attempt to alter his will by the erasure of a part of the will and the insertion of new provisions. Where this is the object of such erasure, and the interlineations are invalid because they are not executed in the manner prescribed by statute, the intention to revoke does not exist, and the will as originally drafted is in force.<sup>91</sup>

<sup>88</sup> *Powell v. Powell*, 35 L. J. P. 100; L. R. 1 P. 209; 14 L. T. 800; *Eckersley v. Platt*, 36 L. J. P. 7; L. R. 1 P. 282; 15 L. T. 327; 15 W. R. 232.

*James v. Shrimpton*, 1 Prob. Div. 431. (This case may be explained on a different theory of the law. The second will (here a codocil) could not be found, but there was no direct evidence to show that he had destroyed it; while his declarations showed that he looked upon his will as being in force. The court may have found that he had not destroyed the second will. It,

however, assumed that he destroyed it, but explained the case on the theory given in the text.)

<sup>89</sup> *Giles v. Warren*, 41 L. J. P. 59; L. R. 2 P. 401; 26 L. T. 780; 20 W. R. 827; *Semmes v. Semmes*, 7 H. & J. 388.

<sup>90</sup> *Goods of James*, 19 L. T. 610.

<sup>91</sup> *Onions v. Tyrer*, 1 P. Wms. 343; *Wolf v. Bollinger*, 62 Ill. 368; *Youse v. Foreman*, 5 Bush (Ky.) 337; *Thomas's Will*, Minn. 79 N. W. 104; *Varnon v. Varnon*, 67 Mo. App. 534; *Pringle v. McPherson*, 2 Des. 524; *Stover v. Kendall*, 1 Cold. 557.

**§261. Animus revocandi.—Destruction without testator's authority.**

Where the will is cancelled, destroyed and the like without the previous permission and authority of testator, such acts are, of course, done without any intent on testator's part to revoke, and do not effect a revocation.<sup>92</sup>

Where the evidence left it doubtful how the will was destroyed or by whom, or whether testator, who was present, was conscious at the time, it was held that since it was destroyed in the lifetime of testator, it must be shown, in order to prevent a revocation, that the destruction was fraudulent.<sup>93</sup>

In other states a destruction by some one other than testator in testator's lifetime, while not operating as a revocation, may leave the will in the anomalous condition of being unrevoked and yet impossible to probate.<sup>94</sup>

While it has been queried whether testator can, by subsequent ratification, make an unauthorized destruction operate as a revocation,<sup>95</sup> the better view seems to be that he can not.<sup>96</sup>

So, where the intention to revoke is abandoned before the act of revocation is completed, it has been held that the act done is not to be considered done with intent to revoke, and does not effect a revocation.<sup>97</sup>

**§262. Revocation by later instrument.—In general.**

Since a will is always revocable, a will valid when made may be superseded or revoked by a later instrument. The questions under this topic may be grouped under two heads: First. By what sort of instrument a testator may revoke his

<sup>92</sup> Mills v. Millward, 59 L. J. P. 23; 15 P. D. 20; 61 L. T. 651; Cheever v. North, 106 Mich. 390, Mundy v. Mundy, 64 N. W. 455; 2 McCart. (N. J.) 15 N. J. Eq. 290; Clingan v. Mitcheltree, 31 Pa. St. 25; Means v. Moore, 3 McC. (S. Car.) 282; Harp. 314.

<sup>93</sup> Kidder's Estate, 66 Cal. 487.

<sup>94</sup> See Sec. 348.

<sup>95</sup> Mills v. Millward, 59 L. J. P. 23; 15 P. D. 20; 61 L. T. 651.

<sup>96</sup> Mundy v. Mundy, 2 McCart. (N. J.) 15 N. J. Eq. 290; Clingan v. Mitcheltree, 31 Pa. St. 25.

<sup>97</sup> Giles v. Warren, 41 L. J. P. 59; 20 W. R. 827; L. R. 2 P. 401; 26 L. T. 780; Doe d. Perkes v. Perkes, 3 B. & Ald. 489.

will; and second, assuming that the instrument is sufficiently formal to effect a revocation, if such is testator's intention, to determine whether his intention to revoke appears upon the face of the later instrument.

The doctrine of revocation by a later will is not affected by statutes on the subject of revocation, which prescribe the formalities of burning, tearing and the like. Even under such statutes a later will inconsistent with the earlier one, or containing an express revocation clause, revokes the earlier.<sup>98</sup>

### §263. Revocation by informal instrument.

In the absence of any statute upon the subject, a will was held to be revoked by any writing, no matter how informal, which showed testator's intention that his will should thereby be revoked.<sup>99</sup> But even where a will may be revoked by a "writing," it is held that a codicil not properly executed is not a "writing" within the meaning of the statute. This distinction is based upon the doctrine of dependent relative revocation. The assumption is made that the revocation clause of the codicil is inserted in order to permit of the dispositive provisions therein; and if the codicil is not so executed as to give effect to these provisions, it is treated as entirely void, including the clause of revocation.<sup>100</sup>

### §264. Revocation by formal instrument.

As the dangers arising out of loose revocation became apparent, and statutes were passed limiting and controlling revocation by act manifest on the will, the legislatures began to pass other statutes providing that a will could be revoked

<sup>98</sup> *Dempsey v. Lawson*, 2 P. D. 98.

<sup>99</sup> *Witter v. Mott*, 2 Conn. 67. (In this case the will was held revoked by the following writing on the back of the will: "This will is invalid March 9, 1813, as Mr. Suther Smith has agreed that my

wife shall claim no right of dower and bound himself accordingly. Samuel Nott.") *Brown v. Thorndike*, 15 Pick. 388; *Johnson v. Brailsford*, 2 N. & McC. 272.

<sup>100</sup> *Boylan v. Meeker*, 4 Dutch. 274; *Heise v. Heise*, 31 Pa. St. 246.

by a later instrument only when executed with the same formalities as a new will. Owing to the fact that testaments of personalty required a less formal execution than wills of realty, they remained for a time subject to revocation by informal instruments.<sup>101</sup>

It is now settled by statute, in most jurisdictions, that if a will is to be revoked by a later instrument; that instrument must be executed with the formalities of a will, and that no matter how clear testator's intention may be, an instrument executed without these forms can not revoke a will.<sup>102</sup>

Hence, where a will must be attested by three witnesses, a paper attested by two can not revoke a written will.<sup>103</sup>

In jurisdictions where testaments of personalty may be executed with less formality than wills of real estate, an instrument which is valid as a testament, but not valid as a will, may revoke an earlier instrument, good both as a will and as a testament, as far as the personal property of testator is concerned.<sup>104</sup>

So a holographic will, as far as it is valid, will revoke a will executed with the formalities required of ordinary written wills.<sup>105</sup>

<sup>101</sup> *Brown v. Thorndike*, 15 Pick. 388.

<sup>102</sup> *Cheese v. Lovejoy*, 46 L. J. P. 66; 2 P. D. 251; 25 W. R. 853; *Barksdale v. Hopkins*, 23 Ga. 332; *Hollingshead v. Sturgis*, 21 La. Ann. 450; *Seymour's Succession*, 43 La. Ann. 993; *Eschbach v. Collins*, 61 Md. 478; *Reid v. Borland*, 14 Mass. 208; *Laughton v. Atkins*, 1 Pick. 535; *West v. West*, 144 Mo. 119; *Morey v. Sohler*, 63 N. H. 507; *Rudy v. Ulrich*, 69 Pa. St. 177; *Reese v. Portsmouth Probate Court*, 9 R. I. 434; *Kennedy v. Upshaw*, 64 Tex. 411; *Noyes's Will*, 61 Vt. 14.

<sup>103</sup> *Morey v. Sohler*, 63 N. H. 507.

<sup>104</sup> *Linberry v. Mason*, 2 Comyn's Rep. 451; *Montefiore v. Montefiore*, 2 Addams, 354; 2 Eng. Ecc. Rep. 342; *Brown v. Tilden*, 5 Har. & J. (Md.) 371; *Marston v. Marston*, 17 N. H. 503; *Orgain v. Irvine*, 100 Tenn. 193; *Guthrie v. Owens*, 2 Hum. (Tenn.) 202; *Glascock v. Smither*, 1 Call. (Va.) 479; *Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467.

<sup>105</sup> *Goods of Turnour*, 56 L. T. 671; *Ennis v. Smith*, 14 How. 400; *Hooper v. McQuary*, 5 Cold. (Tenn.) 129; *Gordon v. Whitlock*, 92 Va. 723.

*Contra, In re Soher*, 78 Cal. 477.

As under the modern statutes words alone can not revoke a written will, it follows that a nuncupative will, even though of itself valid, can not revoke a prior written will,<sup>106</sup> except where the statute makes a special exception in its favor.

Thus, in Tennessee it is provided that if the nuncupative will is reduced to writing in the lifetime of the testator and read over to him and approved, it may operate to revoke a written will.<sup>107</sup>

### §265. Revocation by later instrument not a will.

The instrument by which a previously executed will is revoked may be an instrument executed solely for that purpose, and containing only a provision for revocation.<sup>108</sup> Such an instrument will be held to revoke an earlier will even in jurisdictions in which the later revoking instrument is itself held not to be a will.<sup>109</sup>

It is not necessary that the second instrument be probated in order that it may be used in the contest of the first will to show a revocation thereof.<sup>110</sup>

The revoking instrument may also be a deed.<sup>111</sup>

<sup>106</sup> McCune v. Hause, 8 Ohio 144; Brook v. Chappell, 34 Wis. 405.

<sup>107</sup> Woodward v. Woodward, 5 Sneed (Tenn.) 49.

<sup>108</sup> Goods of Gosling, 55 L. J. P. 27; 11 P. D. 79; 34 W. R. 492; 50 J. P. 263. (In this case the codicil and testator's signature were obliterated by black marks. Testator then wrote "We are witnesses of the erasure of the above." This was duly signed by testator and two witnesses. It was held a good revocation by a writing declaring testator's intention to revoke.) Barksdale v. Hopkins, 23 Ga. 332; Bayley v. Bayley, 5 Cush. 245. (The revoking instrument in this case was "It is my wish that the will I made be destroyed and my estate settled according to law.

It was duly executed.) Seymour's Succession, 48 La. Ann. 993; Noyes's Will, 61 Vt. 14.

<sup>109</sup> Barksdale v. Hopkins, 23 Ga. 332; Seymour's Succession, 48 La. Ann. 993; Noyes's Will, 61 Vt. 14.

<sup>110</sup> Barksdale v. Hopkins, 23 Ga. 332; (*obiter*) Noyes's Will, 61 Vt. 14.

<sup>111</sup> In a recent Maine case the grantor of real property reserved the power to appoint to the use by will or other written instrument. He executed a will in which he appointed to the use. Subsequently by another written instrument he made a different appointment. It was held that the second appointment revoked the will. Paine v. Forsythe, 86 Me. 357.

**§266. What shows testator's intention to revoke will.**

The intention of testator to revoke his earlier will must appear on the face of the revoking instrument in jurisdictions where revocation by parol is abolished.<sup>112</sup>

The question of what shows testator's intention to revoke an earlier will is thus one of construction inserted here for convenience of treatment. Thus, a will in which testator disinherits a daughter, denying that she is his child, is not revoked by a subsequent contract to support her, made by way of compromise to terminate a suit to compel him to support her, even if the contract recognized her as his daughter, and purported to be based on "love and affection."<sup>113</sup>

If the later instrument is not a will, makes no disposition of testator's realty, and shows on its face that testator merely intended to revoke his will at some subsequent time, such instrument is not sufficient to effect a revocation.<sup>114</sup>

**§267. Revocation by later will.—Express revocation clause.**

The later revoking instrument is much oftener a will or codicil.

In the discussion of this branch of the subject a distinction must be noted between wills which contain an express clause of revocation and those which do not contain such a clause.

If the later will contains an express clause of revocation, the earlier will is thereby rendered invalid, irrespective of the disposition of property made by the second will;<sup>115</sup> and this is true even if the other provisions of the revoking will proved ineffectual.<sup>116</sup>

<sup>112</sup> Taylor v. Pegram, 151 Ill. 106; Hill's Succession, 47 La. Ann. 329; Kirkpatrick v. Jenkins, 96 Tenn. 85.

<sup>113</sup> Padelford's Estate, 190 Pa. St. 35.

<sup>114</sup> Ray v. Walton, 2 Mar. (Ky.) 71.

<sup>115</sup> Collins v. Elstone (1893), Prob. 1; 1 Rep. 458; Paton v. Ormerod (1892), Prob. 247; Goods of Carritt, 66 Law T. 379;

Burns v. Travis, 117 Ind. 44; Smith v. McChesney, 2 McCart. 359, 15 N. J. Eq. 359; Snowhill v. Snowhill, 3 Zab. 448 (21 N. J. L. 448); Pierpont v. Patrick, 53 N. Y. 591; Price v. Maxwell, 28 Pa. St. 23; Lutheran, etc., Appeal, 113 Pa. St. 32; Teacle's Estate, 153 Pa. St. 219; Walls v. Walls, 182 Pa. St. 226.

<sup>116</sup> Burns v. Travis, 117 Ind. 44; Price v. Maxwell, 28 Pa. St. 23.

Revocation is effected even where it may be doubtful if testator intended to revoke his first will by his second. In the absence of fraud, at least, the execution of a will with an express clause of revocation operates as a revocation.<sup>117</sup> The revocation clause need not avoid the whole of the earlier will. If it expressly revokes a specified part of such will it will effect a partial revocation only.<sup>118</sup>

The will which contains the revocation clause may, by its phraseology, show that revocation was not intended. Thus, a testator by codicil provided "I hereby annul and revoke" a specified bequest. The rest of the codicil provided that said bequest, instead of vesting on testator's death, should not vest till the death of two other persons. It was held that testator did not intend a revocation by this codicil.<sup>119</sup>

So, where a codicil began "I hereby revoke and annul all wills by me heretofore made," but by constant reference in the codicil to the will to which codicil was annexed, it appeared that the testator intended such will to be in full force, supplemented by the codicil, the will was not revoked.<sup>120</sup>

A will is not revoked by a later will, the revocation clause of which was crossed out by a lead pencil before execution, except as far as the second will was inconsistent with the first.<sup>121</sup> And where the revocation clause in the printed blank on which the will was written was not filled up and was not read to testatrix

<sup>117</sup> Collins v. Elstone (1893), Prob. 1; 1 Reports, 458.

<sup>118</sup> *In re Fence's Estate* (1895), 2 Ch. 778; *Home for Incurables v. Noble*, 172 U. S. 383; *Johns Hopkins University v. Pinkey*, 55 Md. 365; *McGehee v. McGehee*, 74 Miss. 386; *Jackson v. Shinnick*, 6 Ohio Dec. 37; 3 Ohio N. P. 211; *Nelson's Estate*, 147 Pa. St. 160.

<sup>119</sup> *Watt's Estate*, 168 Pa. St. 422. "What the testator did and all that he intended to do was to change the time for the payment of the bequest so as to give the interest to the persons named in the codicil while they lived. This is

not revocation. The fact that the testator called it by that name does not make it so. Revoke means to recall, to take back, to repeal. Annul means to abrogate, to make void. The codicil did not recall or make void the bequest in any particular except as to the time of payment, and this it changed. It left the donee, the gift and the purpose to which it was to be applied, unchanged." *Watt's Estate* 168 Pa. St. 422.

<sup>120</sup> *Gelbke v. Gelbke*, 88 Ala. 427.

<sup>121</sup> *Goods of Tonge*, 66 Law T. N. S. 60.



when the rest of the will was read, it was held not to operate as an absolute revocation of a prior will.<sup>122</sup>

**§268. Revocation by later will.—No clause of express revocation.**

If the later will does not contain a clause of express revocation, the question to be considered is, whether or not the later will is consistent with the earlier will.

If it is consistent no revocation is effected, and the two wills are to be taken together as one in effect.<sup>123</sup> If the later will is inconsistent with the earlier will, it revokes the earlier will just so far as it is consistent with it, and no farther;<sup>124</sup> and the absence of a revocation clause does not prevent revocation to this extent.<sup>125</sup> Hence, where there is no revocation clause, if the second instrument fails of effect for any cause, as for invalidity of the disposition made therein, the earlier will is not thereby revoked.<sup>126</sup>

<sup>122</sup> Goods of Moore, (1892), Prob. 378.

<sup>123</sup> Goods of Rawlings, 41 L. T. 559; Brighthurst v. Orth (Del. Ch.), 44 Atl. 783; Snowhill v. Snowhill, 3 Zab. 448 (21 N. J. L. 448); Wetmore v. Parker, 52 N. Y. 450; Vom Vechten v. Keator, 63 N. Y. 52; Aubert's Appeal, 109 Pa. St. 447; Carl's Appeal, 106 Pa. St. 635; Gordon v. Whitlock, 92 Va. 723; Barksdale v. Barksdale, 12 Leigh 535.

*Contra*, In Barker v. Bell, 49 Ala. 284, it was said that a later will *per se* revokes an earlier one, and that no proof of inconsistency between them was necessary.

<sup>124</sup> Dempsey v. Lawson, 2 P. D. 98; Goods of Hodgkinson (1893), P. 339; Home for Incurables v. Noble, 172 U. S. 383; 19 S. Ct. 226; Kelly v. Richardson, 100 Ala. 584; 13 So. 785; Giddings

v. Giddings, 65 Conn. 149; De La-veaga's Estate, 119 Cal. 651; Stur-gis v. Work, 122 Ind. 134; Mercer's Succession, 28 La. Ann. 564; Coffin v. Otis, 11 Met. 156 (52 Mass.); McGehee v. McGehee, 74 Miss. 386; Marston v. Marston, 17 N. H. 503; Snowhill v. Snowhill, 3 Zab. (21 N. J. L.) 448; Lane v. Hill (N. H.), (1895), 44 Atl. 393; Newcomb v. Webster, 113 N. Y. 191; Hoffner's Estate, 161 Pa. St. 331; McRainey v. Clark, Tayl. (N. Car.), 278 and 698; Gordon v. Whitlock, 92 Va. 723.

<sup>125</sup> Cadell v. Wilcocks (1898), P. 21; 78 L. T. Rep. 83; Tournoir v. Tournoir, 12 La. Report, 19; Jones v. Murphy, 8 W. & S. 275 (Pa.)

<sup>126</sup> Austin v. Oakes, 117 N. Y. 577; Godbold v. Vance, 14 S. Car. 458.

### §269. Revocation by later instrument.—Distinction between will and codicil.

If the later instrument is termed a codicil, a strong effort will be made to construe it so as to reconcile it with the will as far as can possibly be done.<sup>127</sup> The codicil will be held to revoke the will only when necessary to give effect to the provisions of the codicil.<sup>128</sup> So, if the will clearly gives an estate,

<sup>127</sup> *Van Grutten v. Foxwell*, (1897), A. C. 658; *Howell v. Shepherd* (1894), 3 Ch. 649; 64 L. J. Ch. (N. S.), 42; *In re Chifferiel*, 73 Law T. 53; *Homer v. Brown*, 16 How. (U. S.), 354; *Home for Incurables v. Noble*, 172 U. S. 383; *Hitchcock v. Bank*, 7 Ala. 386; *Grimball v. Patton*, 70 Ala. 626; *Mason v. Smith*, 49 Ala. 71; *In re Zeile*, 74 Cal. 125; *Pendleton v. Larrabee*, 62 Conn. 393; *Wheeler v. Fellows*, 52 Conn. 238; *Bringhurst v. Orth* (Del. Ch.) 44 Atl. 783; *Ellis v. Dick*, 165 Ill. 637; *Sharp v. Wallace*, 83 Ky. 584; *Bedford v. Bedford*, 99 Ky. 273; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Thomas v. Levering*, 73 Md. 451; *Tilden v. Tilden*, 13 Gray (Mass.), 103; *Holden v. Blaney*, 119 Mass. 421; *Pendergast v. Tibbetts*, 164 Mass. 270; *Chapin v. Parker*, 157 Mass. 63; *Richardson v. Willis*, 163 Mass. 130; *Hollyburton v. Carson*, 86 N. Car. 290; *Hackett v. Hackett*, 67 N. H. 424; *Hard v. Ashley*, 117 N. Y. 606; *Wetmore v. Parker*, 52 N. Y. 450; *Crozier v. Bray*, 120 N. Y. 366; *Newcomb v. Webster*, 113 N. Y. 191; *Collier v. Collier*, 3 O. S. 369; *Jones v. Strong*, 142 Pa. St. 496; *Rhodes's Estate*, 147 Pa. St. 227; *Whelen's Estate*, 175 Pa. St. 23; *Reichard's Appeal*, 116 Pa. St. 232; *Neff's Appeal*, 48 Pa. St. 501; *Padelford's Estate*, 190 Pa. St. 35;

*Otis v. Brown*, 20 S. Car. 586; *Rodgers v. Rodgers*, 6 Heisk. (Tenn.), 489; *Brown v. Cannon*, 3 Head. (Tenn.) 354; *Barnes v. Hanks*, 55 Vt. 317; *Lyman v. Morse*, Vt. 37 Atl. 1047; *Gordon v. Whitlock*, 92 Va. 723; 24 S. E. 342.

"The codicil is part of the will and they must be construed together as one instrument. If the codicil expressly revokes any part of the will, then the part revoked must be stricken out. If any part or clause of the codicil be irreconcilably repugnant to a clause or clauses of the will, then to that extent the codicil supplants the will, and the latter becomes inoperative. But it supplants the will only to the extent the repugnancy is irreconcilable." *Grimball v. Patton*, 70 Ala. 626.

"The will and codicil are to be taken and construed together as parts of one and the same instrument speaking the language of the testator at the time of his death." *Gray v. Sherman*, 5 Allen (Mass.) 198, quoted in *Richardson v. Willis*, 163 Mass. 130.

<sup>128</sup> *Vaughan v. Bunch*, 53 Miss. 513; *Crozier v. Bray*, 120 N. Y. 366; *Hard v. Ashley*, 117 N. Y. 606; *Reichard's Appeal*, 116 Pa. St. 232; *Rodgers v. Rodgers*, 6 Heisk. 489; *Jenkins v. Lawrence*, 86 Va. 35.

the codicil must be equally clear in order to revoke such gift.<sup>129</sup> So a codicil does not revoke an earlier codicil, unless such result is absolutely necessary to give effect to the later codicil.<sup>130</sup> If, however, the codicil is clearly inconsistent with the will it revokes so far as it is inconsistent;<sup>131</sup> and the fact that the codicil disposes of the whole of testator's estate shows that it is inconsistent with a will which makes a different disposition thereof.<sup>132</sup>

Thus a residuary clause in the codicil operates as a revocation of a partial residuary clause in the will.<sup>133</sup>

Where the second instrument is a will, as distinguished from a codicil, the courts do not make so great an effort to reconcile it with the former will as they do in the case of a codicil. The reason for this distinction lies in the fact that a codicil is ordinarily intended merely to effect some alteration in the will, leaving the rest of it in force; while a later will may quite as well be intended to dispose of testator's property in disregard of the former will.

In fact, if the second will assumes to dispose of the entire estate of testator it is treated as revoking the earlier will as being necessarily inconsistent with it.<sup>134</sup> If it does not, the presumption against partial intestacy will induce the court to construe the two wills together as far as can reasonably be done.<sup>135</sup> Even where the later will, which disposed of ~~only~~

<sup>129</sup> Bedford v. Bedford, 99 Ky. 273; Sturgis v. Work, 122 Ind. 134; Goodwin v. Coddington, 154 N. Y. 283; Freeman v. Coit, 96 N. Y. 63; Viele v. Keeler, 129 N. Y. 190; Redfield v. Redfield, 126 N. Y. 466.

<sup>130</sup> Green v. Tribe, 9 Ch. Div. 231; Goods of DeLaSausseye, L. R. 3 P. D. 42.

<sup>131</sup> Kelly v. Richardson, 100 Ala. 584; De Laveaga's Estate, 119 Cal. 651; Giddings v. Giddings, 65 Conn. 149; Read v. Manning, 30 Miss. 308; Hard v. Ashley, 117 N. Y. 606; Homer v. Brown, 16 How. 354 (U. S.); Holley v. Larrabee, 28

Vt. 274; Dawson v. Dawson, 10 Leigh, 602.

<sup>132</sup> Pilcher v. Hole, 7 Sim. 208; Hallyburton v. Carson, 86 N. Car. 290.

<sup>133</sup> Sturgis v. Work, 122 Ind. 134.

<sup>134</sup> Moorhouse v. Lord, 10 H. L. Cas. 272; Bobb's Succession, 42 La. Ann. 40; Swan v. Houseman, 90 Va. 816; *In re Fisher*, 4 Wis. 254.

<sup>135</sup> Geaves v. Price, 3 S. & T. 71; Sarce v. Dunoyer, 11 La. Rep. 220; Austin v. Oakes, 117 N. Y. 577; Price v. Maxwell, 28 Pa. St. 23; Gordon v. Whitlock, 92 Va. 723.

a twentieth of the estate, began "This is my last will," it was construed together with the earlier wills.<sup>136</sup>

Especially are the two wills to be construed together where the second will expressly disclaims any intention of revoking a prior will;<sup>137</sup> and where they are duplicates, with the exception of one dispositive clause, the remainder in the case cited being given after death of the life-tenant to different persons in the two wills, and it is impossible to ascertain which was executed last, neither is revoked, and both should be probated.<sup>138</sup>

Where two wills are executed at the same time, and they are exact duplicates, the later one does not revoke the earlier.<sup>139</sup> So two wills executed on the same day are to be taken together as far as they are consistent with each other.<sup>140</sup>

### §270. Effect of loss of later instrument.

Where the later revoking instrument is lost, but not revoked or intentionally destroyed by testator, it may still be effective to operate as a revocation of the earlier will.<sup>141</sup>

The fact, however, that testator executed a second will which can not be found at his death, does not of itself revoke the first will.

First, In order to effect a revocation, it must be shown that the second will was executed in compliance with the Statute of Wills there in force.<sup>142</sup>

Second, The contents of the lost will must be proved. In the absence of such proof it will not be presumed that the

<sup>136</sup> *Gordon v. Whitlock*, 92 Va. 723.

<sup>137</sup> *Succession of Shaffer*, 50 La. Ann. 601; 23 Io. 739.

<sup>138</sup> *Murphy's Estate*, 104 Cal. 554.

<sup>139</sup> *Odenuaelder v. Schorr*, 8 Mo. App. 458.

<sup>140</sup> *Phipp v. Anglesy*, 7 Bro. P. C. 443; *Murphy's Estate*, 104 Cal. 554; *Crossman v. Crossman*, 95 N. Y. 145.

<sup>141</sup> *Wallis v. Wallis*, 114 Mass.

510; *Day v. Day*, 2 Gr. Ch. (3 N. J. E.), 550; *Segare v. Ash*, 1 Bay, (S. Car.), 464.

<sup>142</sup> *West v. West*, 144 Mo. 119; 46 S. W. 139; *McKenna v. Michall*, Pa. St.; 42 Atl. 14.

Where the second will is suppressed by a beneficiary under the first will, the law presumes that the second will was legally drawn and executed. *Lambie's Estate*, 97 Mich. 49; See Sec. 439.

second will was so inconsistent with the first as to revoke it.<sup>143</sup>

Third, Unless it is shown that the second will was inconsistent with the first, and was in force at testator's death, it must, in order to effect a revocation, be shown, in addition to the facts of execution, that the lost will contained a clause of revocation. Unless this can be done the first will is in force.<sup>144</sup>

If the lost will is shown to have contained a clause of express revocation, the first will is not in force, even where it is impossible to prove the contents of the lost will further than such revocation clause.<sup>145</sup>

### §271. Effect of revocation of later instrument at common law.

When the revoking will is itself revoked, the question of the validity of the first will arises. Is it still revoked, or is it revived by the revocation of the later will?

In this connection the courts have usually discussed two distinct topics: first, is it possible by such revocation of the second will to revive the first; and second, assuming that the first will may be revived in this manner, what presumption arises from the revocation of the second will as to the intention of testator to revive the first. As far as possible, these two subjects will be discussed separately, the question of the possibility of such revivor being treated of in this chapter, and the subject of the presumptions that arise from the revocation of the later will being reserved for the chapter on Evidence.

The English law prior to statutes upon this difficult question was in great confusion. The ecclesiastical courts seemed

<sup>143</sup> *Hungerford v. Mosworthy*, Shower's cases in Parl. 146; *Goodright v. Harwood*, 7 Bro. P. C. 344; *Hellier v. Hellier*, 9 P. D. 237; *McIntire v. McIntire*, 162 U. S. 383; *In re Sternberg*, 94 Io. 305; *Lawson v. Morrison*, 2 Dall. (Pa.) 286; *Hylton v. Hylton*, 1 Gratt. (Va.) 161.

But in an early Pennsylvania case it was held that when the evidence showed that the second will

was suppressed or destroyed by the beneficiaries under the first will, it might be assumed that the later will was inconsistent with the earlier will and operated as a revocation thereof. *Jones v. Murphy*, 8 W. & S. 275 (Pa.)

<sup>144</sup> *Knox v. Knox*, 95 Ala. 495; *Cheever v. North*, 106 Mich. 390.

<sup>145</sup> *Wallis v. Wallis*, 114 Mass. 510; *Day v. Day*, 2 Gr. Ch. 550; *Segare v. Ashe*, 1 Bay, 464.

disposed to hold, in cases of testaments, that no presumption arose either for or against the validity of the first will upon such a state of facts, and that the question was to be settled by the intention of the testator as disclosed by the evidence.<sup>146</sup>

The common law tribunals in dealing with wills were inclined to adopt the theory that the revocation of the second will raised a presumption that testator thereby intended the first will to be in full force and effect. This was a *prima facie* presumption only and might be rebutted by evidence of a contrary intention.<sup>147</sup> The two sets of tribunals thus seemed to agree that the testator might revive his first will by the revocation of his second if he intended to do so.

Further doubt, however, arises upon attempting an analysis of the earlier English cases for two different reasons. First, it is not always clear whether the English courts are discussing a case where the second will expressly revoked the first, or where it was merely inconsistent with it.<sup>148</sup> Second, in many of the cases, especially in the ecclesiastical courts, the declarations of the testator might have been sufficient to republish his first will, as no set form was required for the execution of wills of personal property. It is therefore at times hard to determine whether the first will is valid because it has been re-published after the revocation of the second will, or whether the mere revocation of the second will, with intent to revive the first, revived it without re-publication.<sup>149</sup>

## §272. Effect of revocation of later instrument under modern statutes in England.

This condition of uncertainty upon an important and often

<sup>146</sup> *Usticke v. Bauden*, 2 Add. Ecc. 116; *Moore v. Moore*, 1 Phil. 375, 406; *Wilson v. Wilson*, 3 Puillim 543; *Kirkcudbright v. Kirkcudbright*, 1 Hagg. Ecc. 325; *Welsh v. Philips*, 1 Moore P. C. 290; *Helyar v. Helyar*, 1 Lee Ecc. R. 472.

<sup>147</sup> *Goodright v. Glazier*, 4 Burr. 2512; *Burstinshaw v. Gilbert*, 1

*Cow.* 49; *Bates v. Holman*, 3 H. & M. 503.

But where the earlier will was destroyed the revocation of the later will did not revive the duplicate copy of the first will. *Ex parte Hellier*, 3 Atk. 798.

<sup>148</sup> *Goodright v. Glazier*, 4 Burr. 2512.

<sup>149</sup> *Harvard v. Davis*, 2 Binn. 406.

occurring question was ended in England by the statute 1 Vict. c. 26, Sec. 22, which provides in substance that a will once revoked can be revived but by a new codicil or re-execution. This statute has always been held to apply with equal force to a will revoked either by a later will containing a clause of revocation, or by a later inconsistent will.<sup>150</sup>

Where such a statute is in force, the revocation of a later will by a testator who intends thereby to revive his earlier will, and who so declares his intention, has no effect to revive his earlier will unless there is a re-execution or re-publication as contemplated by the statute.<sup>151</sup>

### §273. Effect of revocation of later instrument.—American rule.

In the United States, in the absence of a statute on this subject, the decisions are by no means uniform. The better line of authority made a distinction between the cases where the later will contained an express revocation clause, and where it was merely inconsistent with the earlier will.

"There seems to have been material distinction, and on good ground, between the state of a former will after second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have had the effect to do away with its predeces-

<sup>150</sup> *Major v. Williams*, 3 Curt. Ecc. 432; *James v. Cohen*, 3 Curt. Ecc. 770; *Brown v. Brown*, 8 El. & Bl. 876; *Dickinson v. Swatman*, 30 L. J. P. 84; *Wood v. Wood*, L. R. 1 P. 309.

<sup>151</sup> *Major v. Williams*, 3 Curt.

Ecc. 432; *James v. Cohen*, 3 Curt. Ecc. 770; *Dickinson v. Swatman*, 30 L. J. P. 84; *Wood v. Wood*, L. R. 1 P. 309; *Goods of Hodgkinson* (1893), P. 339; *In re Brown*, 4 Jur. N. S. 244.

sor. Being cut off before having its disposition of property awakened into life it could have no affirmative operation through its dispositions upon the estate.”<sup>152</sup>

Where such distinction is recognized, the destruction of a later will inconsistent with an earlier will, but containing no clause of express revocation, revives the first will.<sup>153</sup> Where the second will contains a clause of revocation, it is held in many jurisdictions in the United States, in accordance with the distinction already given, that the destruction of the second will does not revive the first.<sup>154</sup> But even in states holding the contrary view the unauthorized destruction by another than testator of a will containing a clause of revocation, does not revive the first will.<sup>155</sup>

<sup>152</sup> *Scott v. Fink*, 45 Mich. 241, quoted and followed in *Cheever v. North*, 106 Mich. 390.

<sup>153</sup> *Knox v. Knox*, 95 Ala. 495; *Peck's Appeal*, 50 Conn. 562 (distinguishing *James v. Marvin*, 3 Conn. 576); *Dawson v. Smith*, 3 Conn. (Del.), 92; *Colvin v. Warford*, 20 Md. 357; *Cheever v. North*, 106 Mich. 390; *Johnston's Will*, 69 Hun, 157; *Lawson v. Morrison*, 2 Dall. (Pa.) 286; *Jones v. Murphy*, 8 W. & S. (Pa.) 275; *Flintham v. Bradford*, 10 Pa. St. 82; *McClure v. McClure*, 86 Tenn. 173; *Pringle v. McPherson*, 2 Brev. 279.

*Contra*, *Hartwell v. Lively*, 30 Ga. 315.

<sup>154</sup> *James v. Marvin*, 3 Conn. 576; *Barksdale v. Hopkins*, 23 Ga. 332; *Scott v. Fink*, 45 Mich. 241; *Stevens v. Hope*, Mich., 17 N. W. 698; *Bohanon v. Walcott*, 1 How. (Miss.), 336; *Beaumont v. Keim*, 50 Mo. 28; *Lane v. Hill* (N. H.), (1895), 44 Atl. 393; *Hawes v. Nicholas*, 72 Tex. 481; *Pickens v. Davis*, 134 Mass. 252; *Williams v. Williams*, 142 Mass. 515; *Marsh v. Marsh*, 3 Jones L. (N. Car.), 77.

*Contra*, *Linginfetter v. Linginfetter*, 1 Hardin (Ky.), 127; *Randall v. Beatty*, 31 N. J. Eq. 643; *Taylor v. Taylor*, 2 Nott & McC. (S. Car.), 482; *Bates v. Holman*, 3 Hen. & M. (Va.), 502. In these cases a revocation of a later will containing an express clause of revocation revives the entire will.

In *Peck's Appeal*, 50 Conn. 562, it was said in an *obiter*, to be probably the weight of authority in the United States, that the revocation of a will containing a clause of express revocation, of itself revived an earlier will. The reason given for this view was that under modern statutes a will could not be revoked by an informal writing, as in *James v. Marvin*, 3 Conn. 576; but by no later instrument but a will; and an instrument executed as a will, but revoked before testator's death, could not be called a will within the meaning of the statute. The court cited as partially supporting this view *Hyde v. Hyde*, 3 Chan. Rep. 155. *Reid v. Borland*, 14 Mass. 208; *Laughton v. Atkins*, 1 Pick. 535.

<sup>155</sup> *Day v. Day*, 2 Gr. Ch. (3 N. J. E.), 550.



This holding rests on the theory that upon the execution in due form of a will containing a clause of express revocation the first will is absolutely and immediately revoked. To give it validity by the revocation of the second will might be to allow the first will to be made of force and effect, without the execution and attestation required by the Statute of Wills. As is indicated by the note this distinction is not recognized by all the courts. In some states it was held that in no class of wills did the revocation of the second effect a revision of the first; in others, that in all cases of wills a revivor might be thus effected.

**§274. Effect of revocation of later instrument.—American statutes.**

In the United States this subject has been to a considerable extent modified by statutes, which may be divided into two general classes. The statutes of the one class declare that the revocation of the second will shall revive the first only in case it shall appear from the terms of the revocation that it was the intention of testator to revive it. Such statutes affect at least the rule of presumptions arising from the revocation of the revoking will, and require evidence of testator's intention to revive the first will, over and above the mere act of revoking the second will. In some states parol evidence is not excluded, that is, the testator by his mere declarations may revive the first will.<sup>156</sup>

Where the statute expressly provides that the destruction of the second will shall revive the first only when such appears to be testator's intention from the terms of the revocation, the better view is that such intention does not appear from the mere fact that at testator's death the second will can not be found.<sup>157</sup>

<sup>156</sup> Williams v. Williams, 142 Mass. 515; Pickens v. Davis, 134 Mass. 252; Marsh v. Marsh, 30 L. J. P. 77.

<sup>157</sup> Kern v. Kern (Ind.), (1900), 55 N. E. 1004; Williams v. Williams, 142 Mass. 515; So McClure v. McClure, 86 Tenn. 173.

In a recent New York case a statute of this class was carefully analyzed. It was held that the clause providing for a revivor in case it so appeared by the terms of the revocation, applied to revocation only by an instrument in writing; and that if the will was revoked by a later will or codicil, the other clause of the statute applied and testator must duly republish his first will in order to revive it.<sup>158</sup>

Another class of statutes follows the statute of 1st Victoria in substance, and provides that the first will in such a case can be revived only by a re-execution of some sort, with the formalities required by the Wills Act. Under such statutes the testator can not revive his first will by any declarations, no matter how explicit.<sup>159</sup>

#### §275. Conditional revocation.—In general.

As a will may be executed to take effect only upon certain conditions, so an act of revocation may be made to take effect only on the performance of certain conditions.

This statement applies to revocation by act manifest upon the instrument, and to revocation by a subsequent will, codicil, or other instrument in writing; since revocation by these methods exists only when testator intended to revoke and manifested his intention in some manner indicated by the law. It does not apply to revocation by act of the law, such as revocation by changes of testator's circumstances, or revocation by alteration of testator's estate.

This doctrine, known as that of conditional revocation or dependent relative revocation,<sup>160</sup> is recognized in many jurisdictions, and may be stated in this form. If the revocation is of a class in which testator's intention to revoke is essential, and

<sup>158</sup> *Stickney's Will*, 161 N. Y. 42. (Accordingly the oral declarations of testator made to persons who were not attesting witnesses can not serve as a revivor of the first will, no matter how clear testator's intention may have been.)

<sup>159</sup> *Barker v. Bell*, 49 Ala. 284;

*In re Lones*, 108 Cal. 688; *Wolf v. Bollinger*, 62 Ill. 368; *Stewart v. Mulholland*, 88 Ky. 38; *Beaumont v. Keim*, 50 Mo. 28; *Beaumont Rodes*, 29 Gratt. (Va.), 147.

<sup>160</sup> *Eggleston v. Speke*, 3 Mod. 259; *Semmes v. Semmes*, 7 H. & J. (Md.), 388.

testator's intention is in fact conditioned upon a certain state of fact, there is no revocation if such state of fact does not exist.<sup>161</sup>

### §276. Conditional revocation by act manifest on instrument.

The doctrine of conditional revocation applies where the act required by state was done, but testator's intention to revoke depended on the supposed existence of certain facts which prove not to have existed. Cancellations and erasures are often made by testator for the purpose of writing in other words to alter his will. The modern rule is that these alterations are invalid where the will is not re-executed after it is altered.<sup>162</sup>

The question is, What effect shall be given the cancellation or erasure thus made by testator? Testator intended his act of erasure to operate as a partial revocation at least; but only on condition that the alterations made by him shall stand as his will. Accordingly, even where partial revocation is recognized, it is held that a cancellation, solely for the purpose of interlineation or alteration, does not operate as a revocation.<sup>163</sup> So where testator tore out and destroyed one page of his will, with intention to substitute another page for the one torn out, and the substituted page failed because the will was not re-executed after the substitution, it was held that the page torn out was not to be regarded as revoked, the condition upon which testator meant to revoke having failed.<sup>164</sup>

Where testator cancelled a part of his will, in order to substitute an interlineation which failed of effect, it was held that as the revocation was conditional, and the condition failed,

<sup>161</sup> *Eggleston v. Speke*, 3 Mod. 259; *Onions v. Tyrer*, 1 P. Wms. 343; *Goods of James*, 19 L. T. 610; *Burns v. Travis*, 117 Ind. 44.

<sup>162</sup> See Sec. 254, 258, 260, and Chapt. XV.

<sup>163</sup> *Goods of Nelson*, Ir. R. 6 Eq. 569; *Brooke v. Kent*, 3 Moore, P. C. 334; *Goods of McCabe*, 42 L. J.

P. 79; L. R. 3 P. 94; 29 L. T. 249; *Hesterberg v. Clark*, 166 Ill. 241; *Camp. v. Shaw*, 163 Ill. 144 Aff. 52 Ill. App. 241; *Doane v. Hadlock*, 42 Me. 72; *Varnon v. Varnon*, 67 Mo. App. 534.

<sup>164</sup> *Varnon v. Varnon*, 67 Mo. App. 534.

the intent to revoke the cancelled clauses was lacking.<sup>165</sup> So where a part of the will is erased as a part of an attempted re-execution, such erasure not being done *animo revocandi*, does not revoke the will.<sup>166</sup> Or where testator revokes his will in order to execute another which fails of effect, the first will being conditionally revoked is held not to be revoked on failure of the condition;<sup>167</sup> and this rule has been enforced where the later will failed because it was not duly executed.<sup>168</sup>

But where the act done upon the will is intended as a finality for the time being, the revocation is complete, even though testator intended to execute another will in the future, and performed the act of revocation as a preliminary thereto.<sup>169</sup>

### §277. Conditional revocation by later instrument.

The principles of conditional revocation are as applicable to revocation by a later will as they are to revocation by some specified act evident upon the will. If the testator revoked the prior will conditionally upon the existence of a certain state of facts or upon the validity of a subsequent bequest,

<sup>165</sup> Wolf v. Bollinger, 62 Ill. 368. Contrary to the weight of authority is the view expressed in Wilson's Will, 8 Wis. 171, to the effect that an unexplained alteration would avoid the will.

<sup>166</sup> *In re Kennett*, 2 N. R. 461; Goods of Applebee, 1 Hagg. 143; Wilbourn v. Shell, 59 Miss. 205; Frear v. Williams, 7 Baxt. (Tenn.), 550.

<sup>167</sup> Goods of Cockayne, Deane, Ecc. R. 177; 2 Jur. (N. S.) 454; 4 W. R. 555; Powell v. Powell, L. R. 1 P. 209; 35 L. J. P. 100; 14 L. T. 800; Dickinson v. Swatman, 4 S. & T. 205; Dancer v. Crabb, 42 L. J. P. 53; L. R. 3 P. 98; 28 L. T. 914; Doe v. Evans, 10 Ad. & El. 228; Dunham v. Averill, 45 Conn. 61; Mendenhall's Appeal, 124 Pa. St. 387; 23 W. N. C. 379;

Sewall v. Robbins, 139 Mass. 164; Stickney v. Hammond, 138 Mass. 116; Wilbourn v. Shell, 59 Miss. 205; Gardiner v. Gardiner, 65 N. H. 230; 8 L. R. A. 383; Pringle v. McPherson, 2 Desaus. 524; Stover v. Kendall, 1 Cold. (Tenn.) 557; Carpenter v. Miller, 3 W. Va., 174.

<sup>168</sup> Scott v. Scott, 1 Sw. & Tr. 258; 5 Jur. (N. S.), 298; Goods of Middleton, 3 Sw. & Tr. 583; 34 L. J. P. 16; 10 Jur. (N. S.), 1109; 11 L. T. 684.

<sup>169</sup> Dickinson v. Swatman, 4 Sw. & Tr. 205; Goods of Mitchelson, 32 L. J. P. 202; Olmsted's Estate, 122 Cal. 224; Youse v. Forman, 5 Bush, (Ky.) 337; Townsend v. Howard, 86 Me. 285; Brown v. Thorndike, 15 Pick. (Mass.), 388; Banks v. Banks, 65 Mo. 432; Skipwith v. Cabell, 19 Gratt. 758.

such revocation is of no effect unless the conditions are complied with.<sup>170</sup> Thus where a testator had executed two wills, and by codicil revoked the first, and declared the second to be his last will if he should die on or after a given date, but if he should die before such date his second will was revoked, and his first executed will was to be his last will and testament, full force was given to such codicil.<sup>171</sup>

The difficulties in this branch of the law lie in determining what forms of expression indicate a conditional revocation, and what an absolute one; and also in determining what evidence may be adduced to show this intention.

If the second will is invalid either by reason of defective execution, or through lack of capacity of testator to make a valid will, the revocation clause is also invalid, and the first will is not affected thereby in any way.<sup>172</sup> And of course an invalid codicil has no effect to revoke any part of the will to which it is meant to be appended.<sup>173</sup>

Testator may revoke his prior will by a later one, which contains a clause of absolute revocation and is properly executed, but which by reason of something outside the will is ineffectual to pass the property sought to be devised. This differs from the cases where the second instrument contains a revoking clause and nothing more, for in the cases under consideration the instrument contains a revoking clause and a dispositive portion which fails of effect. The question is whether the revoking clause is conditioned upon the validity of the dispositive part or not. The general rule upon this point is that "a second will inconsistent with the first, perfect

<sup>170</sup> See cases cited in this section.

<sup>171</sup> *Hamilton's Estate*, 74 Pa. St. 69; *Bradish v. McClelland*, 100 Pa. St. 607.

<sup>172</sup> *Caeman v. Van Harke*, 33 Kan. 333; *Breathitt v. Whittaker*, 8 B. Mon. (Ky.) 530; *Hollingshead v. Sturgis*, 21 La. Ann. 450; *Colvin v. Warford*, 20 Md. 357; *Reid v. Borland*, 14 Mass. 208; *Laughton v. Atkins*, 1 Pick. (Mass.), 535; *Jacoby's Estate*, Pa.

St.; 12 Atl. 1026; *Price v. Maxwell*, 28 Pa. St. 23; *Rudy v. Ulrich*, 69 Pa. St. 177; *Reese v. Ct. of Probate*, 9 R. I. 434; *In re Noyes*, 61 Vt. 14; *Domer v. Seeds*, 28 W. Va., 113; *In re Fisher*, 4 Wis. 254.

<sup>173</sup> *Kirke v. Kirke*, 4 Russ. 435; *Boylan v. Meeker*, 28 N. J. L. 274; *Austin v. Oakes*, 117 N. Y. 577; *Delafield v. Parish*, 25 N. Y. 9; *Heise v. Heise*, 31 Pa. St. 246.

in form and execution, but incapable of operating as a will on account of some circumstance *dehors* the instrument," revokes the first instrument, where the second contains a clause of express revocation.<sup>174</sup>

The revoking instrument may recite certain facts as the reason for the revocation. If these facts are not true the question arises as to the effect upon the clause of revocation. The general rule is that if the facts are so recited that the revocation is based entirely upon them and conditioned upon their existence, the prior will is not revoked, if the facts recited are not true.<sup>175</sup> Thus in an early and leading case a gift to certain grandchildren was revoked, "they being all dead," though in point of fact they were living. It was held that the revocation clause did not take effect.<sup>176</sup>

A possible exception to this rule exists where the fact is one peculiarly within the knowledge of testator, and within his power to accomplish. Thus, where testator revoked a bequest

<sup>174</sup> Laughton v. Atkins, 1 Pick. (Mass.), 535. To the same effect are James v. Marvin, 3 Conn. 576; Barksdale v. Hopkins, 23 Ga. 332; Burns v. Travis, 117 Ind. 44; Colvin, v. Warford, 20 Md. 357; Vining v. Hall, 40 Miss. 83; Hoffner's Estate, 161 Pa. St. 331; Price v. Maxwell, 28 Pa. St. 23; Boudinot v. Bradford, 2 Dall. 266; Carpenter v. Miller, 3 W. Va. 174.

The case of James v. Marvin is treated in Connecticut as being no longer a precedent, and the doctrine just given in the text is attacked in a recent case.

Security Co. v. Snow, 70 Conn. 288; see also Peck's Appeal, 50 Conn. 562. In the case of Security Co. v. Snow, *supra*, the codicil expressly revoked a former gift to A and bequeathed such gift to B in trust for A, with discretionary power to B; and on A's death to A's heirs. Under the Connecticut law the limitation to A's heirs was

void for remoteness, and on B's death, the discretion being personal, no trustee could be appointed to act. It was held that the revocation clause of the codicil must be treated as conditional upon the validity of its dispositive provisions; and on their failure in part, the gift passed to A absolutely. This view of the law treats the codicil in effect as if it contained no revoking clause, but as if it revoked by implication merely; and it is subject to the objection that it ignores the express wishes of the testator that the gift should be revoked, and enforces his conjectured wish that the will should stand in so far as the codicil failed of effect.

<sup>175</sup> Campbell v. French, 3 Ves. Jr. 321; Doe v. Evans, 10 Add. & El. 228; Mendinshall's Appeal, 124 Pa. St. 387.

<sup>176</sup> Campbell v. French, 3 Ves. Jr. 321.

on the ground that he had 'given' the beneficiary certain property, which had in fact been transferred, but as a sale, and not as a gift;<sup>177</sup> or where testator revoked a legacy because he had provided the legatees with a permanent home, when in fact he had not done so, it was held that in each case the revocation clause took effect, the matter being one over which testator had full control, and of which he had full knowledge.<sup>178</sup>

Where the revoking clause is based upon a mistake of law as to the legal effect of the will, the courts seem disposed to treat this as a conditional revocation, ineffective if conditioned on the correctness of a mistaken belief.<sup>179</sup> But where the facts recited are not the conditions upon which the will is revoked, but merely accompanying circumstances, their falsity can not affect the revocation. If the facts recited are clearly such as could not cause the revocation, or if it appeared that the testator was content to act upon his understanding of them without regard to the ultimate fact of their truth or falsity, the revocation will take effect in any event.<sup>180</sup>

Where the testator revoked a legacy to certain beneficiary, reciting his reason as 'I do not know whether any of them are alive and if they are well provided for,' the revocation was held to be an absolute one.<sup>181</sup>

Where a testator had devised a piece of land to a son, and in a codicil recited that he had sold such land, and revoked the devise to such son, it was held that the revocation was absolute and operated, though testator had not in fact sold the land.<sup>182</sup>

If the clause of revocation is absolute in form, the fact that it was caused by a mistake of testator upon a material fact

<sup>177</sup> *Mendinhall's Appeal*, 124 Pa. St. 387.

<sup>178</sup> *Hayes v. Hayes*, 21 N. J. Eq. 265.

<sup>179</sup> *Barclay v. Maskelyne*, 4 Jur. N. S. 292.

<sup>180</sup> *Campbell v. French*, 3 Ves. Jr. 321; *Doe v. Evans*, 10 Ad. & Ell. 228; *Attorney General v.*

*Lloyd*, 3 Atk. 551; *Giddings v. Giddings*; 65 Conn. 149; *Mordecai v. Boylan*, 6 Jones Eq. (N. Car), 365; *Skipwith v. Cabell*, 19 Gratt. (Va.), 785.

<sup>181</sup> *Attorney General v. Ward*, 3 Ves. Jr. 327.

<sup>182</sup> *Giddings v. Giddings*, 65 Conn. 149.

does not prevent the revocation from taking effect.<sup>183</sup> If this were not the law, a formal written revocation executed in due form by a competent testator could be overthrown by parol, clearly a most undesirable state of the law.

**§278. Revocation by alteration of estate.—At common law and equity.**

At common law a will devising real property was revoked entirely by an alteration in testator's estate in all the realty devised, and *pro tanto* by an alteration of testator's estate in part of the real property devised.<sup>184</sup> If the entire realty devised by a will which devised only realty, were subsequently conveyed, the will was entirely revoked thereby.<sup>185</sup>

It is not necessary that the deed conveying all of testator's realty be recorded in order to operate as a revocation of testator's will.<sup>186</sup>

Where all of testator's realty is conveyed after the execution of a will devising only real estate, the revocation of the will is so complete that the deed may be pleaded as a revocation at probate.<sup>187</sup>

A conveyance of a part of the property devised did not, however, work a total revocation, but only revoked the will as far as the property conveyed was concerned.<sup>188</sup> A will dis-

<sup>183</sup> *Dunham v. Averill*, 45 Conn. 61; *Gifford v. Dyer*, 2 R. I. 99; *Padleford's Estate*, 190 Pa. St. 35; *Skipwith v. Cabell*, 19 Gratt. (Va.), 758.

<sup>184</sup> *Goodtitle v. Otway*, 2 H. Bl. 516; *Cave v. Holford*, 3 Ves. Jr. 653; *Taylor v. Kelly*, 31 Ala. 59; *Pickering v. Langdon*, 22 Me. 413; *Carter v. Thomas*, 4 Me. 341; *Wells v. Wells*, 35 Miss. 638; *Gilbert v. Gilbert*, 4 Barb. (N. Y.), 532; *Borden v. Borden*, 2 R. I. 94; *Donohoo v. Lea*, 1 Swan (Tenn), 119; *Bowen v. Johnson*, 6 Ind. 110; *Terry v. Edminster*, 9 Pick. (note), 356; *Hawes v. Humphrey*, 9 Pick 350; *Cozzens v. Jamison*, 12 Mo. App. 252; *Skerrett v. Burd*, 1 Whart.

246; *Mullock v. Souder*, 5 W. & S. 198; *Pleasant's Appeal*, 77 Pa. St. 356; *Balliet's App.* 14 Pa. St. 451.

<sup>185</sup> *Epps v. Dean*, 28 Ga. 533; *Bowen v. Johnson*, 6 Ind. 110; *Collup v. Smith*, 89 Va. 258.

<sup>186</sup> *Collup v. Smith*, 89 Va. 258.

<sup>187</sup> *Epps v. Dean*, 28 Ga. 533.

<sup>188</sup> *Taylor v. Kelly*, 31 Ala. 59; *Swails v. Swails*, 98 Ind. 511; *Warren v. Taylor*, 56 Io. 182; *Hawes v. Humphrey*, 9 Pick. 350; *Terry v. Edminster*, 9 Pick. (note), 356; *Webster v. Webster*, 105 Mass. 538; *Pleasant's Appeal*, 77 Pa. St. 356; *Balliet's Appeal*, 14 Pa. St. 451; *Clinton v. McKeown*, 39 S. Car. 21.



posing of realty and personalty is not revoked by a conveyance of all the realty.<sup>189</sup>

This rule at common law rested upon the principle that testator by a devise of his property could dispose only of the real property then owned by him; while after-acquired property could not be devised, but passed to the heirs. As we have seen, this was the result of the common law theories of seisin.<sup>190</sup> Hence, if testator after making his will altered his estate in such a way as to divest himself of the seisin, even for a short time, his new estate in the property was looked upon as an after-acquired estate, and could not pass by will. To make a valid devise, testator had to be seized at his death of the same estate that he was seized of at the date of the will.<sup>191</sup> Thus a tax sale operates as a revocation.<sup>192</sup> So a conveyance of realty in fee, reserving a ground rent, operates as a revocation as to such realty, and the ground-rent does not pass by such will.<sup>193</sup> Thus the renewal of a lease to testator after his making his will revoked it as to such land.<sup>194</sup>

If the testator parted with his land by an instrument, whereby title instantly revested in him, the will was revoked,<sup>195</sup> or by an instrument which conveys the legal title, though equity might set it aside, or hold the grantee as a trustee for the grantor on account of fraud.<sup>196</sup> So a conveyance of the equitable estate, testator retaining the legal title, as by a valid contract to convey real estate, enforceable in equity, revoked a prior devise of such real estate, even where

<sup>189</sup> Kent v. Mahaffey, 10 O. S. 204.

<sup>190</sup> See Sec. 142.

<sup>191</sup> Marwood v. Turner, 3 P. Wms. 163; Knollys v. Alcock, 5 Ves. 648; Vawser v. Jeffrey, 16 Ves. Jr. 519; Bennett v. Tankerville, 19 Ves. 171; Parker v. Lamb, 2 Vern. 495; Walton v. Walton, 7 Johns. Ch. 258; Adams v. Winne, 7 Paige, 97; Skerrett v. Burd, 1 Whart. 246; Borden v. Borden, 2 R. I. 94.

<sup>192</sup> Borden v. Borden, 2 R. I. 94.

<sup>193</sup> Skerrett v. Burd, 1 Whart. (Pa.), 246; Mullock v. Souder, 5 W. & S. (Pa.), 198.

<sup>194</sup> Marwood v. Turner, 3 P. Wms. 163.

<sup>195</sup> Cave v. Holford, 3 Ves. Jr. 653

*Contra*, Woolery v. Woolery, 48 Ind. 523.

<sup>196</sup> Simpson v. Walker, 5 Sim. 1; Hick v. Mors, Amb. 215.

such contract was afterwards rescinded.<sup>197</sup> However, conveyances in bankruptcy or to pay testator's debts, were not held to revoke his will as to any property that might remain after the purpose of such conveyance had been accomplished,<sup>198</sup> and where testator had an equitable estate in the property devised, which he retained unaltered, the change of legal title from one trustee to another did not revoke the will.<sup>199</sup>

So where testator retained a part of his estate in the real property unaltered, the will was not entirely revoked as to such property by the creation of a particular estate in such property, as where testator having devised a fee in certain realty afterward granted a life estate therein. The will as to such property was still good to pass the reversion, though of course it could not affect the life interest.<sup>200</sup> So a lease for years did not operate as a revocation of a devise of the realty leased.<sup>201</sup>

A partition was not such alteration of estate as revoked a devise of testator's estate therein prior to partition.<sup>202</sup> An ineffective attempt to execute a conveyance has never been held to amount to a revocation;<sup>203</sup> and still less has a change in the value of testator's property, the title remaining unchanged;<sup>204</sup> nor does a sale of a part of the realty-devised and the incurring of debts to such an extent that the residue of the realty must be sold, of itself operate as a revocation of the will.<sup>205</sup>

However, it was said in an early case that where tes-

<sup>197</sup> *Mayer v. Gowland*, Dick. 563; *Knollys v. Alcock*, 7 Ves. Jr. 558; *Curre v. Bowyer*, 5 Beav. 6; *Donohoo v. Lea*, 1 Swan (31 Tenn.) 119.

<sup>198</sup> *Vernon v. Jones*, 2 Freem. 117; *Temple v. Chandos*, 3 Ves. Jr. 685; *Charman v. Charman*, 14 Ves. Jr. 580; *Jones v. Hartley*, 2 Whart. (Pa.), 103.

<sup>199</sup> *Parsons v. Freeman*, 3 Atk. 749; *Seaman v. Woods*, 24 Beav. 372.

<sup>200</sup> *Parker v. Lamb*, 2 Vern. 495.

<sup>201</sup> *Zimmerman v. Zimmerman*, 23 Pa. St. 375.

<sup>202</sup> *Luther v. Kidby*, 3 P. Wms. 169n; *Attorney General v. Vigor*, 8 Ves. Jr. 281.

<sup>203</sup> *Bennett v. Gaddis*, 79 Ind. 347.

<sup>204</sup> *Webster v. Webster*, 105 Mass. 538; *Verdier v. Verdier*, 8 Rich. (S. Car.), 135.

<sup>205</sup> *Wogan v. Small*, 11 S. & R. 141; *Marshall v. Marshall*, 11 Pa. St. 430.

tator had conveyed so much realty as to make it impossible to execute the provisions of the will, it would operate as a revocation of the entire will.<sup>206</sup>

A testament bequeathing personal property was not revoked by any subsequent alteration of testator's estate except in so far as the property bequeathed did not belong to testator at his death. Of course, property specifically bequeathed passed by testament only if testator owned it at his death;<sup>207</sup> but inasmuch as after-acquired personalty might pass by testament, the transfer of testator's entire personal estate after the execution of his testament did not revoke it.<sup>208</sup>

### §279. Revocation by alteration of estate.—Modern statutes.

The subject of revocation by alteration of estate is practically obsolete at modern law. Nearly all the jurisdictions in which common law is in force have passed statutes to the effect that no alteration in the estate of testator in property devised or bequeathed shall effect a revocation of his will as to such, unless he is wholly divested of his interest therein, or unless in the instrument by which such alteration is made he declares his intention that it shall operate as a revocation of such previous devise.<sup>209</sup>

Under these statutes a conveyance of land in trust, so worded that the trust, as to part, was not declared, and accordingly was a resulting trust for testator, did not revoke a previous devise of such land, further than as far as testator had ceased to own the same at his death, but the will took effect upon the resulting trust;<sup>210</sup> nor does a conveyance in

<sup>206</sup> *Cooper's Estate*, 4 Pa. St. 88.

<sup>207</sup> See Sec. 135.

<sup>208</sup> See Sec. 141.

<sup>209</sup> *Slaughter v. Stephens*, 81 Ala. 418; *Welsh v. Powndes*, 36 Ala. 668; *Powell v. Powell*, 30 Ala. 697; *Tillman's Estate*, —Cal. —; 31 Pac. 563; *Giddings v. Giddings*, 65 Conn. 149; *Swails v. Swails*, 98 Ind. 511; *Belshaw v. Clitwood*, 141 Ind. 377;

*Paine v. Forsaith*, 86 Me. 357; *Cozens v. Jamison*, 12 Mo. App. 452; *Kent v. Mahaffey*, 10 O. S. 204; *Brush v. Brush*, 11 Ohio, 287; *Forney's Estate*, 161 Pa. St. 209; *Maul's Estate*, 186 Pa. St. 477; *Fuller's Estate*, 71 Vt. 73; 42 Atl. 981.

<sup>210</sup> *Brush v. Brush*, 11 O. 287.

trust for the devisee effect a revocation.<sup>211</sup> And a contract by testator, made after the execution of his will, to sell certain realty devised by such will, does not of itself revoke such will.<sup>212</sup>

A contract to sell land followed by a change of possession, and part payment did not of itself revoke the devise. Accordingly, when the contract of sale was rescinded after testator's death, the realty passed by will.<sup>213</sup> Nor does a sale of realty revoke the will by which it is devised, where part of the purchase price remains unpaid, unless the intention to revoke appears from an instrument in writing.<sup>214</sup> And where an oral contract for land has been followed by change of possession, such facts afford no ground for treating the will as revoked, though they may be the basis for an action against the devisees to obtain title to the realty.<sup>215</sup>

Where testator by will created a trust for controlling a newspaper which he owned, together with the rest of his estate, the sale of the newspaper did not effect a revocation of the will.<sup>216</sup> And a statement by one who was about to enter a home for the aged that he had no property, together with a contract on his part to transfer to the home any property that he should subsequently acquire, has no effect as a revocation of a will previously made by such person.<sup>217</sup> And where the will is intended to pass after-acquired property, and does so under the law in force, a subsequent conveyance of testator's entire property by a trust deed reserving the power of revoking the trust, is of itself no revocation of the will;<sup>218</sup> and a receipt given by a son and devisee of testator to testator for money advanced on his share under the will, does not of itself effect a revocation of the will.<sup>219</sup>

<sup>211</sup> *Brush v. Brush*, 11 Ohio, 287; *Clingan v. Micheltree* 31 Pa. St. 25.

<sup>212</sup> *Hall v. Bray*, Coxe (N. J.), 212; *Lefebvre's Estate*, 100 Wis. 192.

<sup>213</sup> *Fuller's Estate*, 71 Vt. 73; 42 Atl. 981.

<sup>214</sup> *Slaughter v. Stephens*, 81 Ala. 418; *Powell v. Powell*, 30 Ala. 697; *Welsh v. Powndes*, 36 Ala. 668;

*Wright v. Minshall*, 72 Ill. 584; *Lefebvre's Estate*, 100 Wis. 192.

<sup>215</sup> *James v. Sutton*, 36 Neb. 393.

<sup>216</sup> *Forney's Estate*, 161 Pa. St. 209.

<sup>217</sup> *Maul's Estate*, 186 Pa. St. 477.

<sup>218</sup> *Morey v. Sohler*, 63 N. H. 507.

<sup>219</sup> *Burnham v. Comfort*, 108 N. Y. 535; 37 Hun, 316.

Under these statutes an invalid deed does not effect a revocation of a prior will,<sup>220</sup> unless (under some statutes) it further manifests a clear intention to revoke the will absolutely. A mortgage does not operate as a revocation,<sup>221</sup> even if it is a mortgage to the devisee.<sup>222</sup>

The distinction has been suggested that a deed, executed by one who is a competent testator, with intent to revoke his will in whole or in part, operates as a revocation even if it fails as a deed for some defect in form; but if made by one who is incompetent, mentally, or who is induced to execute the deed by reason of fraud or undue influence, it does not operate as a revocation.<sup>223</sup>

But even under modern statutes a conveyance of the entire estate of testator in the property devised acts as a revocation of a will previously executed, as far as specific bequests and devises given by such will are concerned. Still some authorities hold, however, that even a deed of testator's entire property can not act as a revocation of a will previously executed, so as to prevent probate, as property rights can not be finally determined in a proceeding to probate the will.<sup>224</sup>

## §280. Revocation by change of circumstances.—In general.

Both at common law, and under modern statutes, certain specified changes in the status, or in the family relations of testator, or testatrix, revoked any will executed before such change. The changes, which effected revocation, as will be seen later, were specifically enumerated at the common law or in the statutes, and no others can have this effect.

Occasionally it has been said in *obiter dicta*, that any change in circumstances which creates new moral duties operates as a revocation.<sup>225</sup>

<sup>220</sup> *Bennett v. Gaddis*, 79 Ind. 347.

<sup>221</sup> *Stubbs v. Houston*, 33 Ala. 555; *McTaggart v. Thompson*, 14 Pa. St. 149.

<sup>222</sup> *Baxter v. Dyer*, 5 Ves. Jr. 656; *McTaggart v. Thompson*, 14 Pa. St. 149.

<sup>223</sup> *Graham v. Burch*, 47 Minn. 171.

<sup>224</sup> *Tillman's Estate*, — Cal. —;

31 Pac. 563; *James v. Sutton*, 36 Neb. 393; *Morey v. Sohler*, 63 N. H. 507.

<sup>225</sup> *Morgan v. Ireland*, 1 Ida. 786; *Young's Appeal*, 39 Pa. St. 115.

In its literal form this doctrine would evidently be so far-reaching as to apply to most wills which had been executed any length of time. The cases in which it appears as an obiter can all be reduced to one of the well-defined classes to be given. But the actual decisions have never gone to this extent. On the contrary, they recognize specific sets of changes in circumstances which effect a revocation of the will, and decline to recognize any others.<sup>226</sup>

The theory underlying the doctrine of revocation by change of circumstances was originally that the testator must be presumed, in view of the change, to have desired a different disposition of his property from that indicated in his will. While this was the theory, the rules of revocation were absolute, and were not changed in cases where it could be shown affirmatively that the testator did not wish or intend the revocation.<sup>227</sup>

#### §281. Effect of marriage on will of husband.—Common law and statute.

At the common law the will of a man was not revoked by his subsequent marriage alone, without birth of children. The reason generally given for this rule was that as the wife could not, under the laws of descent, inherit from the husband, she would not be benefited by the revocation of the will; and there was no reason for making the marriage act as a revocation of the will for the benefit of the collateral heirs of the husband.

This being the accepted reason for the rule, the modern statutes of descent which do not in terms deal with wills, but which provide that if a husband dies intestate, and without issue, the wife shall inherit part or all of his property, present an interesting question. Such statutes destroy the reason

<sup>226</sup> See Sec. 285.

<sup>227</sup> *Brown v. Clark*, 77 N. Y. 369; *Hale v. Hale*, 90 Va. 728.

The old theory that the revocation rests upon testator's intention

as it exists if this can be proved, or as the law presumes it to be in the absence of proof, still finds expression in some cases. *Miller v. Phillips*, 9 R. I. 141.

generally given for the common law rule. Do they destroy the rule? Some jurisdictions hold that they do. Where the testator dies without issue, such courts hold that a will executed prior to his marriage is revoked; but where testator has issue by a prior marriage, the will is not revoked, as in no case would the widow be benefitted by its revocation.<sup>228</sup>

In other states it is held that such a statute has no effect of any sort upon the law of wills, and that marriage alone does not revoke the will of the man.<sup>229</sup> In some states it is especially provided by statute that a will is revoked by the subsequent marriage of testator. Some of these statutes provide that an exception shall exist if such will was expressly made in contemplation of marriage.<sup>230</sup>

Where the statute contains no exception, the fact that the will was made in contemplation of marriage does not prevent such marriage from revoking it.<sup>231</sup>

These statutes are constitutional, even where the constitutional requirement that each statute must be upon one subject clearly expressed in its title, is held mandatory, and the statute is called a statute of descent.<sup>232</sup> And where such statute is in force, the fact that after the marriage the husband and wife separated under an agreement does not prevent revocation of the will by the marriage.<sup>233</sup> Such statutes are usually so worded as to apply only where the marriage was contracted

<sup>228</sup> *Sherrer v. Brown*, 21 Colo. 481, affirming 5 Colo. App. 255; *Tyler v. Tyler*, 19 Ill. 151; *American Board v. Nelson*, 72 Ill. 564; *Duryea v. Duryea*, 85 Ill. 41; *Swan v. Hammond*, 138 Mass. 45; *Garrett v. Dabney*, 27 Miss. 335.

<sup>229</sup> *Goodsell's Appeal*, 55 Conn. 171; *Bowers v. Bowers*, 53 Ind. 430; *Hulett's Estate*, 66 Minn. 327; 34 L. R. A. 384; *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530; *Mundy v. Mundy*, 15 Ohio C. C. 155.

<sup>230</sup> *Corker v. Corker*, 87 Cal. 643; *Goodsell's Appeal*, 55 Conn. 171;

*Ellis v. Darden*, 86 Ga. 368; *Hudnall v. Ham*, 172 Ill. 76; 183 Ill. 486; *Sloniger v. Sloniger*, 161 Ill. 270; *Crum v. Sawyer*, 132 Ill. 443; *Biggerstaff v. Biggerstaff*, 95 Ky. 154; *Ransom v. Connelly*, 93 Ky. 63; *Stewart v. Powell*, 90 Ky. 511; *Swan v. Sayles*, 165 Mass. 177; *Ingersoll v. Hopkins*, 170 Mass. 401; 49 N. E. 623; 40 L. R. A. 191.

<sup>231</sup> *Fransen's Appeal*, 26 Pa. St. 202; *Walker v. Hall*, 34 Pa. St. 483.

<sup>232</sup> *Hudnall v. Ham*, 172 Ill. 76.

<sup>233</sup> *Corker v. Corker*, 87 Cal. 643.

after the statute took effect.<sup>234</sup> But the statute applies to a will made before the passage of the statute, where the marriage follows the passage of the statute.<sup>235</sup>

Under statutes which provide that marriage does not revoke a will made in contemplation of marriage, the fact that marriage was contemplated must appear from the will itself.<sup>236</sup>

Where a testator devised all his property to "a certain single woman," naming her, and making her executrix without bond, and a year afterwards married her, it was held that by force of the statute the will was thereby revoked; and the fact that they were engaged to be married at the time that the will was made (such fact not appearing on the will) did not prevent the revocation, as the statute only excepted cases where the fact that the will was made in contemplation of marriage appeared from the will itself.<sup>237</sup> And even when the marriage takes place a very short time after the execution of the will, it can not be held to be made in contemplation of marriage unless such intention appears on the face of the will itself.<sup>238</sup> So where a man makes a devise to a woman who is living with him as his mistress,<sup>239</sup> or who has been married to him by a marriage invalid in law,<sup>240</sup> and subsequently marries her, such marriage revokes the will.

A valid ante-nuptial contract whereby the wife releases all claims against the husband's estate, for a valuable consideration, bars the wife from claiming that the husband's will, executed before marriage, was revoked by marriage.<sup>241</sup>

<sup>234</sup> *Swan v. Sayles*, 165 Mass. 177.

<sup>235</sup> *Ingersoll v. Hopkins*, 170 Mass. 401; 40 L. R. A. 191.

<sup>236</sup> *Ellis v. Darden*, 86 Ga. 368; *Swan v. Sayles*, 165 Mass. 177; *Ingersoll v. Hopkins*, 170 Mass. 401; 40 L. R. A. 191.

<sup>237</sup> *Ingersoll v. Hopkins*, 170 Mass. 401; 49 N. E. 623, citing and following *Otway v. Sadlier*, 33 L. T. 46; *Goods of Cadywold*, 1 Sw. & Tr. 34; *Ellis v. Darden*, 86 Ga. 368; 11 L. R. A. 51.

<sup>238</sup> *Ellis v. Darden*, 86 Ga. 368;

11 L. R. A. 51; *Goods of Russell*, L. R. 15 P. D. 111.

<sup>239</sup> *Gall's Will*, 32 N. Y. S. R. 695; 10 N. Y. Supp. 661n.

<sup>240</sup> *Warter v. Warter*, L. R. 15 P. D. 152.

<sup>241</sup> *Biggerstaff v. Biggerstaff*, 95 Ky. 154; *Stewart v. Mulholland*, 88 Ky. 38; *Morton v. Onion*, 45 Vt. 145. See *Ransome v. Connelly*, 93 Ky. 63; 14 Ky. Law Rep. 73; 18 S. W. 1029; *Stewart v. Powell*, (Ky.) 90 Ky. 511; 10 L. R. A. 57.

In this last case it was held



In other jurisdictions marriage of a testator is *prima facie* a revocation of his will, but this *prima facie* presumption may be overthrown by showing that the will was made in contemplation of marriage, or that testator wished it to be in force, notwithstanding his marriage.<sup>242</sup>

**§282. Effect of birth of child on will of father.—Common law.**

At the common law the birth of a child alone did not revoke the will made by its father after his marriage, and before the birth of a child as the offspring of such marriage, since after marriage he must have been presumed to contemplate the birth of children, and to make his will with reference thereto.<sup>243</sup>

**§283. Effect of marriage and birth of child on man's will.**

At ecclesiastical law it was held that the marriage of testator, and the birth of a child capable of inheriting his property and unprovided for, would together revoke a prior will, though neither of such facts taken by itself would have such effect. This doctrine was finally adopted by the common law.<sup>244</sup> It was based by the courts upon the theory that if testator's attention had been called to his prior will, he would presumably have revoked it.<sup>245</sup>

When this change of circumstances was shown to have occurred, a presumption arose that testator intended to revoke his will. This presumption was, however, only a *prima facie* one, and might be rebutted.<sup>246</sup>

that while the heirs of testator may claim revocation, the widow can not, since, under the ante-nuptial contract, she would take the same whether the will is upheld or not. See Sec. 325.

<sup>242</sup> *Lant's Appeal*, 95 Pa. St. 279; *Wheeler v. Wheeler*, 1 R. I. 364; *Miller v. Phillips*, 9 R. I. 141.

<sup>243</sup> *Wellington v. Wellington*, 4 Burr. 2165; *Doe v. Barford*, 4 M. &

S. 10; *R. R. v. Wasserman*, 22 Fed. Rep. 872; *McCullum v. McKenzie*, 26 Io. 510; *Hoit v. Hoit*, 63 N. H. 475; *Yerby v. Yerby*, 3 Call, 289.

<sup>244</sup> *Spraage v. Stone*, 2 Ambler 721; *Kenebel v. Scrafton*, 2 East, 530.

<sup>245</sup> *Brady v. Cubitt*, Dougl. 31.

<sup>246</sup> *Brady v. Cubitt*, Dougl. 31.

In this country it has been adopted as settled law that the marriage of a man, and the birth of a child, both occurring subsequent to the execution of his will, will revoke such will.<sup>247</sup>

The reason given for the rule by modern authorities is rather that the law annexes to a will made by any man a condition that the will is not to take effect if he afterwards marries and has a child capable of inheriting his property.<sup>248</sup>

In order to effect a revocation the child must not have been provided for in any way. Hence, it is held by some courts where the will does not pass the entire estate of testator, but leaves a substantial portion to descend, according to the laws of intestacy, that a provision is made for the child and the will is not revoked.<sup>249</sup> If, however, the will disposes of the entire estate of the testator, the fact that he subsequently acquired property which would not pass by the terms of the will, but would descend to his child, would not be such provision as would prevent revocation.<sup>250</sup> If the children born of the subsequent marriage are expressly provided for, either by the will or by an ante-nuptial settlement, the will is not of course revoked.<sup>251</sup>

<sup>247</sup> Gay v. Gay, 84 Ala. 38; Sanders v. Simcich, 65 Cal. 50; Goodsell's Appeal, 55 Conn. 171; Belton v. Summer, 31 Fla. 139; 21 L. R. A. 146; Hart v. Hart, 70 Ga. 764; Shorten v. Judd, 60 Kan. 73; 53 Pac. 286; Baldwin v. Spriggs, 65 Md. 273; Warner v. Beach, 4 Gray (Mass.), 162; Lansing v. Haynes, 95 Mich. 16; Morgan v. Davenport, 60 Tex. 230; Wilcox v. Rootes, 1 Wash. (Va.), 140; Sneed v. Ewing, 5 J. J. Marsh. (Ky.), 460.

<sup>248</sup> Marston v. Roe, 8 Ad. & El. 14; Corker v. Corker, 87 Cal. 643; Hoitt v. Hoitt, 63 N. H. 498.

*Contra*, Yerby v. Yerby, 3 Call (Va.), 289; apparently adopts the theory of the ecclesiastical law that the question is one of *prima facie* intention only. as do Sanders v. Simcich, 65 Cal. 50; Brush v. Wil-

kins, 4 Johns. Ch. 506; Havens v. Van den Burgh, 1 Den. 27.

These cases are not on their facts as diverse as would appear from the statement of the underlying theory; as the fact relied on to rebut the presumption of implied revocation is the provision for the child by way of settlement.

<sup>249</sup> Doe v. Edlin, 4 Ad. & El. 582; Marston v. Roe, 8 Ad. & El. 14; Brady v. Cubitt, Dougl. 31.

<sup>250</sup> Baldwin v. Spriggs, 65 Md. 273.

<sup>251</sup> Gay v. Gay, 84 Ala. 38; Sanders v. Simcich, 65 Cal. 50; Warner v. Beach, 4 Gray (Mass.), 162; Brush v. Wilkins, 4 Johns. Ch. 506; Kurtz v. Saylor, 20 Pa. St. 205; Fransen's Will, 26 Pa. St. 202; Phaup v. Wooldridge, 14 Gratt. (Va.), 332.

This common law rule that marriage and the birth of a child revoked testator's will has been enacted by statute in many American states.<sup>252</sup>

**§284. Effect of marriage on will of wife.—Common law and statute.**

At common law the will of a woman was, *ipso facto*, revoked by her marriage. This rule was based upon the theory that the same degree of capacity was required to revoke a will as to make one; that a married woman not being able to make a will could not revoke one made before marriage; and therefore, unless the marriage itself revoked the will, it would be irrevocable during coverture.<sup>253</sup>

This rule was very generally adopted as the common law rule in the United States,<sup>254</sup> and has been re-enacted by statute in many states.<sup>255</sup> In some states, on the other hand, this rule has been expressly repealed by statute.<sup>256</sup>

In other states where the statutes are silent as to the effect of marriage as a revocation of a woman's will, an interesting question is presented by the passage of statutes authorizing

<sup>252</sup> Nutt v. Norton, 142 Mass. 242; Blodgett v. Moore, 141 Mass. 75; Swan v. Hammond, 138 Mass. 45; Edward's Appeal, 47 Pa. St. 144.

<sup>253</sup> Forse v. Hambley's Case, 4 Coke, 60; Hodsden v. Lloyd, 2 Bro. Ch. 534; Doe v. Staples, 2 T. R. 684.

"It is contrary to the nature of the instrument which must be ambulatory during the life of the testatrix, and as by the marriage she disables herself from making any other will, the instrument ceases to be of that sort and must be void." Hodsden v. Lloyd, 2 Bro. Ch. 534.

<sup>254</sup> Colcord v. Conroy, 40 Fla. 97; 23 So. 561; Crum v. Sawyer, 132 Ill. 443; Nutt v. Norton, 142 Mass.

242; Swan v. Hammond, 138 Mass. 45; Lansing v. Haynes, 95 Mich. 16; Garrett v. Dabney, 27 Miss. 335; Cotheal v. Cotheal, 40 N. Y. 405; Fidelity Trust Co.'s Appeal, 121 Pa. St. 1; Carey's Estate, 49 Vt. 236; Vandever v. Higgins, — Neb. —, 1899.

<sup>255</sup> Ellis v. Darden, 86 Ga. 368; 11 L. R. A. 51; McAnnulty v. McAnnulty, 120 Ill. 26; Blodgett v. Moore, 141 Mass. 75; Swan v. Hammond, 138 Mass. 45; McLarney v. Phelan, 153 N. Y. 416; Craft's Estate, 164 Pa. St. 520; Hale v. Hale, 90 Va. 728; Phaup v. Wooldridge, 14 Gratt. 332.

<sup>256</sup> Emery's Appeal, 81 Me. 275; Church v. Crocker, 3 Mass. 17; Webb v. Jones, 9 Stew. (N. J.), 163.

married women to make wills. This evidently does away with the reason underlying the common law rule, and the question is often presented whether it destroys the rule together with the reason. A majority of the courts hold that such a statute prevents the marriage of a woman from acting *ipso facto*, as a revocation of a prior will.<sup>257</sup>

In a Delaware case it was held, recognizing the principle just stated but distinguishing the facts, that where the will was made before the passage of the act, and the marriage took place after, the will was revoked since the statute applied only to wills executed after its passage.<sup>258</sup>

Under statutes where a married woman might make a will of realty, but not of personalty, marriage revoked the latter, but not the former.<sup>259</sup>

A minority of the courts adhere to the common law rule, and treat the marriage of a woman as a revocation of a prior will, where no statute specifically provides for such case.<sup>260</sup>

Where the statutes give a married woman the power to make a will, and also provide expressly that her marriage shall act as a revocation of a prior will, the statute on the subject of revocation is strictly construed. As it provides generally that the will of any 'unmarried woman' shall be revoked by a subsequent marriage, it includes the will of a widow made during her widowhood, where she afterwards remarries.<sup>261</sup> But it does not apply to a will made by a married woman

<sup>257</sup> Tuller's Will, 79 Ill. 99; Hunt's Will, 81 Me. 275; Roane v. Hollingshead, 76 Md. 369; 17 L. R. A. 592; Noyes v. Southworth, 55 Mich. 173; 54 Am. Rep. 359; Fellows v. Allen, 56 Am. Rep. 530; 60 N. H. 439; Morey v. Sohler, 63 N. H. 507; Hoitt v. Hoitt, 63 N. H. 475; Webb v. Jones, 36 N. J. Eq. 163; Morton v. Onion, 45 Vt. 145; Ward's Will, 70 Wis. 251; Lyon's Will, 96 Wis. 339.

<sup>258</sup> Smith v. Clemson, 6 Houst. (Del.), 171.

<sup>259</sup> Carey's Estate, 49 Vt. 236.

<sup>260</sup> Shorten v. Judd, 60 Kan. 73; Stewart v. Mulholland, 88 Ky. 38; Blodgett v. Moore, 141 Mass. 75; Swan v. Hammond, 138 Mass. 45; Brown v. Clark, 77 N. Y. 369.

This is said to be still the rule in Nebraska as far at least as the curtesy of the husband is concerned. Vandever v. Higgins, —, Neb. —, 1899; 80 N. W. 1043.

<sup>261</sup> Blodgett v. Moore, 141 Mass. 75; *In re Kaufman*, 131 N. Y. 620.

during coverture, though her husband afterwards dies and she remarries.<sup>262</sup>

These statutes are generally so worded as not to apply where the marriage whereby the will is sought to be revoked was solemnized before the statute took effect.<sup>263</sup> Since a married woman could always execute a power conferred upon her, even if such power was to be executed by will, her marriage did not revoke a will made to execute a power.<sup>264</sup> And where the woman expressly reserved, by an ante-nuptial agreement, the power to dispose of her property by will, her subsequent marriage did not effect a revocation.<sup>265</sup>

An ante-nuptial contract may refer to a previously executed will in such a way as to make it an execution of the power created by the contract. In such case the marriage will not revoke the will.<sup>266</sup> In such case, however, the birth of a child not provided for by will or otherwise might revoke the will; even though the husband could not avoid it at his option.<sup>267</sup> But an agreement that the woman shall retain control of her own property does not prevent the marriage from revoking the will, since the property becomes the husband's on marriage.<sup>268</sup>

As appears from the foregoing sections, modern legislation has, in many jurisdictions, made the same rules applicable to the wills of men and women. In some jurisdictions marriage revokes the wills of both; in others, of neither. In the latter

<sup>262</sup> *Chapman v. Dismer*, 14 App. D. C. 446; *In re McLarney*, 153 N. Y. 416.

A married woman made a will. Then her husband died: she then adopted a child; married a second time, and was divorced from her second husband. These facts did not effect a revocation of her will. *Comassi's Estate*, 107 Cal. 1.

<sup>263</sup> *Goodrell's Appeal*, 55 Conn. 171; *McAnnulty v. McAnnulty*, 120 Ill. 26; *Swan v. Sayles*, 165 Mass. 177.

<sup>264</sup> *Cutter v. Butler*, 25 N. H. 343; *Miller v. Phillips*, 9 R. I.

141; *Phaup v. Wooldridge*, 14 Gratt. (Va.), 332.

<sup>265</sup> *Osgood v. Bliss*, 141 Mass. 474; *Lant's Appeal*, 95 Pa. St. 279; *Morton v. Onion*, 45 Vt. 145.

<sup>266</sup> *Boyes v. Cook*, 14 Ch. D. 53; *Logan v. Bell*, 1 C. B. 872; *Osgood v. Bliss*, 141 Mass. 474; *Lant's Appeal*, 95 Pa. St. 279.

<sup>267</sup> *Nutt v. Norton*, 142 Mass. 242; *Craft's Estate*, 164 Pa. St. 520.

<sup>268</sup> *Nutt v. Norton*, 142 Mass. 242; *Lathrop v. Dunlap*, 63 N. Y. 610; *Carey's Estate*, 49 Vt. 236.

class of states the birth of a child revokes the will either entirely or *pro tanto*.

§285. Effect of change not specified by law.

While there is considerable diversity among the different states as to what constitutes a revocation by change of circumstances (a diversity almost entirely confined to statute law), it is well settled that combinations of fact other than those specifically recognized by law will not effect a revocation of a prior will, no matter how strongly it may be conjectured that testator would have revoked his will if his attention had been called to it. The death of the chief beneficiary before the testator does not revoke the will,<sup>269</sup> nor does the death of the sole legatee where an executor is appointed,<sup>270</sup> nor probably even where no executor is appointed.<sup>271</sup>

A great increase in testator's property, the birth of a child contemplated in the will, the death of testator's wife, and the insanity of testator for years so that he could not revoke his will, are not facts which amount in law to a revocation of his will.<sup>272</sup>

The fact that testator, who had made a will in favor of his wife, was afterwards divorced from her does not revoke the will, even where they settled and adjusted their property rights on separation.<sup>273</sup> So where a testator made a will in favor of a woman whom he was about to marry, and they were afterwards married and then divorced, it was held that such facts did not revoke his will.<sup>274</sup> But where testator devised property to his wife, and ten years afterwards they were divorced and by agreement terminated all their property relations, in pursuance of which agreement he deeded part of

<sup>269</sup> *Brown v. Just*, 118 Mich. 678; 77 N. W. 263.

<sup>270</sup> *In re Hickman*, 101 Cal. 609.

<sup>271</sup> *Hoitt v. Hoitt*, 63 N. H. 475.

<sup>272</sup> *Warner v. Beach*, 4 Gray, 70 Mass. 162.

<sup>273</sup> *Card v. Alexander*, 48 Conn.

492; *Baacke v. Baacke*, 50 Neb. 18. This case does not refer to *Lansing v. Haynes*, 95 Mich. 16.

<sup>274</sup> *Charlton v. Miller*, 27 O. S. 298. While not on the exact point *Corker v. Corker*, 87 Cal. 643, supports this case by its reasoning.

his property to her, it was held that such facts effected a revocation by implication.<sup>275</sup>

**§286. Effect of alteration of circumstances after revocation is complete.**

If a will is revoked by change of testator's circumstances no subsequent change of circumstances can revive it.<sup>276</sup> Thus, a will revoked by the birth of a child, testator having none when he made the will, is not revived by the fact that testator survives the child.<sup>277</sup> This rule, of course, does not apply where by statute, the will is revoked only where the wife or child survives the testator. So a will revoked by the subsequent marriage of testator is not revived by the subsequent separation of the parties.<sup>278</sup>

**§287. Effect of birth of child upon will of childless parent.**

At the common law the birth of a child did not of itself revoke a will previously executed by its parent,<sup>279</sup> nor did such child have any rights in testator's estate as against the devisee.<sup>280</sup>

In Iowa, however, it was held at common law that the birth of a child to testator revoked a previously executed will. This view was held in a case where testator was childless when the will was made,<sup>281</sup> but was extended to the case where testator had children living when the will was executed;<sup>282</sup> and was held to amount to a total revocation.<sup>283</sup>

<sup>275</sup> *Lansing v. Haynes*, 95 Mich. 16.

This case distinguishes *Charlton v. Miller*, on the ground that there was no settlement of property rights in that case.

<sup>276</sup> *Emerson v. Boville*, 1 Phill. 342; *Ash v. Ash*, 9 O. S. 383.

<sup>277</sup> Cases cited in preceding note.

<sup>278</sup> *Corker v. Corker*, 87 Cal. 643; or by their divorce. *Stewart v. Powell*, 90 Ky. 511; *Bowers v. Bow-*

*ers*, 53 Ind. 430; *Hulett v. Carey*, 66 Minn. 327.

<sup>279</sup> See Sec. 282.

<sup>280</sup> *Wild v. Brewer*, 2 Mass. 570; *Prentiss v. Prentiss*, 11 All. 47; *Peters v. Siders*, 126 Mass. 135; *Cotheal v. Cotheal*, 40 N. Y. 405; *Chace v. Chace*, 6 R. I. 407.

<sup>281</sup> *McCullum v. McKenzie*, 26 Io. 510.

<sup>282</sup> *Alden v. Johnson*, 63 Io. 124.

<sup>283</sup> *Negus v. Negus*, 46 Io. 487; *Fallon v. Chidestor*, 46 Io. 588.

Nor did a child omitted without any intention of excluding it from its share of testator's estate, as where it was believed at the time of the execution of the will to be dead, have any rights in testator's estate as against the devisee.<sup>284</sup>

In many states these common law principles have been altered or abrogated by statute. The details of these statutes are almost as many as the jurisdictions in which they are in force; but in their essential features they may be reduced to three classes:

1. Statutes of the first class provide that the birth of a child to testator shall revoke the will if such child is not provided for by will, or is not intentionally excluded. Statutes of this class usually by their terms apply only when testator had no children at the time of executing his will.<sup>285</sup> Where testator had had children, who were dead when the will was made, the birth of subsequent children operated under these statutes as a revocation.<sup>287</sup> Where a will is thus revoked by the birth of a child, the subsequent death of the child before testator does not revive the will.<sup>287</sup>

**§288. Effect of birth of child upon will of parent who has other children living.**

2. Statutes of the second class usually apply where testator had a child or children living at the time of the execution of his will, and provide that in case of the birth of a child (or in some cases the discovery of the existence of a child who was thought to be dead) subsequent to the execution of a will in which such child is not provided for, and where intention to exclude such child is not shown, such child shall take the

<sup>284</sup> Gifford v. Dyer, 2 R. I. 99.

<sup>285</sup> Belton v. Sumner, 31 Fla. 139; 21 L. R. A. 146; Baldwin v. Spriggs, 65 Md. 373; Coudert v. Coudert, 43 N. J. Eq. 407; Smith v. Robertson, 89 N. Y. 555; 24 Hun,

210; Ash v. Ash, 9 O. S. 383;

Evans v. Anderson, 15 O. S. 324; Rhodes v. Weldy, 46 O. S. 234.

<sup>286</sup> Coudert v. Coudert, 43 N. J. Eq. 407.

<sup>287</sup> Ash v. Ash, 9 O. S. 383.



share of testator's estate that it would have taken had testator died intestate.<sup>288</sup>

Under these statutes a will of a married woman made in execution of a power is avoided by the birth of a child after such execution, as far as the interests of such child are concerned.<sup>289</sup>

Statutes of the second class do not provide for a revocation of the will by the subsequent birth of a child, but only that the after-born child shall take as if his parent had died intestate. Accordingly, if such after-born child dies without issue before testator, the will of testator is not avoided even to the extent of the interest of such child.

### §289. Construction of these statutes.—“Having no child.”

One of the questions which has been presented to the courts under statutes of these classes is, What is ‘having no child’ within the meaning of the provision of the statute referring to a child born after the execution of the will?

Where the mother of the child was pregnant at the time of the execution of the will, and the child was born after the execution of the will, it is held that under such circumstances the testator or testatrix ‘had no child’ within the meaning of the statute, and the birth of such child avoids the will.<sup>290</sup>

<sup>288</sup> *Clarkson v. Stevens*, 106 U. S. 505; *Holloman v. Copeland*, 10 Ga. 79; *Tyler v. Tyler*, 19 Ill. 151; *Hughes v. Hughes*, 37 Ind. 183; *In re Minot*, 164 Mass. 38; *Bowen v. Hoxie*, 137 Mass. 527; *Peters v. Siders*, 126 Mass. 135; *Bancroft v. Ives*, 3 Gray (Mass.), 367; *Beck v. Metz*, 25 Mo. 70; *Hockensmith v. Slusher*, 26 Mo. 237; *Stevens v. Shippen*, 1 Stew. (N. J.), 487; 2 Stew. (N. J.), 602; *Wilson v. Fritts*, 5 Stew. (N. J.), 59; *Rhodes v. Weldy*, 46 O. S. 234; *Tomlinson v. Tomlinson*, 1 Ash.

224; *Walker v. Hall*, 34 Pa. St. 483; *Grosvenor v. Fogg*, 81 Pa. St. 400; *Potter v. Brown*, 11 R. I. 232; *Burns v. Allen*, 93 Tenn. 149; 23 S. W. 111; *Verrinder v. Winter*, 98 Wis. 287.

<sup>289</sup> *Young's Appeal*, 39 Pa. St. 115.

<sup>290</sup> *Waterman v. Hawkins*, 63 Me. 156; *Evans v. Anderson*, 15 O. S. 324; *Rhodes v. Weldy*, 46 O. S. 234; *Willard's Estate*, 68 Pa. St. 327; *Burns v. Allen*, 93 Tenn. 149; 23 S. W. 111; *Verrinder v. Winter*, 98 Wis. 287.

**§290. Construction of these statutes.—“Subsequent” birth, or having child “afterward.”**

Another point which has been the subject of adjudication is, What is the meaning of “subsequent” or “afterward” within the meaning of this provision of the statute? It is held that the birth of a posthumous child avoids a prior will under the terms of these statutes.<sup>291</sup> In some states the statutes originally protected the interests of posthumous children only,<sup>292</sup> and children born after the execution of the will and before the death of testator could take only what the will gave them.<sup>293</sup>

The birth of an illegitimate child, after execution of the will, if followed by such recognition by both parents as to give it capacity of inheriting under the local statutes of descent, is sufficient to avoid or revoke the will.<sup>294</sup> But if the statute does not provide for the legitimation of an illegitimate child by recognition, or if no such recognition takes place, the subsequent birth of an illegitimate child does not avoid the will of its parent, even of its mother.<sup>295</sup>

Where the illegitimate child was born before the will was executed, its recognition and legitimation after the will is executed is not a constructive birth so as to avoid the will.<sup>296</sup>

The adoption of a child is not of itself sufficient to revoke a prior valid will.<sup>297</sup>

Some statutes of these two classes entirely deprive testator of the power of disinheriting his after-born children; and avoid the will, at least so far as such after-born children are

<sup>291</sup> *Hart v. Hart*, 70 Ga. 764; *Bowen v. Hoxie*, 137 Mass. 527; *Evans v. Anderson*, 15 O. S. 324; *Wilson v. Otto*, 160 Pa. St. 433; *McKnight v. Read*, 1 Whart. (Pa.), 213.

<sup>292</sup> *Ex parte Wamer*, Dud. Eq. (S. Car.). 154; *Talbird v. Bell*, 1 De S. (S. Car.), 592.

<sup>293</sup> *Ellis v. Ellis*, 2 De S. 556.

<sup>294</sup> *Milburn v. Milburn*, 60 Io. 411.

<sup>295</sup> *Kent v. Barker*, 2 Gray (Mass.), 535.

<sup>296</sup> *McCulloch's Appeal*, 113 Pa. St. 247.

<sup>297</sup> *Comassi's Estate*, 107 Cal. 1 (Will of a woman). *Davis v. Fogle*, 124 Ind. 41; *Davis v. King*, 89 N. Car. 441.

*Contra*, *Hilpipre v. Claude* (Io.) (1899) 80 N. W. 332; *Woods v. Drake*, 135 Mo. 393.

concerned. No attention is paid, under statutes of this class, to the actual intention of testator. Even if it appears from the will that it was the intention of testator to disinherit his after-born children, they will take as though testator died intestate, and the will will be revoked as to them. Statutes of this class provide that after-born children shall take as if testator had died intestate unless some provision is made for such children.<sup>298</sup>

### §291. Omission of children from a will.

3. The third class of statutes provide in substance that if testator does not provide for his children by will, or show his intention to omit such provision, such omitted children will take as if testator had died intestate.<sup>299</sup> This rule applies as well to community property as to testator's separate property.<sup>300</sup>

The statutes of this class were originally framed on the theory that a testator who neither provided for his children, nor expressly indicated his intention not to provide for them, must have omitted to provide for them through inadvertence, and that his probable intention could be best enforced by giving the omitted children such share as they would have taken had testator died intestate. By their terms and the construction placed upon them by the courts, however, they go farther than this and operate as a restriction upon the power of testamentary disposition.

<sup>298</sup> *Holloman v. Copeland*, 10 Ga. 79; *Waterman v. Hawkins*, 63 Me. 156; *Hollingsworth's Appeal*, 51 Pa. St. 518; *Walker v. Hall*, 10 Casey (Pa.), 483.

<sup>299</sup> *Boman v. Boman*, 49 Fed. 329 reversing (Wash.) 47 Fed. 849; *Trotter v. Trotter*, 31 Ark. 145; *Smith v. Olmstead*, 88 Cal. 582; 12 L. R. A. 46; *Rhoton v. Blevin*, 99 Cal. 645; *Hawhe v. Chicago & W. I. Ry. Co.*, 165 Ill. 561; *Lurie v. Radnitzer*, 166 Ill. 609; *Arnold v. Arnold* 62 Ga. 627 (a case arising

under Arkansas law); *Merrill v. Hayden*, 86 Me. 133; *Ramsdill v. Wentworth*, 101 Mass. 125; *Forbes v. Darling*, 94 Mich. 621; *Stebbin's Estate*, 94 Mich. 304; *Woods v. Drake*, 135 Mo. 393; *Thomas v. Black*, 113 Mo. 66; *Smith v. Sheehan*, 67 N. H. 344; *Bower v. Bower*, 5 Wash. 225; 31 Pac. 598; *Barker's Estate*, 5 Wash. 390; *Mason v. McLean*, 6 Wash. 31; *Hill v. Hill*, 7 Wash. 409.

<sup>300</sup> *Hill v. Hill*, 7 Wash. 409.

Some of the statutes provide that the child shall take the share of the estate which he would have had if testator had died intestate unless such child is named or provided for by the will.<sup>301</sup>

**§292. What shows intentional omission of a child.**

Under statutes which provide that an omitted child shall take such share of his parent's estate as he would have received if his parent had died intestate, unless such child is provided for, or it appears that testator intended to make no provision for him, no set form of words is necessary to show that the omission was intentional. Any form of expression from which testator's intention can be inferred is sufficient to exclude such child.<sup>302</sup> Unless such intention does appear, the omission will be presumed to have been unintentional and the child will take as if his parent had died intestate.<sup>303</sup>

But the courts do not agree as to what provisions show an intentional omission. In some cases it is held that where testator, with full knowledge of the facts, disposes of all his property by will to his wife, he shows an intention not to provide for his minor children.<sup>304</sup> This holding seems clearly contrary to the spirit of the statute, and is not entertained in other jurisdictions.

The weight of authority is that a devise of all of testator's property, where the children are not named, does not show an intention to make no provision for them.<sup>305</sup> Where testator expressly provides that he leaves all his property to his wife to the exclusion of his children, not from want of affection for them, but because he is sure

<sup>301</sup> *Schneider v. Koester*, 54 Mo. 500.

<sup>302</sup> *Merrill v. Hayden*, 86 Me. 133.

<sup>303</sup> *Thomas v. Black*, 113 Mo. 66; *Mason v. McLean*, 6 Wash. 31.

<sup>304</sup> *Hawhe v. Chicago & W. I. Ry. Co.* 165 Ill. 561; *Lurie v. Radnitzer*, 166 Ill. 609.

<sup>305</sup> *R. R. v. Wasseman*, 22 Fed. Rep. 872; *Ward v. Ward*, 120 Ill.

111; *Bank v. White*, 159 Ill. 136; *Bancroft v. Ives*, 3 Gray (Mass.), 367; *Carpenter v. Snow*, 117 Mich. 489; 41 L. R. A. 820; *Breese v. Stiles*, 22 Wis. 120; *Thomas v. Black*, 113 Mo. 66; *Burch v. Brown*, 46 Mo. 441; *Bradley v. Bradley*, 24 Mo. 311; *Mason v. McLean*, 6 Wash. 31.

that she will always be a kind and devoted mother to them, it is held that this shows an intention not to provide for the children.<sup>306</sup>

A will leaving all the property of testatrix to her husband, to the exclusion of everyone else who might be entitled to it, was held not to show an intention to exclude the children of testatrix.<sup>307</sup>

Under the terms of some of these statutes, naming a child is sufficient to show an intent to make no further provision for such child than is made by the will.<sup>308</sup>

Where testator's illegitimate child is clearly referred to by mentioning its mother, such child is not 'omitted,' even though testator recites its first name incorrectly.<sup>309</sup> But a bequest of \$100 to each of the "heirs at law" of testator is not such a naming of his children as to comply with the provisions of this statute.<sup>310</sup> But a devise to testator's "legal heirs" is a sufficient reference to his children.<sup>311</sup>

A gift over to the heirs of testator's wife does not show an intention not to provide for testator's children.<sup>312</sup> So a devise to testator's wife "and her heirs forever," is not a provision for testator's children by her or a naming of them.<sup>313</sup>

Where testator specifically refers to his unborn children, his intention is clear to exclude them from any share other than that given by will. Thus, where testator by will provided that if his widow should remarry, an unborn child should re-

<sup>306</sup> *Rhton v. Blevin*, 99 Cal. 645; (but in an almost identical case, *Walker v. Hall*, 34 Pa. St. 483, it was held that not even such a provision could exclude after-born children. Under the Pennsylvania Statute, however, the after-born children took as in intestacy, unless provided for).

<sup>307</sup> *Barker's Estate*, 5 Wash. 390; So of a gift to the wife, *Hargadine v. Pulte*, 27 Mo. 423.

<sup>308</sup> *Boman v. Boman*, 49 Fed. 329, reversing 47 Fed. 849, (Wash.); *Smith v. Olmstead*, 88 Cal. 582; 12

L. R. A. 46; *Rhton v. Blevin*, 99 Cal. 645; *Woods v. Drake*, 135 Mo. 393; *Thomas v. Black*, 113 Mo. 66.

<sup>309</sup> *Gorkow's Estate*, 20 Wash. 563.

<sup>310</sup> *Boman v. Boman*, 49 Fed. 329, reversing 47 Fed. 849, (Wash.).

<sup>311</sup> *Smith v. Sheehan*, 67 N. H. 344 (in this case, however, a gift was made direct to the 'legal heirs' of testator).

<sup>312</sup> *Rhodes v. Weldy*, 46 O. S. 234.

<sup>313</sup> *Bower v. Bower*, 5 Wash. 225.

ceive one-third of his property, but that otherwise the widow should receive such part, it was shown that the testator either provided for such unborn child or intended to make no provision.<sup>314</sup> So, where a testatrix provided that her property should go to her husband if he survived her, but if not, "and I shall die leaving a child or children," then to such child or children, it was held to be a provision for them, and to show an intention not to provide for them further.<sup>315</sup>

In some jurisdictions, however, the word 'heir' in a gift to the surviving spouse and his heirs, is held to show testator's intention to exclude his children.<sup>316</sup> A gift to one to the exclusion of 'any one else' who might be entitled to such property, is not a naming of the disinherited children.<sup>317</sup>

A reference to testator's minor children is not a naming of his adult children.<sup>318</sup> But a bequest to the children of an adopted daughter is a sufficient naming of such adopted daughter.<sup>319</sup>

A reference to a deceased daughter shows testator's intention to make no provision for her children where none is made by will.<sup>320</sup> And a gift by name to one who had married testator's daughter was held to be a sufficient naming of such daughter.<sup>321</sup>

An express declaration that a given child shall have no part of testator's estate is a sufficient naming,<sup>322</sup> as is a devise to testator's wife to dispose of "with reference to her child or children," where the only child that they had was then alive.<sup>323</sup>

A recent case seems at variance with the principle just laid down in the text. Testator devised all his estate to his

<sup>314</sup> *Verrinder v. Winter*, 98 Wis. 287.

<sup>315</sup> *Osborn v. Bank*, 116 Ill. 130.

<sup>316</sup> *Osborn v. Bank*, 116 Ill. 130; *Leonard v. Enochs*, 92 Ky. 186; *Minot, Petitioner*, 164 Mass. 38; *Verrinder v. Winter*, 98 Wis. 287 (in these cases there was either such a wording of the will as to lend color to the inference that testator meant to exclude his children;

or the court found that some provision had been made for them).

<sup>317</sup> *Barker's Estate*, 5 Wash. 390.

<sup>318</sup> *Wetherall v. Harris*, 51 Mo. 65.

<sup>319</sup> *Woods v. Drake*, 135 Mo. 393.

<sup>320</sup> *Guitar v. Gordon*, 17 Mo. 408.

<sup>321</sup> *Hockensmith v. Slusher*, 26 Mo. 237.

<sup>322</sup> *Block v. Block*, 3 Mo. 594.

<sup>323</sup> *Beck v. Metz*, 25 Mo. 70.

wife, "giving my said wife full power and authority to collect all debts," etc., and "to sell any and all of my estate," and to convey the same "as fully, amply and completely as I could have done in my lifetime." The testator then had two children; a third was born in two months. It was held that the intention was apparent that after-born children should not take.<sup>324</sup>

### §293. What is a provision for a child.

By the terms of these statutes a child for whom a "provision" is made is not included among those who may take as in cases of intestacy. Such child can take what the will gives it, and no more. It is often important, therefore, to determine what is a "provision" within the meaning of these statutes.<sup>325</sup>

The "provision" must be a present vested interest to take immediate effect in possession upon the death of the testator. A vested interest *in futuro*, such as a remainder or reversion, is not sufficient. "A reversionary interest, whether vested or contingent, is not a provision for an after-born child within the words or spirit of the statute."<sup>326</sup>

Thus, a devise to testator's wife for life, and on her death to the heirs of her body, no child being in existence when the will was made, is no "provision" for an after-born child.<sup>327</sup>

Where testator devised property to his wife and each of his children then living, and provided that the residue should be divided among his "surviving children," it was held that

<sup>324</sup> *Hawhe v. R. R. Co.*, 165 Ill. 561.

In this case the court laid great stress upon the fact that the children already born were disinherited, as showing that testator did not mean to provide for those born later. It assumes to distinguish the earlier cases there cited which support the text, except *R. R. v. Wasseman*, which it refuses to follow.

<sup>325</sup> *Clarkson v. Stevens*, 106 U. S. 505; *Stevens v. Shippen*, 1 Stew. 487; 2 Stew. 602.

<sup>326</sup> *Willard's Estate*, 68 Pa. St. 327. To the same effect are *Alden v. Johnson*, 63 Io. 124; *Waterman v. Hawkins*, 63 Me. 156; *Rhodes v. Weldy*, 46 O. S. 234; *Hollingsworth's Appeal*, 51 Pa. St. 518; *Potter v. Brown*, 11 R. I. 232.

<sup>327</sup> *Rhodes v. Weldy*, 46 O. S. 234.

a posthumous child was not provided for within the meaning of the statute, nor did the fact that the residuary clause was by accident so worded as to include such child show an intent to exclude it further.<sup>328</sup>

In many other cases, however, this view is held unsound, and any beneficial gift of property, either in the nature of a reversion or a remainder, is a "provision" within the meaning of the statute.<sup>329</sup>

Thus, in a recent case testator, knowing that his wife was pregnant, left his property, after some specific gifts, none of which were to such unborn child, to trustees, to pay the entire income to his wife during her life, and on her death the reversion "to those persons who if my death occurred at the time of her death would then be my heirs at law by blood." It was held that a provision was made for this unborn child within the meaning of the statute.<sup>330</sup>

So, where testator provided that his widow should have all his property in fee, but if she remarried "her heir" should have a third of the property, it was held that this contingent remainder either was a provision for an unborn child or showed an intention to exclude such child from a share in testator's will.<sup>331</sup>

So, a devise of testator's real estate to his wife to hold till his youngest child "if any be born to me" should come of age, and if no child of testator is alive at his death to the wife absolutely, is an implied gift to the children when the

<sup>328</sup> *Bowen v. Hoxie*, 137 Mass. 527.

<sup>329</sup> *Rhoton v. Blevin*, 99 Cal. 645;

*Hawhe v. Chicago & W. I. R. Co.*, 165 Ill. 561; *Leonard v. Enochs*, 92 Ky. 186; *Minot, Petitioner*, 164 Mass. 38; *Verrinder v. Winter*, 98 Wis. 287; *Donges's Estate*, 103 Wis. 497.

<sup>330</sup> *Minot, Petitioner*, 164 Mass. 38, distinguishing *Bowen v. Hoxie*, 137 Mass. 527, as a case where the child was posthumous and appar-

ently testator did not know of its existence.

This case might have been decided as showing, in view of all the facts, an intention to exclude such child, as the intention need not in Massachusetts appear on the face of the will. But the court puts its decision on the specific ground that the child was provided for.

<sup>331</sup> *Verrinder v. Winter*, 98 Wis. 287.



youngest comes of age, and is a "provision" within the meaning of the statute.<sup>332</sup>

A gift to the surviving spouse "and his heirs" (or "her heirs," as the case may be) is usually held neither to be a provision for after-born children nor to show an intent to exclude them.<sup>333</sup>

Since the word "heirs" in this connection is one of limitation, and not of purchase, the children of the surviving spouse by the decedent have no interest under the will, vested or contingent, and are very clearly not provided for.

Where the surviving spouse is a second wife, so that children of testator by his first wife can not be her heirs, a gift to her and her heirs is no provision for testator's children by his first wife.<sup>334</sup>

A gift for the maintenance and support of after-born children during their minority is a provision for them; <sup>335</sup> and a devise of certain land in a county named is a "provision" for the beneficiaries, even if at the time of making the will testatrix did not own any land in such county.<sup>336</sup> But a gift of a family bible, if another child did not wish it, with the privilege of selecting some books and clothing, is not a provision;<sup>337</sup> nor is a gift of one dollar to each of the heirs at law of testator a provision.<sup>338</sup>

A deed to a divorced wife for alimony and maintenance of minor children is not a provision, especially where the decree of divorce specifically provides that this deed shall not affect the interests of the unborn child.<sup>339</sup>

<sup>332</sup> Donges's Estate, 103 Wis. 497.

<sup>333</sup> Holloman v. Copeland, 10 Ga. 79; Bancroft v. Ives, 3 Gray, 367; Ramsdill v. Wentworth, 101 Mass. 125; Potter v. Brown, 11 R. I. 232; Bower v. Bower, 5 Wash. 225; Barker's Estate, 5 Wash. 390.

<sup>334</sup> Thomas v. Black, 113 Mo. 66.

<sup>335</sup> Forbes v. Darling, 94 Mich.

621; Jackson v. Jackson, 2 Pa. St. 212.

<sup>336</sup> Callaghan's Estate, 119 Cal. 571; 39 L. R. A. 689.

<sup>337</sup> Stebbins v. Stebbins, 94 Mich. 304.

<sup>338</sup> Boman v. Boman, 49 Fed. 329, reversing 47 Fed. 849 (Wash.).

<sup>339</sup> Burns v. Allen, 93 Tenn. 149; 23 S. W. 111.

## §294. Evidence.—How intention to omit must be shown.

As these statutes usually apply where the will does not make a provision for such children or show an intent not to provide for them, extrinsic evidence is not admissible, either to show that the omission was intentional,<sup>340</sup> or that the omitted children were otherwise provided for.<sup>341</sup> Nor can clauses in a will which were erased before execution be used to show that the omission was intentional.<sup>342</sup>

Where the statute does not require testator's intention to exclude his children from his estate to appear on the face of the will, evidence of testator's intention to provide for his children or not to do so may be shown outside the will.<sup>343</sup>

## §295. Necessity of contest by omitted children.

As these statutes make testator's will absolutely void, as far as the rights of the child or children protected by statute are concerned, it is not necessary that such child contest the will. The will may be probated without contest, and yet treated as a nullity as to the interests of such child.<sup>344</sup>

<sup>340</sup> *Carpenter v. Snow*, 117 Mich. 489; 41 L. R. A. 820; *Thomas v. Black*, 113 Mo. 66; *Burns v. Allen*, 93 Tenn. 149; 23 S. W. 111.

<sup>341</sup> *Hill v. Hill*, 7 Wash. 409.

<sup>342</sup> *Lurie v. Radnitzner*, 166 Ill. 609. (In this case testator made a provision for an unborn child, which clause he erased before execution, adding a certificate to the effect that the erasure was made with his approval. It was held that as such erased clause formed no part of the will, and as testator's intention to exclude an after-born child must appear on the face of the will, such child took as if testator died intestate.)

<sup>343</sup> *Ramsdill v. Wentworth*, 101 Mass. 125. (This case involves disinheriting children alive when the will was made. Parol evidence was

admitted to show that testator had disinherited his children by reason of a mistake of law, believing that his wife would take a life estate, citing and following *Lorings v. March*, 6 Wall. 337; *Wilson v. Fosket*, 6 Met. 400; *Bancroft v. Ives*, 3 Gray, 367; *Converse v. Wals*, 4 All. 512. So *Carpenter v. Snow*, 117 Mich. 489; 41 L. R. A. 820.

Thus in Michigan, intention to exclude children in existence at the execution of the will need not appear on the will, but intention to exclude children not in existence at the execution of the will must appear on the will. *Carpenter v. Snow*, 117 Mich. 489; 41 L. R. A. 820.

<sup>344</sup> *Morse v. Morse*, 42 Ind. 565; *Fallon v. Chidester*, 46 Io. 588; *Evans v. Anderson*, 15 O. S. 324.

This is upon the theory that, while probate establishes the capacity of testator and the due execution of the will, it does not for other purposes "establish the testamentary character of the instrument and give validity to a title based upon it."<sup>345</sup> Indeed, it is held that these children can not have the will set aside even if they bring suit for that purpose.<sup>346</sup>

## §296. Effect of omission upon other provisions of will.

The question is sometimes raised whether provisions of a will not dispositive in their nature, such as the appointment of an executor or the creation of a power of sale, are superseded by the birth or existence of children as to whom the will is a nullity.

In some jurisdictions it seems to be held that whether the will is entirely revoked, or is merely a nullity as to certain children, no provisions of the will have any force as against their interests by descent.<sup>347</sup>

In other states a distinction is made, and where the will is not revoked the power of sale or the appointment of an executor is held operative as to their interests.<sup>348</sup> While if the facts are such as to operate as a revocation of the will, the power of sale is invalid.<sup>349</sup>

<sup>345</sup> *Fallon v. Ohidester*, 46 Io. 588.

<sup>346</sup> *Barker's Estate*, 5 Wash. 390.

*Contra*, that its validity may thus be tested at once, *Meyers v. Barrow*, 3 Ohio C. C. 91.

<sup>347</sup> *Smith v. Olmstead*, 88 Cal. 582; 12 L. R. A. 46. (In this case a power of sale was held ineffective as to the shares of omitted child, neither named nor provided for by will.)

<sup>348</sup> *Van Wickle v. Van Wickle*, N. J. Eq. —, 1899; 44 Atl. 877; *Wilson v. Fritts*, 32 N. J. Eq. 59; *Coates v. Hughes*, 3 Binn. (Pa.), 498.

"The will stands, except so far as the disposition of property under it is disturbed by the necessity of contribution to make up the portion of the posthumous child." *Wilson v. Fritts*, 32 N. J. Eq. 59.

<sup>349</sup> *Smith v. Robertson*, 24 Hun, 210; 89 N. Y. 555.

Whether the subsequent birth of a child revokes a prior will of its parent, or only secures the child's share of the estate independent of the will is, of course, purely a question of the wording and meaning of the statute.

An appointment of a guardian for testator's minor children was not avoided by the subsequent birth of a child.<sup>350</sup>

It will be noticed at once that statutes of the second class effect only a partial revocation; while statutes of the third class do not effect a revocation at all. A discussion of statutes of the third class in this chapter is therefore illogical. But a separate discussion of them would necessitate a repetition of the discussion of what is a provision, what is a naming, and what shows testator's intention to exclude children from a share in his estate; and to save space, therefore, this topic is taken up out of its order.

<sup>350</sup> *Hollingsworth v. Hollingsworth*, 51 Pa. St. 518.

## CHAPTER XV.

### ALTERATION AND PARTIAL SPOLIATION.

#### §297. General principles.

Since revocability is an essential and inherent element of a valid will, the testator has full and absolute power to revoke and alter his will as he sees fit.<sup>1</sup> It is further clear that no one else has any right to alter the will of testator without his consent and authority.<sup>2</sup>

The general principles being well settled, the practical questions presented to the courts for adjudication concern the practical effect of such changes in the will when actually made.

#### §298. Definition of alteration.

Alteration is a change in the words of a will, by addition, or erasure, or both, made by testator, or some one acting under his authority, after the execution of the will.<sup>3</sup> Changes made in the wording of a will before execution are not included in this definition, since such changes become by execution an integral part of the will.<sup>4</sup>

#### §299. Effect of alteration.

Under our modern statutes an alteration made by testator

<sup>1</sup> Sec. 50.

<sup>2</sup> Sec. 300.

<sup>3</sup> *Finch v. Combe* (1894) P. 191;  
*Hesterberg v. Clark*, 166 Ill. 241;  
*Gardiner v. Gardiner*, 65 N. H. 230;

8 L. R. A. 383; *Simrell's Estate*,  
154 Pa. St. 604.

<sup>4</sup> *Lurie v. Radnitzer*, 166 Ill. 609;  
*Wright v. Wright*, 5 Ind. 389.

in his will after execution is of no effect whatever, unless the will has subsequently been re-executed or republished. The part inserted is treated as if it did not exist. The part stricken out is treated as if it were still part of the will.<sup>5</sup> But a correction of an error, as in the name of an executor, does not invalidate the will in whole, or in part.<sup>6</sup>

There are two exceptions to this general rule: First, in those states where partial revocation is allowed, an alteration in the will may take effect if it merely takes from the provisions of the will, though it can not be given effect where it adds to them unless the will is afterwards re-published.<sup>7</sup> Second, where it is impossible either from the will itself or from extrinsic evidence to determine the words which were erased or stricken out, such words must be disregarded, and the will probated with such clauses blank.<sup>8</sup>

The effect of republication upon alterations in a will after execution is discussed under the subject "Republication."<sup>9</sup>

### §300. Definition of spoliation.

Spoliation is a change in the wording of a will, made after execution by one who is neither the testator nor is authorized by him. The word is also used of the destruction of a will by some one other than testator or one authorized by him. This branch of the subject is treated under the head of Lost and Spoliated Wills.<sup>10</sup> Spoliation is often called alteration. The

<sup>5</sup>Finch v. Combe (1894) P. 191; Brasier's Estate (1899), P. 36; 68 L. J. P. D. & A. N. S. 6; *In re* Lawson, 25 N. S. 454; Hindmarsh v. Charlton, 8 H. L. Cas. 160; Goods of Madlock, L. R. 3 P. & M. 169; Tyler v. Merchant Tailor Co. L. R. 15 Prob. D. 216; Hesterberg v. Clark, 166 Ill. 241; Camp v. Shaw, 52 Ill. 241, affirmed, 163 Ill. App. 144; Doane v. Hadlock, 42 Me. 72; Gardiner v. Gardiner, 65 N. H. 230; 8 L. R. A. 383; Lovell v. Quit-

man, 88 N. Y. 377; Lang's Will, 61 N. Y. S. 675; 30 N. Y. Supp. 388; Simrell's Estate, 154 Pa. St. 604; Stover v. Kendall, 1 Cold. (Tenn.) 557; Varnon v. Varnon, 67 Mo. App. 534.

<sup>6</sup>Lang's Will, 61 N. Y. S. 675; 30 N. Y. Supp. 388.

<sup>7</sup>See Sec 254.

<sup>8</sup>See Sec. 254.

<sup>9</sup>See Chap. XVI, Republication.

<sup>10</sup>See also Sec. 261; See Sec. 434 et seq.; Sec. 347, et seq.

names are not always kept distinct, but the principles controlling the two are rarely confused.<sup>11</sup>

### §301. Effect of spoliation by a stranger to the will.

The effect of a spoliation depends upon who changed the will or caused it to be changed. If a stranger to the instrument changed it, such spoliation is a nullity. The part inserted by the stranger is disregarded. The part erased by him is to be read as it was originally written, if it is possible either from the will itself or from extrinsic evidence to determine the words originally employed.<sup>12</sup>

### §302. Effect of spoliation by a beneficiary.

But where a beneficiary under a will alters a provision in such will, it avoids the provision thus altered as far as his interest is concerned. It does not, however, avoid the interests of other beneficiaries not parties to the spoliation, nor does it avoid other provisions in the same will in favor of the spoliator not altered by him.<sup>13</sup>

The foregoing proposition is amply sustained by authority where the spoliation is material. But where it is immaterial it has been held, in the absence of evidence showing additional reasons for avoiding a bequest to the spoliating beneficiary, that the will should not be affected in any way by such immaterial alteration.<sup>14</sup>

<sup>11</sup> Miles's Appeal, 68 Conn. 237; Thomas v. Thomas, 76 Minn. 237.

<sup>12</sup> Miles's Appeal, 68 Conn. 237; Camp v. Shaw, 163 Ill. 144, affirming 52 Ill. App. 241; Doane v. Hadlock, 42 Me. 72; Thomas v. Thomas, 76 Minn. 237; Holman v. Riddle, 8 O. S. 384; Widdowson's Estate, 189 Pa. St. 338; 41 Atl. 977; Grubbs v. McDonald, 91 Pa. St. 236; Means v. Moore, 3 McCord, 282.

<sup>13</sup> Smith v. Fenner, 1 Gall. (U. S.) 170; Doane v. Hadlock, 42 Me.

72; Thomas v. Thomas, 76 Minn. 237.

In Wilson's Will, 8 Wis. 171, it was laid down as a general proposition that any alteration in a will avoided the whole will. But in that case the evidence made it very probable that the beneficiary had altered it, and the observations of the court are probably confined to those facts.

<sup>14</sup>McIntire v. McIntire, 8 Mackey (D. C.) 482.

## CHAPTER XVI.

## REPUBLICATION.

## §303. Definition.

Republication is any act which gives new validity in law, as of the date of republication, to a will which has already been executed.<sup>1</sup>

## §304. History of law of republication.

At the common law, in the absence of statute, it was held that no set form was necessary to constitute republication. It was not necessary that any writing be made, nor was signature by testator necessary. The only requisites to a good republication were that testator should, by his acts and words, recognize the will as being in full force and effect.<sup>2</sup>

Thus, in cases where the testator had kept the will after revocation, and had spoken of it as his will and had referred to it as suiting him, it was held that these acts amounted to a republication.<sup>3</sup> And at the common law the mere fact of keeping the will among valuable papers might, without further acts, amount to a republication.<sup>4</sup>

<sup>1</sup> Whiting's Appeal, 67 Conn. 379.

<sup>2</sup> Alford v. Earle, 2 Vern. 209; Long v. Alfred, 3 Add. 48; Abney v. Miller, 2 Atk. 593 so in Pennsylvania before 1833; Havard v. Davis, 2 Binn. (Pa.) 406; Jones v. Hartley, 2 Whart. 103.

<sup>3</sup> Miller v. Brown, 2 Hagg, 209; Braham v. Burchell, 3 Add. 243; Brotherton v. Hellier, 6 Eng. Ecc. Cas. 33.

<sup>4</sup> Braham v. Burchell, 3 Add. 243.



The republication of a will once revoked was thus entirely a matter of parol evidence of the intention of the testator. The law was reduced to such an unfortunate condition that Parliament interfered, and in the Statute of Frauds, 29 Car. II, ch. 3, abolished these rules as to wills of lands, and required that wills of realty could be republished in no manner except by formal re-execution, or by a properly executed codicil. This statute did not make any change in the law of republication of testaments of personalty, and they could be republished by the acts, conduct and declarations of testator as before.<sup>5</sup>

### §305. Modern statutes.

In the United States statutes were passed at different times during the present century and the latter part of the last century which abolished the common law rules on the subject of republication, and substituted for them the general principles of the Statute of Frauds. Wills can not henceforth in such jurisdictions be republished except by a compliance with the statute; and the statute in most states calls for either re-execution of the will itself, with the same formalities as those necessary for the execution of a new will, or such reference to it in a properly executed codicil as will incorporate it therein.<sup>6</sup>

Under such statutes the acts of keeping the revoked will and speaking about it as a will do not effect a republication.<sup>7</sup>

### §306. Methods of republication.—Re-execution.

While under the modern statutes a will is no longer subject to republication by testator's keeping such document in his possession after revocation, speaking of it as his will and the like,<sup>8</sup> and in most states these statutes apply to both wills and

<sup>5</sup> Long v. Aldred, 3 Add. 48; Miller v. Brown, 2 Hagg, 209.

<sup>6</sup> Barker v. Bell, 46 Ala. 216; 49 Ala. 284; Stewart v. Mulholland, 88 Ky. 38; Stickney's Will, 161 N. Y. 42.

<sup>7</sup> Stickney's Will, 161 N. Y. 42;

Mitchell v. Kimbrough, 98 Tenn. 535, and see *In re Smith*, L. R. 45 Ch. D. 632.

<sup>8</sup> Battle v. Speight, 9 Ired. (N. Car.) 288; Mitchell v. Kimbrough, 98 Tenn. 535; Warner v. Warner, 37 Vt. 356.

testaments, there are still some states in which a testament of personalty may be republished by the words and acts of the testator.

The methods of republication prescribed by our modern statutes are two: re-execution and by codocil. Re-execution must be had with all the formalities necessary for original execution.<sup>9</sup> No further formalities, however, are necessary. Thus, in Pennsylvania, where execution before two witnesses is necessary, but they need not subscribe the will, it is sufficient in republication for testator to declare the instrument to be his will before the requisite number of witnesses. Thus, a testator may acknowledge his signature before the witnesses in republication instead of making a new signature, since the statute gives him that privilege in original execution. But the witnesses can not acknowledge their signatures, since the statute gives them no such permission.<sup>10</sup> They must sign the instrument once more in the presence of testator, and at his request, just as in original execution.

### §307. Methods of re-execution.—Codicil.

A properly executed codicil which is attached to a will,<sup>11</sup> or which refers to it specifically, as by its date and contents,<sup>12</sup> acts as a republication of the will as of the date of the codicil.<sup>13</sup>

There is one very obvious exception to the doctrine that a valid codicil republishes the will of which it is a part. Where holographic wills are recognized, a holographic un-

<sup>9</sup> *Jackson v. Holloway*, 7 Johns. (N. Y.) 394; *Havard v. Davis*, 2 Binn. (Pa.) 406; *Jones v. Hartley*, 2 Whart. (Pa.) 103; *Neff's Appeal*, 48 Pa. St. 509.

<sup>10</sup> *O'Neill v. Owen*, 25 Conn. L. J. 376; 9 Conn. L. T. 297.

<sup>11</sup> *Barnes v. Crowe*, 1 Ves. Jr. 485; *Shaw v. Camp*, 163 Ill. 144; *Hobart v. Hobart*, 154 Ill. 610.

<sup>12</sup> *Popẽ v. Pope*, 95 Ga. 87; *Hobart v. Hobart*, 154 Ill. 610; *Har-*

*vey v. Chouteau*, 14 Mo. 587; *Barney v. Hayes*, 11 Mont. 571; *Gass v. Gass*, 3 Humph. (Tenn.) 278.

<sup>13</sup> *Shaw v. Camp*, 163 Ill. 144; *Pope v. Pope*, 95 Ga. 87; *Hawke v. Euyart*, 30 Neb. 149; *Gilmor's Estate*, 154 Pa. St. 523; *Baker's Appeal*, 107 Pa. St. 381; *Skinner v. American Bible Society*, 92 Wis. 209; *Brown v. Clark*, 77 N. Y. 369; *Vogel v. Le Ritter*, 139 N. Y. 223.

attested codicil does not republish a previously executed will not in the handwriting of testator.<sup>14</sup>

An improperly executed codicil has not, of course, the effect of republishing a will;<sup>15</sup> and where the codicil refers to a will already revoked in such a manner as to show that testator does not intend to revive this will, there is not republication.<sup>16</sup>

Thus, a reference to a revoked codicil by inserting in a subsequent codicil the statement that "my two sisters named in my codicil of — are both dead" did not revive the codicil referred to.<sup>17</sup>

In some jurisdictions, by statute, a codicil does not revive a will once revoked unless such intention shall expressly appear on the face of the codicil, or unless the disposition of the estate in such codicil is inconsistent with any other intent than that of republishing the will.<sup>18</sup>

### §308. General effect of republication.

The effect of republication of a will is to make it in legal effect a valid will as executed at the time of such republication, and speaking as of such time.<sup>19</sup> But while the execution of a codicil republishes the original will, it does not prevent the ademption of specific legacies given therein, nor does it make valid such as have been adeemed.<sup>20</sup> But where a general legacy was adeemed by payment in whole or in part, it was held that such legacy was revived by a subsequent will giving a legacy of the same amount to the same legatee,<sup>21</sup> or by a codicil republishing the will.<sup>22</sup>

<sup>14</sup> Sharp v. Wallace, 83 Ky. 584.

<sup>15</sup> Vestry of St. John's Parish v. Bostwick, 8 App. D. C. 452; Love v. Johnston, 12 Ired. L. (N. Car.) 355; Dunlap v. Dunlap, 4 De Saus (S. Car.) 305.

<sup>16</sup> *In re* Dennis (1891) Prob. 326.

<sup>17</sup> *In re* Dennis (1891), Prob. 326

<sup>18</sup> Madonnell v. Purcell, 23 Can. Sup. 101.

<sup>19</sup> Whiting's Appeal, 67 Conn. 379; Pope v. Pope, 95 Ga. 87; Bar-

ney v. Hayes, 11 Mont. 571; Hawke v. Euyart, 30 Neb. 149; 27 Am. St. Rep. 391; Gilmor's Estate, 154 Pa. St. 523.

<sup>20</sup> Tanton v. Keller, 167 Ill. 129, aff. 61 Ill. App. 625, citing Payne v. Parsons, 14 Pick. 318; Richards v. Humphreys, 15 Pick. 133; Langdon v. Astor, 16 N. Y. 57; Hawze v. Mallet, 4 Jones Eq. 194.

<sup>21</sup> Jacques v. Swasey, 153 Mass. 596; 12 L. R. A. 566.

<sup>22</sup> Bird's Estate, 132 Pa. St. 164.

**§309. Application of the doctrine of republication.—After acquired realty.**

At common law the doctrine of republication was one of great importance. We have already seen that at common law a testator could not, by will, devise after-acquired realty no matter how clear his intention might be.<sup>23</sup> Republication made the will in legal effect as of the date of the republication, and not of the date of the will. Thus, if the will attempted to devise land which the testator did not own at the date of the execution of the will, but which he had acquired afterward, and before republication, republication would make the will good to pass the title to such land.<sup>24</sup>

This application of the doctrine of republication has lost most of its importance since statutes have been passed allowing a testator to devise after-acquired realty by will, if his intention so to do is manifest.<sup>25</sup>

**§310. Revivor of prior revoked will.**

The doctrine of republication is still of great practical importance when a will once properly executed has been revoked and it is sought to show that it has been again put in force by republication.

Where a will is revoked by the execution of a later inconsistent will, which contains no clause of express revocation, we have seen that, by the weight of modern authority, the revocation of the second will leaves the first in full force and effect without any republication.<sup>26</sup>

The reason underlying this rule is that the subsequent inconsistent will, since it does not contain a clause of express revocation, does not work a revocation at all until, by the death of testator, it takes effect. Up to that time its destruction prevents it from ever taking effect, either as a disposition of property or negatively by way of revocation.

<sup>23</sup> See Sec. 142.

<sup>25</sup> See Sec. 142.

<sup>24</sup> *In re Champion* (C. A.) (1893), 1 Ch. 101; *Reynolds v. Shirley*, 7 Ohio, 2d part, 39.

<sup>26</sup> *Pickens v. Davis*, 134 Mass. 252; *Cheever v. North*, 106 Mich. 390; see Secs. 270-274.

But where the will was revoked in any other manner, as by some act manifest on the face of the instrument, such as tearing, destroying and the like, or by a change of circumstances, or by the execution of a later will containing a clause of express revocation, it must, under most modern statutes, be republished as provided for in the statute.<sup>27</sup>

### §311. Re-execution cures a defectively executed will.

Republication is also still of practical importance when the will sought to be revived by republication is defectively executed, or was executed when testator had not capacity in law to make a will. In such a case if the will is republished, as required by statute, it is valid, no matter what defects may have originally existed in its execution.<sup>28</sup>

Improperly executed codicils annexed to a will are republished by a subsequent codicil properly executed, which refers to the whole will, including the codicils.<sup>29</sup> But where the second codicil covers the same ground as the first codicil, and is inconsistent therewith, it is held to be a substitute for the first and not a republication;<sup>30</sup> and the omission of all reference to a pre-existing codicil may, in connection with other facts and circumstances, show an intention not to republish such codicil.<sup>31</sup> So, where the original will was executed when testator did not possess testamentary capacity,<sup>32</sup> or was constrained to execute the will by undue influence,<sup>33</sup> subse-

<sup>27</sup> *Chilcott's Estate* (1897) P. 223; 66 L. J. P. 108; *Brown v. Clark*; 77 N. Y. 369; *Kurtz v. Saylor*, 20 Pa. St. 205.

<sup>28</sup> *Burge v. Hamilton*, 72 Ga. 568; *In re Murfield*, 74 Io. 479; *Harvey v. Chouteau*, 14 Mo. 587; *Barney v. Hays*, 11 Mont. 571; *McCurdy v. Neal*, 42 N. J. Eq. 333; *Stover v. Kendall*, 1 Coldw. (Tenn.), 557; *Skinner v. American Bible Society*, 92 Wis. 209.

<sup>29</sup> *Chilcott's Estate* (1897) P.

223; 66 L. J. P. 108 *Shaw v. Camp*, 163 Ill. 144; 36 L. R. A. 112, affirming 52 Ill. App. 241; *Walton's Estate*, 194 Pa. St. 528.

<sup>30</sup> *Chichester v. Quatrefages* (1895) P. 186.

<sup>31</sup> *McLeod v. McNab* (P. C.) (1891) A. C. 471.

<sup>32</sup> *Brown v. Riggan*, 94 Ill. 560; *Gass v. Gass*, 3 Humph. (Tenn.) 278.

<sup>33</sup> *Campbell v. Barrera* (Tex. Civ. App.) 32 S. W. 724.

quent republication, when testator is free from these disabilities, will make the will valid. So, where a will has been altered after execution a subsequent republication will give effect to the will including these alterations.<sup>34</sup>

Where the prior will was intended to incorporate an extrinsic instrument, and was so drawn as to fail in this attempt by reason of a lack of some element necessary, there is no doubt that a subsequent codicil may so refer to the document as to incorporate it. But if the codicil and will taken together do not so refer to the extrinsic document as to incorporate it, the fact that the codicil republishes the will does not make valid the original invalid attempt to incorporate.<sup>35</sup>

Thus, where the will spoke of the funds to be used in creating a trust as those which the trustees would find noted by the testator, and this noting consisted in writing out a list of the funds to be applied in trust after the will was executed, it was held that a subsequent codicil confirming the will did not effect an incorporation of this document in the will, since the will did not refer to it as in existence at the date that the will was made, and the codicil did not attempt to incorporate it.<sup>36</sup>

<sup>34</sup>Goods of Heath (1892) P. 253; 66; 6 Rep. 582; Goods of Reid, 38 L. Shaw v. Camp, 163 Ill. 144, affirm- J. P. 1.  
ing 52 Ill. App. 241.

<sup>36</sup>Durham v. Northern (1895),

<sup>35</sup>Durham v. Northern (1895) P. Prob. 66.

## CHAPTER XVII.

## PROBATE AND CONTEST.

## §312. History and general nature.

At common law there was nothing corresponding to probate in case of a will devising real property. If testator died leaving a valid will, it went into force and effect at once without any further formalities. If any question arose as to the validity of the will as a muniment of title to the realty devised it was proved in the ejectment or partition suit, whereby the title to the real estate was being tested, just as a deed would be proved, allowing for the difference in the nature of the two instruments and the formalities of execution.<sup>1</sup>

At ecclesiastical law testaments bequeathing personalty were required to be probated after the death of testator as a prerequisite to their taking effect in law. There were two kinds of probate at the ecclesiastical law: probate "in the common form" and probate "in the solemn form," or "in the form of law," or "*per testes*." Probate in the common form was an *ex parte* proceeding without notice to the next of kin. Probate in the solemn form was a proceeding upon citation of all persons interested, and upon full proof by witnesses for and against the will.<sup>2</sup>

<sup>1</sup> Kirk v. Bowling, 20 Neb. 260; Floyd v. Herring, 64 N. Car. 409.

<sup>2</sup> "At common law there were two modes of proving a will: The sol-

emn form, in which all the parties interested were cited to appear at the time of probate, and in which the order admitting the will to pro-

In tracing the origin of their probate jurisdiction, many of the American courts have discussed in more or less detail the history of the English law.<sup>3</sup>

In England the distinction between the probate of wills and of testaments was expressly abolished by statute in 1857, and since that date both must be probated.<sup>4</sup>

In the United States the distinction between wills and testaments, as to the necessity of probating each, was recognized by a few states in earlier cases,<sup>5</sup> and is persisted in in some jurisdictions still.<sup>6</sup>

In New York probate is "presumptive only" as to wills devising realty,<sup>7</sup> but in practically all the American states

bate was conclusive upon all parties so cited unless fraud or collusion could be shown; and the common form, in which the will was proved and admitted to probate *ex parte*, without citation to any one, and in which the probate could be called in question by interested parties, and the executor required to repropound the will *de novo* by original proof in the same manner as if no probate thereof had been had. Both of these modes have been adopted in several of the states by statute, but in this state the common form is the only one which has been adopted. *Hubbard v. Hubbard*, 7 Oreg. 42."

*Malone v. Cornelius*, 34 Oreg. 192; 55 P. 536; *Luper v. Werts*, 19 Oreg. 122.

<sup>3</sup> *Tompkins v. Tompkins*, 1 Story (U. S.) 547; *Knox v. Paull*, 95 Ala. 505; *Luther v. Luther*, 122 Ill. 558; *Mears v. Mears*, 15 O. S. 90; *Domestic Missionary Society v. Eells*, 68 Vt. 497; *Keene v. Corse*, 80 Md. 20.

<sup>4</sup> Stats. 20 and 21 Vict. C. 77.

<sup>5</sup> *Waters v. Waters*, 35 Md. 531; *Bell v. Newman*, 5 S. & R. (Pa.) 78; *Brown v. Gibson*, 1 Nott & McC. (S. Car.) 326.

<sup>6</sup> *Webb v. Janney*, 9 App. D. C. 41; *Perry v. Sweeny*, 11 App. D. C. 404, disapproving *Barbour v. Moore*, 4 App. D. C. 535, citing *Tompkins v. Tompkins*, 1 Story, 542; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Den, Thomas v. Ayres*, 13 N. J. L. 153; *Smith v. Bonsall*, 5 Rawle 80; *Rowland v. Evans*, 6 Pa. St. 435; *Crosland v. Murdock*, 4 McCord Law. 217; *Parker v. Parker*, 11 Cush. 519; *Ballow v. Hudson*, 13 Gratt. 672; *Hume v. Burton*, 1 Ridgw. P. C. 277; *Montgomery v. Clark*, 2 Atk. 379; *Massey v. Massey*, 4 Harr. & J. 141; *Warford v. Colvin*, 14 Md. 532; *Johns v. Hodges*, 62 Md. 525; *Darby v. Mayer*, 10 Wheat. (U. S.) 465; *Robertson v. Pickrell*, 109 U. S. 608; *Campbell v. Porter*, 162 U. S. 478; *White v. Keller*, 68 Fed. 796.

<sup>7</sup> *Corley v. McElmeel*, 149 N. Y. 228; so in Florida, *Belton v. Summer*, 31 Fla. 139.



today wills and testaments alike must be probated as a prerequisite to their validity.<sup>8</sup>

Probate may be defined as the solemn judicial act of an officer authorized by law adjudging and decreeing that the instruments offered to be proved or recorded as the last will and testament of deceased is such last will and testament.<sup>9</sup> The word "probate" is often so used as to include the offering of proof before such authorized officer; and even the entire judicial proceeding which results in the admission of the will to probate.

The different states of the Union have statutes upon the subject of Probate, differing widely in form, and yet in most cases strikingly alike in all essentials.

There is always an opportunity given for probating a will in an *ex parte* proceeding before the court having such jurisdiction in what is practically the old ecclesiastical "probate in common form."

In this proceeding only those witnesses offered by the parties interested in having the will admitted to probate may testify. No chance is given to those opposing the admission of the will to probate to adduce any evidence to support the issues on their side, though they may cross examine the witnesses offered by those who are interested in having the will admitted to probate.<sup>10</sup>

Probate in the common form is usually said to be an *ex parte* proceeding. This is a term which is used by the courts in two distinct senses. In some states it means only that the parties opposed to the admission of the will to probate have no right to introduce evidence opposed to that introduced by

<sup>8</sup> Knox v. Paull, 95 Ala. 505; Cummins v. Cummins, 1 Marv. (Del.) 423; Luther v. Luther, 122 Ill. 558; Kosteletzky v. Scherhart, 99 Io. 120; Meyers v. Smith, 50 Kan. 1; Allen v. Froman, 96 Ky. 313; Babcock v. Collins, 60 Minn. 73; Osborne v. Leak, 89 N. Car. 433; Swazey v. Blackman, 8 Ohio 5; Woodbridge v. Banning, 14 O. S.

328; Wall v. Wall, 123 Pa. St. 545; Wilson v. Gaston, 92 Pa. St. 207; Wright v. Smithson, 7 Lea (Tenn.) 12; Domestic Missionary Society v. Eells, 68 Vt. 497; O'Dell v. Rogers, 44 Wis. 136.

<sup>9</sup> Adapted from Bouvier's Law Dictionary.

<sup>10</sup> See Sec. 320.

those who are interested in having the will admitted to probate, though such adverse parties are entitled to notice of the application for admission of the will to probate.<sup>11</sup> In other states it means that the will may be offered for probate without any notice to the parties opposed to its admission.<sup>12</sup>

Then there is another proceeding corresponding to the ecclesiastical "probate *per testes*," in which those who are interested in resisting probate may introduce evidence to support the issues on their side to be established, and may submit the question of the validity of the will to a proper tribunal upon a full and ample hearing, after probate in common form. This second proceeding is generally known as Contest. It is always regarded as a direct attack upon the order admitting the will to probate.<sup>13</sup>

It is brought about in the different states in different ways. In some, contest is had by appealing from the order of probate to the court which hears the contest.<sup>14</sup> In others it is had by a new and independent suit to contest the will, which is, however, always said to be, while not an appeal,<sup>15</sup> still in the nature of an appeal from the order admitting the will to probate, and hence a direct attack upon such order.<sup>16</sup>

In other jurisdictions this new suit to contest the will assumes the form of a suit to revoke the order admitting the will to probate.<sup>17</sup> Again, in a remaining class of jurisdictions probate in common form is the method of commencing every probate, but by the filing of a formal denial of the validity of the will, and a notice of an intention to resist its admission to probate, the probate in common form is changed into probate in solemn form.

In a text-book of this size and scope no attempt can be

<sup>11</sup> See Sec. 319.

<sup>12</sup> See Sec. 319.

<sup>13</sup> Mears v. Mears, 15 O. S. 90; Haynes v. Haynes, 33 O. S. 598.

<sup>14</sup> Corly v. Wayne Co. Prob. Judge, 96 Mich. 11; 55 N. W. 386.

<sup>15</sup> Bradford v. Andrews, 20 O. S. 208.

<sup>16</sup> Oakley v. Taylor, 64 Fed. 245;

Haynes v. Haynes, 33 O. S. 598; Jones v. Dove, 6 Ore. 188; Brown v. Brown, 7 Or. 285; Clark v. Ellis, 9 Or. 128; Chrisman v. Chrisman, 16 Or. 127; Potter v. Jones, 20 Or. 239; Rothrock v. Rothrock, 22 Or. 551.

<sup>17</sup> Larson's Estate, 71 Minn. 250.

made to collect the statutes of the different jurisdictions and to cite the cases decided thereunder; nor would such an attempt be profitable in comparison with the value of the material that would necessarily be excluded thereby. Further, the statutes are changed in outward form from time to time. What is sought in this chapter is to discuss the general principles which underlie these diverse statutes, principles which are substantially uniform, partly from their common descent from the English law and partly from the necessities of the case. While these proceedings are purely statutory, the legislature can not, under guise of changing the procedure, alter the law so as to prevent contest of wills executed by testators who have died before the change of the law, since property rights are fixed at testator's death.<sup>18</sup>

### §313. Necessity of probate.

Under the common law probate was not necessary for a will passing real property, though it was for a testament passing personalty.<sup>19</sup> By modern statutes this distinction has been abolished in almost every jurisdiction.<sup>20</sup>

In the District of Columbia the probate of a will devising lands was formerly of no effect whatever, but by subsequent statute it was made *prima facie* evidence of the validity of such will.<sup>21</sup>

Under modern statutes a devisee can not acquire any title to the realty devised to him until the will whereby it is devised has been probated.<sup>22</sup>

<sup>18</sup> Jones v. Robinson, 17 O. S. 423; Luther v. Luther, 122 Ill. 558; Seery v. Murray, — Io. —; 77 N. W. 1058; Meyers v. Smith, 50 Kan. 1; Miller v. Swan, 91 Ky. 36; Pratt v. Hargreaves, 76 Miss. 955; 71 Am. St. Rep. 551; Fotherree v. Lawrence, 30 Miss. 416; London v. R. R. Co., 88 N. Car. 584; Swazey v. Blackman, 8 Ohio, 5; Wilson v. Tappan, 6 Ohio 172; Douglass v. Miller (Common Pleas), 3 Ohio N. P. 220; Roelke v. Roelke, 103 Wis. 204.

<sup>19</sup> See Sec. 312 and cases there cited.

<sup>20</sup> See cases cited in note following the next note.

<sup>21</sup> Robertson v. Pickrell, 109 U. S. 608; Barbour v. Moore, 4 App. D. C. 535.

<sup>22</sup> McClaskey v. Barr, 54 Fed. 781; Trawick v. Davis, 85 Ala. 342; Knox v. Paull, 95 Ala. 505; Cummins v. Cummins, 1 Marv. (Del.)

A will which has not been probated can not be used in evidence to support the title of the devisee;<sup>23</sup> and when a will was probated but the order of confirmation was vacated by the order of the court, such court having power to make this order, such will was not admissible to support devisee's title in an ejectment suit.<sup>24</sup>

Attaching an instrument, in effect a will, to a pleading as an exhibit does not avoid the necessity for the adversary party to show that such instrument was probated.<sup>25</sup>

Probate has always been regarded as indispensable to allow a testament passing personal property to take effect.<sup>26</sup> So essential is probate to the validity of a will and testament that some methods of approaching the subject of wills treat the topics of capacity, execution, the inherent elements and the like as merely of importance because they are conditions precedent to probate; and regard probate as the essentially important step in the Law of Wills.

This is merely an example of the temptation, always present even under modern procedure, of classifying substantive law upon a basis of procedure and treating substantive law as of importance simply because upon certain conditions of law and fact, the courts take certain judicial action. This is, of course, an inversion of the true basis of modern law. Judicial action follows substantive law as dependent upon it and secondary to it. If the cause is correctly presented and decided, an order admitting the will to probate will always follow, if the facts show a will valid by the rules of substantive law. In actual practice, however, blunders are occasionally made by the attorney in presenting a cause, and error is sometimes made by the court in deciding the case. The actual working of the system of law, as far as wills are concerned, is with few exceptions, that any dispositive paper actually admitted to probate is good as a will until set aside by direct attack in the proper manner, no matter what defects there may

<sup>23</sup> *Inge v. Johnston*, 110 Ala. 650.

<sup>25</sup> *Trawick v. Davis*, 85 Ala. 342.

<sup>24</sup> *Snuffer v. Howerton*, 124 Mo.

<sup>26</sup> See Sec. 312.

have been in the execution of the will, the capacity of the testator and the like; while a perfect will is of no validity if refused probate, until the error is corrected in the manner prescribed by the rules of procedure. From a practical standpoint, then, probate and contest are the critical periods for a will.

### §314. What must be probated.

The probate acts are so general in their terms as to require every instrument of a testamentary character to be probated as a pre-requisite to its validity. When only testaments of personalty were required to be probated, a will which disposed of both realty and personalty had to be probated.<sup>27</sup>

In some special cases questions have arisen as to the necessity of probating particular instruments. Thus, where an extrinsic document is so referred to in the will as to be a part thereof, it is held that such document need not be probated.<sup>28</sup>

On the same principle it is held that where a codicil refers to a will, and makes specific changes therein, the probate of the codicil operates as a probate of the unrevoked parts of the will, and no further proof is necessary.<sup>29</sup>

Where the codicil refers clearly to the will, the will need not be proved if the codicil is.<sup>30</sup> Ordinarily a codicil is so connected with the will to which it refers, that it can not be probated apart from such will.<sup>31</sup>

While it may be possible in some cases to probate a codicil without the will to which it refers, it is only where the inten-

<sup>27</sup> *Rumph v. Hiatt*, 35 S. Car. 444.

<sup>28</sup> *Balme's Estate* (1897), P. 261; 66 L. J. P. 161 (where the document referred to was a lengthy library catalogue); *Wiley's Estate* (Cal.), 56 Pac. 550; 60 Pac. 471; *Tuttle v. Berryman*, 94 Ky. 553.

<sup>29</sup> *Hobart v. Hobart*, 154 Ill. 610.

<sup>30</sup> *Fry v. Morrison*, 159 Ill. 244.

<sup>31</sup> *In re Harris*, 2 Prob. & D. 83; *In re Crawford*, 15 Prob. Div. 212; *De La Saussaye, Goods of*, L. R. 3 P. & D. 42; *In re Honeywood*, 2 Prob. & D. 251; *Lord Howden's Case*, 43 L. J. P. 26; *Fry v. Morrison*, 159 Ill. 244; *Pepper's Estate*, 148 Pa. St. 5; *Hood's Estate*, 21 Pa. St. 106.

tion of the testator that the codicil is to operate independent of the will is manifest.<sup>32</sup> If a codicil to a will can not be found the original will may nevertheless be probated without it.<sup>33</sup>

In some jurisdictions where a will is not signed at the end, the part above the signature will be regarded as a valid will and admitted to probate as such.<sup>34</sup> While this case is open to dispute concerning the validity of the will as a whole, there is no doubt that the addition of a writing below the signature after execution does not invalidate the will, but such writing should not be admitted to probate.<sup>35</sup> But a will, in form a joint will, can not be probated as the will of both parties thereto during the lifetime of either of them, but it may be offered as the separate will of each.<sup>36</sup>

A will which is executed in due form, and is partly valid and partly invalid, must be admitted to probate.<sup>37</sup> It was said in an obiter that a will appointing a testamentary guardian only need not be offered for probate.<sup>38</sup>

Where testator executes separate wills, one referring to property in England, and the other to property in a foreign country, and appoints separate executors for each of such wills, the English courts will not admit to probate the will referring exclusively to property in a foreign country, even though at his death testator was domiciled in England.<sup>39</sup> But it was required to show by affidavit that the personalty disposed of by each will was in fact, at the time of testator's death, within the country to which the will made reference,<sup>40</sup> and where a will, which passed property in one jurisdiction, con-

<sup>32</sup> *Youse v. Forman*, 5 Bush (Ky.) 337; *Pepper's Estate*, 148 Pa. St. 5.

<sup>33</sup> *Sternberg's Estate*, 94 Io. 305;

<sup>34</sup> *In re Gee*, 78 Law T. Rep. 843.

<sup>35</sup> *In re Gilbert's Estate*, 78 Law T. Rep. 762. See Sec. 186.

<sup>36</sup> *Davis's Will*, 120 N. Car. 9; 38 L. R. A. 289; *Bank v. Bliss*, 67 Conn. 317.

<sup>37</sup> *McClary v. Stull*, 44 Neb. 175;

*Crane's Will*, 42 N. Y. Supp. 904.

<sup>38</sup> *Slach v. Perrine* (D. C. App.), 23 Wash. L. Rep. 853.

<sup>39</sup> *Goods of Murray* (1896), Prob. 65; *In re Fraser* (1891), Prob. 285; *Tamplin, Goods of*, (1894), Prob. 39; *In re Seaman* (1891), Prob. 253; *In re De La Rue*, L. R. 15 P. D. 185; *In re Calloway*, L. R. 15 P. D. 147.

<sup>40</sup> *In re Seaman*, 1891 (P.), 253.

firmed an earlier will which passed property in another jurisdiction, it was held that both wills should be probated together.<sup>41</sup> In some jurisdictions a will may be corrected at probate for mistake, and probated as corrected.<sup>42</sup>

### §315. The court of probate powers.

In the different states, tribunals are generally established having jurisdiction in matters of probate in common form, or of probate generally, known variously as the orphan's courts, courts of surrogate, probate courts and the like,<sup>43</sup> and in some states probate power is left to the clerk of the specified court.<sup>44</sup>

Probate jurisdiction is generally exclusively vested in these courts. When this is the case, equity can not interfere in matters of probate.<sup>45</sup> Nor can equity in a suit brought against one who had altered a deed, and suppressed a will, decree probate of such will as incidental relief; <sup>46</sup> especially where full relief can be had in probate tribunals.<sup>47</sup>

A court of equity can not enjoin the custodian of an alleged invalid will from offering it for probate,<sup>48</sup> and can not order such will to be cancelled.<sup>49</sup> Further, the federal court

<sup>41</sup> *In re Lockhart*, 1 Rep. 481; 69 Law T. 21; 57 J. P. 313.

<sup>42</sup> *In re Boehm* (1891) P. 247.

<sup>43</sup> *Foley's Estate*, — Nev. —; 51 Pac. 834; *Merriam's Will*, 136 N. Y. 58; *Walker's Will*, 136 N. Y. 20; *Walton v. Williams* (Okl.), 49 Pac. 1022; *Tozer v. Jackson*, 164 Pa. St. 373.

<sup>44</sup> *Davie v. Davie*, 1892, — Ark. —; 18 S. W. 935; *De las Fuentes v. McDonald*, 85 Tex. 132; *Blanchard v. Wilbur*, 153 Ind. 387; 55 N. E. 99.

<sup>45</sup> *Cilley v. Patten*, 62 Fed. 498; *Oakley v. Taylor*, 64 Fed. 245; *Ewell v. Tidwell*, 20 Ark. 136; *Israel v. Wolf*, 100 Ga. 339; *Cousens v. Advent Church of Biddeford*, 93 Me. 292.

<sup>46</sup> *McDaniel v. Pattison*, 98 Cal. 86.

<sup>47</sup> *Wells, Fargo & Co. v. Walsh*, 87 Wis. 67. (Thus a creditor can not compel the executor to prove a will of his non-resident testator by a suit in equity. The creditor has a complete remedy by producing an authenticated copy of the will and having it recorded in the county court.)

<sup>48</sup> *Israel v. Wolf*, 100 Ga. 339. (*Contra* in *Cobb v. Hanford*, 88 Hun, 21, where an executor named in a will was enjoined from offering it for probate on the ground that the property named in it did not belong to decedent.)

<sup>49</sup> *Israel v. Wolf*, 100 Ga. 339; *Langdon v. Blackburn*, 109 Cal. 19.

will not order a will to be cancelled when the state equity courts have no such jurisdiction.<sup>50</sup> But in a New York case an injunction was allowed against probating a will by which a pre-existing will made in pursuance of a contract upon valuable consideration was revoked.<sup>51</sup>

Where the powers of the probate tribunals are inadequate, equity will aid.<sup>52</sup> But in many jurisdictions, courts having equity powers, or courts in code states, which correspond to the courts of equity powers, may hear and determine the contest of a will which has been presented for probate, and probated in common form;<sup>53</sup> and where the state courts of equitable jurisdiction have power to hear and determine contests of wills already probated, the United States courts may, in cases where the parties are citizens of different states and the amount involved is sufficient, take jurisdiction of such contests.<sup>54</sup> In any case, a court not especially authorized by law can not admit a will to probate, as incidental to its general judicial functions.<sup>55</sup>

A will disposing of property should be offered for original probate in the court within whose jurisdiction testator was domiciled at the time of his death, irrespective of where he might have died.<sup>56</sup>

In case of a married woman this is *prima facie* the jurisdiction in which her surviving husband is domiciled; so that her will must be offered for probate there, irrespective of where she may have died.<sup>57</sup>

Under most systems of law a will may be offered for probate where the property of decedent is situated, without reference to his domicile. But this is an ancillary probate only,

<sup>50</sup> Cilley v. Patten, 62 Fed. 498.

<sup>51</sup> Cobb v. Hanford, 88 Hun, 21.

<sup>52</sup> Rote v. Stratton, 2 Ohio N. P. 27; 3 Ohio Dec. 156.

<sup>53</sup> Wright v. Jewell, 9 Manitoba, 607; see Sec. 312.

<sup>54</sup> Gaines v. Fuentes, 92 U. S. 10; Ellis v. Davis, 109 U. S. 485; Broderick's Will, 21 Wall. 503; Richardson v. Green, 61 Fed. 423, distinguishing *In re Cilley*, 58 Fed. 977. In *Richardson v. Green*, *su-*

*pra*, the court sustained a suit to contest a will instituted before the will was probated.

<sup>55</sup> Campbell v. Porter, 162 U. S. 478.

<sup>56</sup> Miller v. Swan, 91 Ky. 36; Manuel v. Manuel, 13 O. S. 458; Converse v. Starr, 23 O. S. 491; Walton v. Hall, 66 Vt. 455.

<sup>57</sup> Wicke's Estate (Cal.) (1900), 60 Pac. 867.



and affects the property situated in such jurisdiction alone.<sup>58</sup> The court within whose jurisdiction property is situated is not precluded from admitting the will to probate by the action of the court of testator's domicile in admitting the will to probate there.<sup>59</sup>

In some cases courts have refused to admit to probate the will of testator domiciled in their jurisdiction where it appears that no property rights can be controlled thereby. Where the only property disposed of by will is realty situated in another jurisdiction,<sup>60</sup> or is personal property situated in a foreign country, the courts of the jurisdiction where testator was domiciled at the time of his death, have refused to entertain probate jurisdiction thereof.<sup>61</sup>

A provision in a will dispensing with bond and with all proceedings in the court having probate powers, after inventory and appraisement, does not oust such court of its jurisdiction.<sup>62</sup>

A court of probate powers may, if due notice is given, admit a will to probate in any part of the county.<sup>63</sup>

### §316. Effect of delay in probate.

In many states some penalty is imposed for delay in probate. Where a beneficiary withholds a will from probate beyond a specified time, it is generally provided that he forfeits his rights thereunder.<sup>64</sup> If he was entitled by the law

<sup>58</sup> *Robertson v. Pickrell*, 109 U. S. 608; *Gordon's Will*, 50 N. J. Eq. 397; *Fisher's Will*, 49 N. J. Eq. 517; *Blymeyer's Will*, *Goebel* (Ohio), 14; *Pepper's Estate*, 148 Pa. St. 5; *Tarbell v. Walton*, 71 Vt. 406; 45 Atl. 748; *Walton v. Hall*, 66 Vt. 455; *Frame v. Thormann*, 102 Wis. 653. Doubt in Kansas, *Meyers v. Smith*, 50 Kan. 1, on same theory as administration case of *Perry v. Railroad*, 29 Kan. 420.

<sup>59</sup> *Frame v. Thormann*, 102 Wis. 653.

<sup>60</sup> *In re Earhart*, 50 La. Ann. 524; 23 So. 476.

<sup>61</sup> *Goods of Tamplin* (1894), Prob. 39; 6 Rep. 533.

<sup>62</sup> *Prather v. McClelland*, 76 Tex. 574.

<sup>63</sup> *La Grange v. Ward*, 11 Ohio, 257. (At any rate such order is valid against collateral attack.)

<sup>64</sup> *Foote v. Foote*, 61 Mich. 181. This does not apply to foreign wills. *Carpenter v. Denoon*, 29 O. S. 379, but though the rights of the devisee may be thus forfeited, the will may be probated nevertheless. *Blymeyer's Will*, *Goebel* (Ohio), 14.

or the will to administer the estate of testator, he is held to renounce his rights by such delay, and his ignorance of the law is no excuse.<sup>65</sup>

As an additional means of coercing the custodian of a will to produce it, power is usually given to the court of probate to enforce its production by contempt proceedings, and it is in many states made a crime to conceal, suppress or destroy a will.

Long delay in the production of a will does not in most states operate to prevent its admission to probate.<sup>66</sup> Still it is a circumstance of suspicion and may justify the court of probate jurisdiction in revoking an order of probate made on formal proof, and in requiring full proof of the validity of the will in a contest.<sup>67</sup> But in a recent Kentucky case it was held that an application for admission of a will to probate was an action in the sense of the statutes of limitation of actions, since the word action included a proceeding in any court. The right to offer a will for probate was not therefore limited by the time for granting original administration, but was limited by the statute fixing ten years as the period of limitation for an action for relief not otherwise limited.<sup>68</sup>

### §317. Who may propound a will for probate.

Under early procedure it was often said that the executor was the proper person to propound the will for admission to probate,<sup>69</sup> and where the executor is erroneously named and described in the will, he may have it probated upon showing his correct name and description.<sup>70</sup>

Under modern statutes any person interested in having the will admitted to probate may propound it. The expres-

<sup>65</sup> Keith v. Proctor, 114 Ala. 676;  
21 So. 502.

<sup>66</sup> Waters v. Stickney, 12 Allen  
(Mass.) 1; Besancon v. Brownson,  
39 Mich. 388; Vance v. Upson, 64  
Tex. 266.

<sup>67</sup> Gordon v. Old, 52 N. J. Eq.  
317.

<sup>68</sup> Allen v. Froman, 96 Ky. 313.

<sup>69</sup> Baskett's Estate, 78 Law T.  
Rep. 843; Redmond v. Collins, 4  
Dev. L. (N. Car.) 430; Ford v.  
Ford, 7 Hump. (Tenn.) 92.

<sup>70</sup> Baskett's Estate, 78 Law T.  
Rep. 843.

sion 'any person interested' means any person having a beneficial interest under the will, such as a devisee or legatee.<sup>71</sup> And where such a party appears in support of the will the executor who propounded it can not dismiss his application for probate.<sup>72</sup> It is generally, under these statutes, held that one who is named executor under the will may propound it for probate.<sup>73</sup> One who is a creditor of testator, and of a legatee, has been held to be such a "party interested" as to have a right to propound the will. "Whoever has a right to offer a will in evidence, or to make title under it, may insist on having it proved."<sup>74</sup>

Where the will attempts to pass title to property, or to give control thereof to any person, such person is regarded as a 'party interested in having the will admitted to probate,' though subsequent proceedings may prevent such gift from taking effect. Thus, where testator attempted to establish a charitable home, which was to be in charge of a certain church, and to bequeath property to such home, it was held that the church might propound the will for admission to probate.<sup>75</sup>

An application which fails to show that the parties propounding the will are beneficially interested in its admission to probate is insufficient.<sup>76</sup>

### §318. Procedure at probate.—Petition.

In the absence of a statute expressly requiring it, a written petition for admitting a will to probate is not necessary to give the court jurisdiction over the probate of the will.<sup>77</sup> In

<sup>71</sup> *Eliot v. Eliot*, 10 Allen (Mass.) 357; *Mower v. Verplanke*, 105 Mich. 398; *Taylor v. Bennett*, 1 Ohio C. C. 95; *Elwell v. Convention*, 76 Tex. 514; *Schultz v. Schultz*, 10 Gratt. (Va.) 358

<sup>72</sup> *Lasak's Will*, 131 N. Y. 624.

<sup>73</sup> *Kennard v. Kennard*, 63 N. H. 303.

<sup>74</sup> *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33; *Wells, Fargo Co. v. Walsh*, 87 Wis. 67.

<sup>75</sup> *Vestry of St. John's Parish v. Bostwick*, 8 App. D. C. 452.

<sup>76</sup> *Doane v. Mercantile Trust Company*, 160 N. Y. 494.

<sup>77</sup> *Deslonde v. Darrington*, 29 Ala. 92; *St. Leger's Appeal*, 34 Conn. 434; *In re Storey*, 120 Ill. 244; *Seery v. Murray*, 107 Io. 384; 77 N. W. 1058.

some jurisdictions, however, such written petition is required by statute.<sup>78</sup>

### §319. Notice.

Upon the filing of the petition for admitting the will to probate, or upon oral application made therefor, it is usually required that a proper notice of the pendency of the application be served, either by sending a copy of such notice to the persons interested, or by publication in a newspaper, or both.<sup>79</sup>

<sup>78</sup> *Malone v. Cornelius*, 34 Oreg. 192; 55 Pac. 536. Where not required by statute, a written application is often required by the rules of the probate court. A form in use in many Ohio courts is here given: In the matter of the last will and testament of A B, deceased. Probate court, Franklin County, State of Ohio. To the Probate court of Franklin County, State of Ohio. The undersigned ———— respectfully represents to this court that he is a ——— of A B, deceased, late of ——— Township ——— County, State of ———, and that said A. B. died on the — day of —, A. D. —; that at and immediately prior to his death he was domiciled in said — Township, — County, State of —; that he left surviving him his widow, C. D., who resides at —, and the following named persons, who are all the heirs and next of kin of said A. B., deceased, to wit: E. F., a son of said A. B., deceased, H. I. (etc.). Your petitioner further represents that said A. B., deceased, left a last will and testament, which he herewith produces, offers for probate and files with this court. Your petitioner therefore respectfully requests this court to direct the manner in which notice of the pendency

and object of this proceeding shall be given to said C. D., widow of said A. B., deceased, and to said —, next of kin (resident of the State of —), and the time at which such notice shall be given; and to fix a time for the hearing of this application; and your petitioner prays that upon said hearing said last will and testament may be admitted to probate and recorded. Sworn to before me by the aforesaid T. M., and by him subscribed in my presence this — day of —, A. D. 19—. —, Prob. Judge.

<sup>79</sup> *Curtis v. Underwood*, 101 Cal. 661; 36 Pac. 110, 397; *Bacigalupo v. Superior Ct.*, 40 Pac. 1055; 120 Cal. 421; 52 Pac. 708; *Dugan v. Northcutt*, 7 App. D. C. 351; *Larson's Estate*, 71 Minn. 250; 73 N. W. 966; *Heminway v. Reynolds*, 98 Wis. 501.

A form of the order fixing the time for hearing upon the application to admit the will to probate, and prescribing the notice to be given, is as follows: In the matter of the will of A. B., deceased. — Court, — County, —, Ohio, —, A. D. 19—. This day an instrument in writing, purporting to be the last will and testament of A. B., deceased, late of — Town-

Where notice is required, the order admitting the will to probate may be vacated upon petition of the next of kin upon whom proper notice of the pendency of the probate proceedings has not been served.<sup>80</sup>

In direct attack, an order of probate can not be sustained where the record shows that the hearing was not had on the day for which it was set, and the evidence, while showing that notice was published, does not disclose the contents of the notice or the length of time for which it was published.<sup>81</sup> So where a will was admitted to probate upon insufficient evidence, and without any notice to testator's father or brothers, his heirs, and on application to vacate order of probate the only contradiction of evidence tending to establish these facts, was an affidavit of the administrator that he believed that these heirs had received notice in time to appear and object, it was held that in the absence of any facts on which

ship, in this county, was produced in open court for probate, and the application of L. M., a — of said A. B., deceased, for the admission of said will to probate, was filed. It is now ordered that said instrument in writing be filed in this court, and that due notice thereof and of said application to admit the same to probate and record as the last will and testament of said A. B., deceased, be given to the widow and next of kin of the testator, resident of (the State of —), — days prior thereto that the application will be for hearing before this court on the — day of —, A. D. 19—, at — o'clock, — M.; and that said notice shall be in writing and shall be served on said parties personally or by leaving copies thereof at their usual place of residence.

A form of notice approved by many courts is as follows:

NOTICE.—Probate Court, — County, State of Ohio. In the mat-

ter of the last will and testament of A. B., deceased. Notice. To —. You are hereby commanded to notify —, giving at least — days' notice thereof in writing, that on the — day of — A. D. 19—, an instrument in writing, purporting to be the last will and testament of A. B., deceased, late of — Township, in said county, deceased, was produced in open court, and an application to admit the same to probate was on the same day made to said court. Said application will be for hearing before this court on the — day of —, A. D. 1900, at — o'clock, — M. Hereof fail not, but of this writ and service thereon make due return. Witness my signature, as Judge of the — Court, and the seal of said court, this — day of —, A. D. 1900. —, Probate Judge.

<sup>80</sup> *Herring v. Ricketts*, 101 Ala. 340; *In re Harlow*, 73 Hun, 433.

<sup>81</sup> *Heminway v. Reynolds*, 98 Wis. 501.

to base such belief, it was error for the court to refuse to vacate such order.<sup>82</sup>

Where the parties actually appear in the case, the question of defective publication of the notice for application for probate can not be raised.<sup>83</sup>

A contestant can not take advantage of failure to notify one of the next of kin. This omission is not prejudicial to him as "probate upon a proper application without notice to any of the parties entitled thereto would not be void but merely voidable."<sup>84</sup>

The fact that the notice was served as required by the special statute, and not as required by the statute on the subject of service in general, is no reason for attacking the probate.<sup>85</sup> Nor where notice is served upon the person intended, will a slight mistake in the name, such as "Helen Majora Hamilton," instead of "Ellen Majora Hamilton," prevent the court from obtaining jurisdiction.<sup>86</sup>

Notice to the executor does not bind non-resident heirs.<sup>87</sup> In other states the probate in common form is even more closely modelled upon the English ecclesiastical probate, and no notice whatever is required.<sup>88</sup>

<sup>82</sup> *Heminway v. Reynolds*, 98 Wis. 501.

<sup>83</sup> *Dugan v. Northcutt*, 7 App. D. C. 351.

<sup>84</sup> *Reese v. Nolan*, 99 Ala. 203; 13 So. 677; *Hall v. Hall*, 47 Ala. 290; *Otis v. Dargan*, 53 Ala. 178.

<sup>85</sup> *Hamilton's Estate*, 120 Cal. 421; 52 Pac. 708.

<sup>86</sup> *Hamilton's Estate*, 120 Cal. 421.

<sup>87</sup> *Feuchter v. Keyl*, 48 O. S. 357.

<sup>88</sup> "Under our statute no citation is necessary or required, but the probate of a will is wholly an *ex parte* proceeding. It is made by the presentation of the will to the proper county court, together with a verified petition for its admission to probate, setting forth facts neces-

sary to give the court jurisdiction, and the production of competent evidence of its validity. Whenever an instrument purporting to be the last will and testament of a deceased is presented for probate, it is the duty of the court to hear the witnesses as to its due execution, and if they show *ex parte* the instrument offered to be the will of the deceased, it must be admitted to probate and letters testamentary issued as a matter of course." *Malone v. Cornelius*, 34 Oreg. 192; 55 P. 536; *Yoe v. McCord*, 74 Ill. 33; *Capper's Will*, 85 Io. 82; 52 N. W. 6; *Bent v. Thompson*, 5 N. M. 408; 23 Pac. 234; *Laughton v. Atkins*, 1 Pick. 535; *Loring v. Steineman*, 1 Met. 204; *Marcy v. Mar-*

Where no notice is required for probate in the common form, it is error for the court to refuse to proceed to take proof, or to probate the will, until notice can be given to the parties interested.<sup>89</sup>

### §320. Examination of witnesses *ex parte*.

Where a separate proceeding is provided for by statute in order to contest the will, the proceeding in the nature of probate in common form is usually *ex parte*, in the sense that only the subscribing witnesses, and such others as those interested in having the will admitted to probate may see fit to offer, are allowed to testify, and no opportunity is given to those who are interested in opposing the probate of the will to introduce evidence.<sup>90</sup> But the adversary parties who are present may cross-examine the witnesses offered by those who are interested in having the will admitted to probate.<sup>91</sup>

cy, 6 Met. 360; *Crippen v. Dexter*, 13 Gray, 330; *Arnold v. Sabin*, 1 Cush. 525; *Bonnemort v. Gill*, 167 Mass. 338.

<sup>89</sup> *Malone v. Cornelius*, 34 Oreg. 192; 55 Pac. 536.

<sup>90</sup> *Richardson v. Green*, 61 Fed. Rep. 423; *Feuchter v. Keyl*, 48 O. S. 357; *M. E. Missionary Society v. Ely*, 56 O. S. 405; *Hathaway's Will*, 4 O. S. 383; *In re Stacey*, 6 Ohio Dec. 499; *Malone v. Cornelius*, 34 Oregon, 192; 55 Pac. 536.

Where such rule is in force the legatees are not always parties "interested in having such will admitted to probate." If their interest appears adverse to the probate of the will, they can not offer evidence. *In re Jones*, 2 Ohio N. P. 194.

<sup>91</sup> *St. Leger's Appeal*, 34 Conn. 434; *Gray v. Gray*, 60 N. H. 28.

In *Gray v. Gray*, 60 N. H. 28, it was held that on probate in common form, the appearance of the heirs and next of kin by attorney, who cross-examined the wit-

nesses offered by proponent, did not of itself waive the notice required by statute so as to amount in legal effect to probate in solemn form. The right of cross-examination was tacitly recognized rather than expressly adjudicated.

In Ohio the local practice in the Probate Courts is not uniform upon the question of the right to cross-examine witnesses at probate. In some courts the right is refused; in others it is granted. In *Jones's Estate*, 2 Ohio N. P. 190, cross-examination of witnesses at probate of ordinary wills was spoken of as a practice which had grown up, "which may not be commendable," but which was "the proper view to take of a case like this"; that is, in an application to admit a spoliated will to probate.

Under the peculiarities of Ohio practice it is almost impossible that this question should be presented for decision to a reviewing court on error. See Sec. 323.

This point is in dispute in many jurisdictions. If the local statute is specific it, of course, controls, but it rarely is, and . . the law must be reasoned out on analogy. In jurisdictions where upon contest the order of probate has no force at all, and the burden is upon proponents throughout, it must be admitted that no injustice is done by refusing the right of cross-examination at probate. But where the effect of the order of probate is to make out a *prima facie* case on contest in favor of the will,\* or where the evidence of the subscribing witnesses given at probate is admissible on contest as if it were a deposition,<sup>92</sup> it seems clear upon principle that unless the statute very clearly precludes it, cross-examination should be allowed at probate. If it is not allowed, some witness who is examined at probate may be dead, sick or beyond the jurisdiction of the court on contest. In such case, it might easily happen that the will might be established on contest by the evidence of witnesses whom contestants had no opportunity to examine, and who might have modified their testimony very materially on cross-examination.

In probate in the common form the subscribing witnesses should be called if in the jurisdiction of the court, and available.<sup>93</sup> Otherwise, if they are alive, it is usually provided that a commission issue with the will annexed to take their depositions. If the subscribing witnesses do not make out a *prima facie* case in favor of the will, the parties interested in having the will admitted to probate are not concluded thereby, but may call other witnesses in order to make out a *prima facie* case;<sup>94</sup> unless, of course, the statute specifically provides that only the subscribing witnesses may testify at probate in common form. It is only required that the proponents of the will make out a *prima facie* case, to entitle the will to admission to probate.<sup>95</sup>

It is often provided that the testimony of witnesses offered at probate shall be reduced to writing and signed by them.

\* See Sec. 330.

<sup>92</sup> See Sec. 367.

<sup>93</sup> See Sec. 366.

<sup>94</sup> Ludlow's Estate, 7 Ohio Dec. 104; 4 Ohio N. P. 155; Whitclaw's

Exrs. v. Sims, 90 Va. 588; Loughney v. Loughney, 87 Wis. 92. See Sec. 366.

<sup>95</sup> Ludlow's Will, 6 Ohio Dec. 314; 4 Ohio N. P. 155.



Such provision has been held to mean that the affidavits of these witnesses should be offered in evidence, instead of *viva voce* testimony.<sup>96</sup> Such provisions are directory not jurisdictional. Where the court omitted to comply with this provision literally, but set out on the record the substance of their testimony, it was held to be a sufficient compliance with the statute.<sup>97</sup> Whether the statute requiring the testimony of the witnesses to be reduced to writing makes it necessary to take their testimony by affidavit, or not, the practice is very ancient and is well established in many courts.<sup>98</sup>

<sup>96</sup> Baker v. Cravens, 150 Ind. 199.

"We have no doubt that the statutory requirement that the proof shall be entered of record contemplated that, ordinarily, proof should be made by affidavit." Baker v. Cravens, 150 Ind. 199.

<sup>97</sup> Reese v. Nolan, 99 Ala. 203.

<sup>98</sup> The following form of affidavit of subscribing witness is in common use:

(Affidavit of subscribing witness.) (Style of case and court.) The State of —, — County, ss. I, C D, being first duly sworn in open court this — day of —, A. D. 19—, do depose and make oath that I was present upon the — day of —, A. D. 19—, at the execution of the last will and testament of A B, deceased, hereunto annexed; that I saw said testator, A B, subscribe said will (and heard him publish and declare the same to be his last will and testament), and that I subscribed my name as witness to said will at the request of said A B, and in his presence (and in the presence of — (the other subscribing witness).) I do further depose that at the time of the execution of said will by said A B, that said A B was of full age (to wit, of about the age of —); that he was of sound mind and memory, and that he was under no restraint. (Signed) C D.

Sworn to before me by the aforesaid C D in open court on the day and year above mentioned and by him then and there subscribed in my presence.

\_\_\_\_\_,  
Probate Judge.

(Form of reduction of the evidence of the subscribing witnesses to writing.) The subscribing witnesses to said will, after being duly sworn to speak the truth, the whole truth and nothing but the truth, in relation to the execution of said will, testified in open court which testimony was reduced to writing and by them respectively subscribed, and is in words and figures following, to wit:

The State of —, — County, s. s.: — Court. I, C D, being first duly sworn in open court this — day of —, A. D. 19—, depose and say that I was present at the execution of the last will and testament of A B, deceased, hereunto annexed, on the — day of — A. D. 19—; that I saw said testator, A B, subscribe his name to said will (and heard him publish and declare the same to be his last will and testament); and I further depose and say that said A B at the time of the execution of said last will and testament was of full age, of sound mind and memory, and not under any restraint, and that I signed the same as a witness

### §321. Contest.—Limitations.

In most states a certain period is fixed by statute within which a will once admitted to probate may be contested. This period of time is different in different jurisdictions, extending from one to five years. Whatever the limit, however, it is well settled that contest is not governed by the ordinary statute of limitations, but by its own special statute, wherever such a one exists.<sup>99</sup> In Pennsylvania, the fact that a caveat

thereto in the presence of said testator, A B, and at his request. Sworn to before me by the aforesaid C D, and by him subscribed in my presence, the day and year above written. — —, Judge.

(Form of order admitting will to probate.) In the matter of the will of A B, deceased. Be it remembered: That heretofore, to wit, on the — day of —, A. D. 19—, an instrument in writing purporting to be the last will and testament of A B, deceased, late of — Township, in this county, was produced in open court for probate, and application was made for admission of said instrument to probate as the last will and testament of A B, deceased, by L M, a — of said A B, deceased; and it was ordered by the court that said instrument be filed in this court, and that notice in writing of the filing of said instrument and of the application to admit said instrument to probate as the last will and testament of A B, deceased, and of the time of the hearing of said application be given to the widow and next of kin (resident in the State of —) at least — days prior to said hearing; and it now being shown to the satisfaction of the court that due notice of the filing of said will and of the application to admit the same to probate and record in this court has been given to the widow and next of kin of the tes-

tator, pursuant to said former order of this court, thereupon this day came C D and E F, the subscribing witnesses to said will, who, being first duly sworn and qualified, testified to the due execution and attestation of said will; which testimony was reduced to writing, by them respectively subscribed and filed with said will. Whereupon the court finds that the aforesaid instrument in writing is the last will and testament of A B, deceased; that the same was duly executed and attested as required by law; that the said testator at the time of signing the same was of lawful age, of sound and disposing mind and memory, and under no undue or unlawful restraint whatsoever. It is therefore by the court ordered that the said will be admitted to probate, and the same, together with the testimony of the witnesses above named, be entered to record in this court.

<sup>99</sup> *Bacigalupo v. San Francisco*, Super. Court, 108 Cal. 92; *Sbarboro's Estate*, 63 Cal. 5; *Storrs v. St. Luke's Hospital*, 180 Ill. 368; *Keister v. Keister*, 178 Ill. 103; *Evansville, etc., Co. v. Winsor*, 148 Ind. 682; *Bartlett v. Manor*, 146 Ind. 621; *Duff v. Duff*, — Ky. —; 45 S. W. 102; *Justus's Succession*, 45 La. Ann. 190; *Meyer v. Henderson*, 88 Md. 585; 42 Atl. 241; *Schlottman v. Hoffman*, 73 Miss. 188; *Stowe v. Stowe*, 140 Mo. 594;

was filed, does not prevent the judgment from becoming conclusive upon the lapse of the time fixed by statute.<sup>100</sup>

The statute of limitations in contests differs from the ordinary statute in that it is jurisdictional in its nature, and can not be waived by consent of the parties, since after the limit fixed by statute, the court has no jurisdiction over the subject-matter of the contest.<sup>101</sup>

Where the ground of contest was unknown to the heir, and was not discovered by him until after the limit for contest had elapsed, it was held that such heir could not contest the will under the statute, and that equity would grant him no relief;<sup>102</sup> even where the cause of contest was fraud, and this was concealed till the statutory time for contest had elapsed.<sup>103</sup>

In jurisdictions where the grounds of contest must be set out, no addition can be made thereto after the time fixed by statute has expired.<sup>104</sup> But where the amendment offered only re-stated in a fuller manner the issuable facts of the original petition, it may be permitted.<sup>105</sup>

In some states it is held that a decree admitting a will to probate may be vacated for fraud or mistake without regard to the time for contesting the will.<sup>106</sup> This right generally rests on specific statutory provisions. Its exercise prevents the good results of stability and certainty which a fixed period for contest was designed to give. In some states where this right is recognized it is said that intervening rights obtained under the will can not be disturbed.<sup>107</sup> In other states this right is denied after the end of the term at which the order admitting

41 S. W. 951; *Hughes v. Boone*, 81 N. Car. 204; *Cox's Estate*, 167 Pa. St. 501; *Miller's Estate*, 166 Pa. St. 97; *Nichol's Estate*, 174 Pa. St. 405.

<sup>100</sup> *Nichol's Estate*, 174 Pa. St. 405.

<sup>101</sup> *Meyer v. Henderson*, 88 Md. 585; 42 Atl. 241.

<sup>102</sup> *Bartlett v. Manor*, 146 Ind. 621; 45 N. E. 1060; *Stowe v. Stowe*, 140 Mo. 594; 41 S. W. 951.

<sup>103</sup> *Luther v. Luther*, 122 Ill. 558.

<sup>104</sup> *Meyer v. Henderson*, *supra*.

<sup>105</sup> *Wilson's Estate*, 117 Cal. 280, modifying same case, 117 Cal. 262.

<sup>106</sup> *Snuffer v. Howerton*, 124 Mo. 637; *Gordon v. Old*, 52 N. J. Eq. 317; *In re Janes*, 87 Hun, 57; *Hambleton v. Yocum*, 108 Pa. St. 304; *Vance v. Upson*, 64 Tex. 266; *Goodell v. Pike*, 40 Vt. 319.

<sup>107</sup> *Waters v. Stickney*, 12 Allen (Mass.) 1.

the will to probate was rendered.<sup>108</sup> It is fairly well settled, however, that the probate court will not have any authority to set aside an order admitting a will to probate, unless specifically authorized by statute.<sup>109</sup>

The statutes limiting the time within which a will may be contested generally contain certain exceptions in favor of infants, persons of unsound mind, and the like. These exceptions exist only by force of the statute, and the statutes are to be strictly construed. Thus, where the statute made an exception in favor of those who were absent from the state, it was held that, where an heiress came into the state for a short visit when she was a child, after the probate of the will, she could not, after the expiration of the time limit, claim exemption from the provisions of the statute on the ground that she had been without the state.<sup>110</sup> Where an exception to the statute of contest generally, such as infancy, is omitted from the statute controlling the contest of wills of a particular class, as foreign wills, the courts can not add such exception to the provisions of the statute controlling the particular class.<sup>111</sup> The legislature has ample power to omit all disabilities as bars to the operation of the statute, if it sees fit.<sup>112</sup>

In analogy to a familiar principle of the Statute of Limitations, disabilities can not be tacked together to take the case out of the statute. Thus, where an heiress left the state after the will was probated, before coming of age, and remained outside till after coming of age, it was held that the time of limitations was to be counted from the time of coming of age, and that the period of absence from the state could not be added to the time of minority to postpone the operation of the statute.<sup>113</sup>

<sup>108</sup> *Walters v. Ratliff*, 5 Bush. (Ky.) 575 *Taylor v. Tibbatts*, 13 B. Mon. (Ky.) 177.

<sup>109</sup> *Corly v. Wayne Co.*, Prob. Judge, 96 Mich. 11; *Beatty's Will* 193 Pa. St. 304, 45 Atl. 1057

*Contra Hotchkiss v. Ladd*, 62 Vt. 209.

<sup>110</sup> *Powell v. Koehler*, 52 O. S. 103.

<sup>111</sup> *Wheeler v. Wheeler*, 134 Ill. 522; *Evansville, etc. Co. v. Winsor*, 148 Ind. 682; *Bent v. Thompson*, 5 N. M. 408; 23 Pac. (1890), 234.

<sup>112</sup> *Garrison v. Hill*, 81 Md. 551.

<sup>113</sup> *Powell v. Koehler*, 52 O. S. 103.

But these statutes do not apply where contest is not sought, but simply the correction of an error in the recording of a will. Errors in recording the order of the court may be corrected after the time for contest has elapsed.<sup>114</sup>

### §322. Inconsistent wills.

Where two separate wills are probated together, and as one instrument, and no appeal is taken, such action precludes any claim that the second will operates as a revocation of the first.<sup>115</sup>

When one will is probated, another will inconsistent with the first can not be probated at a later time as a codicil, since this in effect operates as a revocation of the earlier will. The earlier will should be contested. Hence an application to substitute a will discovered after an earlier will had been admitted to probate necessarily involves a contest of the will probated, and must be made within the time limited for contest. It follows that where a will is discovered so long after the earlier will was admitted to probate that the limit fixed by statute for contest has elapsed, such will can not be probated.<sup>116</sup> In some earlier cases this principle has been ignored without discussion, and inconsistent wills have been admitted to probate after the time for contesting the first will has elapsed,<sup>117</sup> or a later inconsistent codicil has been probated without any proceeding in the nature of a contest.<sup>118</sup>

It has been held recently that the probate court has power to admit a will to probate when offered, and if such will effects a revocation of a will previously admitted to probate, the court has power to reverse or revoke the former decree as far as may be necessary to give effect to the later will.<sup>119</sup>

<sup>114</sup> *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 380.

<sup>115</sup> *Dicke v. Wagner*, 95 Wis. 260; 70 N. W. 159.

<sup>116</sup> *Watson v. Turner*, 89 Ala. 220; *Bartlett v. Manor*, 146 Ind. 621.

<sup>117</sup> *Waters v. Stickney* 12 Allen (Mass.) 1; *Vance v. Upson*, 64 Tex. 266.

<sup>118</sup> *Bracken's Estate*, 138 Pa. St. 104.

<sup>119</sup> *Cousens v. Advent Church of Biddeford*, 93 Me. 292.

### §323. Nature of contest.

Contest is, under most modern systems of jurisprudence, entirely a statutory proceeding. It is not an action at law or a suit in equity,<sup>120</sup> and is not a civil action, though it is a civil case.<sup>121</sup> In some states it is an action at law by statute.<sup>122</sup> Under some of the older systems contest was treated as a suit in equity, independent of statute; and this view of the proceeding is still entertained in some states in spite of statutory changes.<sup>123</sup> Contest is in the nature of an appeal;<sup>124</sup> but it is still an original action, and not an appeal.<sup>125</sup> As contest is usually either an appeal or an action in the nature of an appeal, there must be an order admitting the will to probate in order to authorize a contest.<sup>126</sup>

The court may, in its discretion, consolidate proceedings instituted by different persons for the purpose of having different instruments each probated as the last will and testament of decedent.<sup>127</sup> Separate contests of a will and a codicil, or of two wills, each claimed to be the last will of testator, may be consolidated by the court and heard together.<sup>128</sup>

In contest, the question whether the will was admitted to probate properly or improperly does not exist. Contest does not review the action of the court below on error.<sup>129</sup> The question of the validity of the will as offered for probate is raised for adjudication on its merits in a contest, and the court

<sup>120</sup> *Clough v. Clough*, 10 Colo. App. 433; *Grady v. Hughes*, 64 Mich. 540; *Corly v. Wayne Co.*, Prob. Judge, 96 Mich. 11; 55 N. W. 386.

<sup>121</sup> *Carpenter v. Bailey*, 127 (Cal.) 582; 53 Pac. 842.

<sup>122</sup> *Garland v. Smith*, 127 Mo. 567; 28 S. W. 191; 29 S. W. 836; *Lilly v. Tobbein*, 103 Mo. 477; *Appleby v. Brock*, 76 Mo. 314.

<sup>123</sup> *Shaw v. Camp*, 163 Ill. 144, affirming 61 Ill. App. 68; *Hudnall v. Ham*, 172 Ill. 76; *Claussenius v. Claussenius*, 179 Ill. 545; *Keister v. Keister*, 178 Ill. 103.

<sup>124</sup> *Haynes v. Haynes*, 33 O. S. 598.

<sup>125</sup> *Bradford v. Andrews*, 20 O. S. 208.

<sup>126</sup> *Olmstead v. Webb*, 5 App. D. C. 38; *Hoope's Estate*, 152 Pa. St. 105.

*Apparently contra*, *Richardson v. Green*, 61 Fed. 423.

<sup>127</sup> *Roulett v. Mulherin*, 100 Ga. 591.

<sup>128</sup> *Roulett v. Mulherin*, 100 Ga. 591; *Wilson's Estate*, 117 Cal. 280; 117 Cal. 262; 49 Pac. 172.

<sup>129</sup> *Watson's Will*, 131 N. Y. 587; *Clark v. Ellis*, 9 Oreg. 128; *Converse v. Starr*, 23 O. S. 491.

is not restricted in its inquiry by the action of the court below.<sup>130</sup> The court may, therefore, in a contest proceeding, admit on cross-petition a part of the will which was rejected by the trial court.<sup>131</sup> Further, in case of erroneous recording of the will in the probate court, the question is whether the instrument offered at the trial on contest is the last will and testament of testator.<sup>132</sup> On appeal in the nature of a contest the court may bring in new parties.<sup>133</sup> Where contest takes the form of filing a caveat, such act puts a stop to all further proceedings in the probate in common form until the caveat is disposed of.<sup>134</sup> The method provided by statute for reviewing an order admitting a will to probate is usually exclusive. Thus, if appeal on contest is provided, error will not lie.<sup>135</sup>

In order to promote justice, a suit brought to set aside a will and the probate thereof, on the ground that such will is revoked, is treated as a statutory proceeding to contest such will.<sup>136</sup> But contest can not be made the means of trying the validity of certain devises in a will.<sup>137</sup> It is often required that, upon instituting proceedings in contest, the court of probate powers shall, after due notice, transmit the will and a transcript of the probate proceedings to the court before which contest is pending. This requirement is not jurisdictional, and the failure of the court to transmit such papers is not ground for dismissing the contest.<sup>138</sup>

<sup>130</sup> McIntire v. McIntire, 162 U. S. 383; Mack's Appeal, 71 Conn. 122; 41 Atl. 242; Shaw v. Camp, 163 Ill. 144, affirming 61 Ill. App. 68; Preston v. Fidelity, etc., Co. — Ky. —; 22 S. W. 318; Sanderson v. Sanderson, 52 N. J. Eq. 243; Smith v. Smith, 48 N. J. Eq. 566; Commonwealth v. Thomas, 163 Pa. St. 446; Berg's Estate, 173 Pa. St. 647.

<sup>131</sup> Shaw v. Camp, 163 Ill. 144.

<sup>132</sup> Haynes v. Haynes, 33 O. S. 598.

<sup>133</sup> Miller's Will, 166 Pa. St. 97.

<sup>134</sup> King's Administrator v. Rose, — Ky. —; 38 S. W. 844; Keene v.

Corse, 80 Md. 20; 30 Atl. 569; Fischer's Case, 49 N. J. Eq. 517.

<sup>135</sup> Mosier v. Harmon, 29 O. S. 220.

<sup>136</sup> Evansville, etc., Company v. Winsor, 148 Ind. 682.

<sup>137</sup> Cox v. Cox, 101 Mo. 168; 13 S. W. 1055; Lilly v. Tobbein, 103 Mo. 477; 13 S. W. 1060; Mears v. Mears, 15 O. S. 90; Anderson v. Anderson, 112 N. Y. 104; 2 L. R. A. 175; Prather v. McClelland, 76 Tex. 574.

<sup>138</sup> Johnson v. Cochrane, 91 Hun, 165; aff. 159 N. Y. 555; 54 N. E. 1092.

### §324. Necessity of parties.—Notice.

As to the necessity of parties in a will contest the states may be divided into two classes. In states of one class all parties interested must be made parties to the proceeding, and served either actually or constructively.<sup>139</sup> If the attention of the trial court is called to this omission it may dismiss the appeal at once for defect of parties, without prejudice to a new appeal.<sup>140</sup> In courts of this class the omission of a necessary party, as a legatee, is reversible error,<sup>141</sup> and the objection of a defect of parties may be made for the first time in the upper court.<sup>142</sup> But where a beneficiary under an earlier will contested the probate of a later will, and was plaintiff because of his interest under such earlier will, it was held unnecessary to make him a defendant, too, because of his interest under the later will.<sup>143</sup> And, where an unborn child of testator was in existence at testator's death, the court might nevertheless proceed as in ordinary cases of probate and contest.<sup>144</sup> Notice is also required where opposition to probate is filed under the local statute, as a means of demanding probate in solemn form.<sup>145</sup> And where this notice was in fact served in time, and proof of service was filed before the actual hearing of the contest, proponent could not take advantage of the fact that the proof of service was not filed before the time originally fixed for the hearing.<sup>146</sup> In states of the other class contest is treated in its general theory more like a strict proceeding *in rem*; and it is not necessary to make those in interest parties

<sup>139</sup> Scott's Estate, 124 Cal. 671; Moore v. Gubbins 54 Ill. App. 163; Storey's Will, 20 Ill. App. 183; 120 Ill. 244; McDonald v. McDonald, 142 Ind. 55; Wells v. Wells, 144 Mo. 198; Holt v. Lamb, 17 O. S. 374; Reformed, etc., Church v. Nelson, 35 O. S. 638.

<sup>140</sup> Miller's Estate, 159 Pa. St. 562.

<sup>141</sup> McMaken v. McMaken, 18 Ala. 576; Moore v. Gubbins, 54 Ill. App. 163; Reformed, etc., Church v. Nelson, 35 O. S. 638; Holt v. Lamb, 17 O. S. 375.

<sup>142</sup> Wells v. Wells, 144 Mo. 198; Reformed, etc., Church v. Nelson, 35 O. S. 638.

<sup>143</sup> McDonald v. McDonald, 142 Ind. 55.

<sup>144</sup> Hamilton's Estate, 120 Cal. 421.

<sup>145</sup> Protestant Orphan Asylum v. Superior Court, 116 Cal. 443; Stewart v. Hall, 100 Cal. 246; Bacigalupo v. Superior Court, 108 Cal. 92; 40 Pac. 1055.

<sup>146</sup> Stewart v. Hall, 100 Cal. 246.



to the appeal or contest. It is sufficient to give such notice as is required by the local statute.<sup>147</sup>

### §325. Who may contest.

The statutes generally provide that 'any person interested' adversely to the will or 'any person aggrieved' by its admission to probate, may contest such will.<sup>148</sup> Under these statutes a person who would take more if the will were denied probate than if it were admitted to probate is a person interested adversely to the will.<sup>149</sup> Thus a legatee under a prior will may contest a later will which revokes the earlier one,<sup>150</sup> even before the earlier will has been formally probated.<sup>151</sup> So a widow who would take as heir under the statute, in addition to her dower rights, may contest a will by which she is given less than she would receive if her husband had died intestate.<sup>152</sup>

In addition to this class of persons, it is also held that such persons as have the first right to administer the estate may contest a will whereby an executor is appointed, even though the will does not affect their share in testator's estate adversely to their interests.<sup>153</sup> But one whose share in testator's estate

<sup>147</sup> *Tompkins v. Tompkins*, 1 Story, C. C. 547; *Hunt v. Acre*, 28 Ala. 580; *Thomas v. Wood*, 61 Ind. 132; *Parker v. Parker*, 11 Cush. (Mass.) 519; *Wells v. Child*, 12 Allen (Mass.) 330; *Crippen v. Dexter*, 13 Gray (Mass.) 330; *Bonne-mort v. Gill*, 167 Mass. 338; *Brigham v. Fayerweather*, 140 Mass. 411; *Miller's Estate*, 166 Pa. St. 97; *Linch v. Linch*, 1 Lea (Tenn.) 526; *Woodruff v. Taylor*, 20 Vt. 65; *Wills v. Spraggins*, 3 Gratt. (Va.) 555; *Schultz v. Schultz*, 10 Gratt. (Va.) 358.

<sup>148</sup> *Lockard v. Stephenson*, 120 Ala. 641; 24 So. 996; *Hickman's Estate*, 101 Cal. 609; 36 Pac. 118; *Jele v. Lemberger*, 163 Ill. 338; *Kostelecky v. Scherhart*, 99 Io. 120; *Biles v. Dean*, — Miss. —; 14 So.

536; *Shepard's Estate*, 170 Pa. St. 323; *Kenyon v. Saunders*, 18 R. I. 590; 30 Atl. 470.

<sup>149</sup> *Kostelecky v. Scherhart*, 99 Io. 120; *Murry v. Hennessy*, 48 Neb. 608; *Snow v. Hamilton*, 90 Hun. 157; *Cochran v. Young*, 104 Pa. St. 333; *Kenyon v. Saunders*, 18 R. I. 590.

<sup>150</sup> *McCutchen v. Loggins*, 109 Ala. 457; *McDonald v. McDonald*, 142 Ind. 55; *Kostelecky v. Scherhart*, 99 Io. 120; *Dower v. Church*, 21 W. Va. 23.

<sup>151</sup> *Kostelecky v. Scherhart*, 99 Io. 120.

<sup>152</sup> *Moyses v. Neilson*, 9 Ohio S. & C. P. Dec. (Ohio Dec.), 623.

<sup>153</sup> *Watson v. Alderson*, 146 Mo. 333. "The next of kin were enabled to contest the validity of the

is affected adversely by the will, may contest a will even where he is debarred by law from administering testator's estate. Thus in Rhode Island it is held that a convict, though not allowed to administer his wife's estate, may contest her will excluding him from the share which he would have had in her estate had she died intestate.<sup>154</sup>

One who is not benefited by having the will set aside, either by taking a share of decedent's estate, or by obtaining the first right to administer, can not contest the will.<sup>155</sup> Thus one who would have taken had testator died intestate, but who took more under the will than he would have taken had testator died intestate, can not contest such will.<sup>156</sup> Nor can a non-resident alien, who is by the law of the state incapable of inheriting real estate, contest a will devising real estate.<sup>157</sup> A widow of decedent who, by an ante-nuptial agreement, has determined her property rights so that they are in no way affected by the will, can not contest,<sup>158</sup> nor can a creditor of decedent contest the will.<sup>159</sup> And one in possession of realty, not an heir of decedent, can not resist the probate of a will by purchasers of such realty from devisees under such will, though they can not make out title to such realty until the will is pro-

will 'as of common right.' Of common right, because to them the administration of the goods of the deceased 'ought to be committed if he died intestate.' This common right is secured to them by our statute, and is independent of the pecuniary results to them of the contest." *Watson v. Alderson*, 146 Mo. 333; *Fallon's Will*, 107 Io. 120, citing *Sanborn's Estate*, 98 Cal. 103; *Hickman's Estate*, 101 Cal. 609; *Maurer v. Naill*, 5 Md. 324; *Middleditch v. Williams*, 47 N. J. Eq. 585; *Franke v. Shipley*, 22 Or. 104.

<sup>154</sup> *Kenyon v. Saunders*, 18 R. I. 590.

<sup>155</sup> *Lockhart v. Stephenson*, 120 Ala. 641; 24 So. 996; *McCutchen v.*

*Loggins*, 109 Ala. 457; *Sanborn's Estate*, 98 Cal. 103; 32 Pac. 865; *Jele v. Lemberger*, 163 Ill. 338; *Wilcoxon v. Wilcoxon*, 165 Ill. 454; *Biggerstaff v. Biggerstaff*, 95 Ky. 154; *Biles v. Dean*, — Miss. —; 14 So. 536; *Middleditch v. Williams* 47 N. J. Eq. 585; *Lewis v. Cook*, 150 N. Y. 163; *Franke v. Shipley*, 22 Oreg. 104; *Shepard's Estate*, 170 Pa. St. 323.

<sup>156</sup> *Biles v. Dean*, — Miss. —; 14 So. 536.

<sup>157</sup> *Jele v. Lemberger*, 163 Ill. 338.

<sup>158</sup> *Biggerstaff v. Biggerstaff*, 95 Ky. 154.

<sup>159</sup> *Montgomery v. Foster*, 91 Ala. 613.

bated and an ejectment suit is pending to which such possessor is defendant.<sup>160</sup>

In some states a public administrator is appointed by law to administer the estates of decedents under certain circumstances specified in the statutes—generally in case decedent dies intestate, and has within the state no relative competent to act as administrator. Such administrator can not, by reason of his interest in the fees, contest decedent's will,<sup>161</sup> nor can an executor, in his official capacity, contest the probate of a codicil which revokes his appointment.<sup>162</sup> The creditor of an heir of decedent can not contest decedent's will disinheriting such heir by reason of creditor's hopes or expectations of being paid out of the heir's share of decedent's estate.<sup>163</sup> But where, before probate of the will, a judgment creditor of one heir levies upon such interest in testator's real estate as the heir would have inherited had testator died intestate, and upon judicial sale of the heir's interest in such property such judgment creditor buys it in, it is held that the judgment creditor has such interest that he may contest the will.<sup>164</sup>

One who purchases land from an heir of testator after the probate of a will whereby the heir is disinherited, can not contest such will, even though the heir had a contingent remainder in the land after the death of testatrix, subject to be defeated by disposition by will.<sup>165</sup> If the proponents of the will deny the fact of contestant's interest in the estate of testator, he must prove such interest as entitles him to contest the will, in order to establish his standing in court.<sup>166</sup> It is said that

<sup>160</sup> *Johnson v. Bard* (Ky.) (1900), 54 S. W. 721.

<sup>161</sup> *Sanborn's Estate*, 98 Cal. 103; 32 Pac. 865; *Hickman's Estate*, 101 Cal. 609; 36 Pac. 118.

<sup>162</sup> *Stewart's Estate*, 107 Io. 117, citing *In re Langevin*, 45 Minn. 429; *Meyer v. Fogg*, 7 Fla. 292; 68 Am. Dec. 441; *Reid v. Vanderheyden*, 5 Cow. 719.

<sup>163</sup> *Lockhard v. Stephenson*, 120 Ala. 641; 24 So. 996; *Shepard's Estate*, 170 Pa. St. 323; *Cochran v. Young*, 104 Pa. St. 333.

<sup>164</sup> *Smith v. Bradstreet*, 16 Pick. (Mass.) 264; *In re Langevin*, 45 Minn. 429, *Watson v. Alderson*, 146 Mo. 333.

<sup>165</sup> *McDonald v. White*, 130 Ill. 493.

<sup>166</sup> *Solari v. Barras*, 45 La. Ann. 1128; *Pattee v. Stetson*, 170 Mass. 93 (where it was denied that contestant was wife of testator); *Roger's Estate*, 154 Pa. St. 217 (where it was denied that contestant was son of testator).

this issue should be tried first.<sup>167</sup> When contestants claim no more for their interest in testator's estate than that they think that they were legally adopted by testator, and believe that they can prove it, they have no standing in court to contest the will.<sup>168</sup>

It is held that the right to contest does not survive where a party who had a right to contest dies before suit is brought. In this case the party having the right to contest was *non compos mentis* when testator died, and he died after the time for contest had elapsed although the statute made an exception in his favor, it was held that neither his heirs nor his administrator could contest.<sup>169</sup> But where contestant died after suit was brought, the court assumed, rather than expressly decided that the action would survive, discussing at length the necessity of giving the heirs notice, and deciding that such notice need not be given.<sup>170</sup>

Local practice differs as to the right of one who was not formally made a party to the probate in common form to contest the will by calling for probate in solemn form. Where the contest is had in a new action there is no restriction upon parties interested adversely to the will, who were not parties to the probate in common form; but any party interested may contest, whether he took part in the proceedings of original probate or not. Where the contest assumes the form of an appeal some courts hold that any party interested may appeal, whether he took part in the probate or not,<sup>171</sup> while other courts hold that they must become parties to the proceeding below, in order to have a right to appeal from the order admitting the will to probate.<sup>172</sup> Parties not notified of the pendency of probate proceedings may, "by petition to the pro-

<sup>167</sup> Meyer v. Henderson, 88 Md. 585; Roger's Estate, 154 Pa. St. 217.

<sup>168</sup> Renton's Estate, 10 Wash. 533.

<sup>169</sup> Storrs v. St. Luke's Hospital, 180 Ill. 368, affirming 75 Ill. App. 152.

<sup>170</sup> Bonnemort v. Gill, 167 Mass. 338.

<sup>171</sup> Ouachita Baptist College v. Scott, 64 Ark. 349; Meyer v. Henderson, 88 Md. 585.

<sup>172</sup> Blakely v. Blakely, 33 Ala. 611; Leslie v. Sims, 39 Ala. 161; Reese v. Nolen, 99 Ala. 203; 13 So. 677; Dugan v. Northcutt, 7 App. D. C. 351.

bate court, propound their interest, and after giving notice to the party having an interest, have themselves made parties to such a decree, so as to prosecute appeal therefrom.”<sup>173</sup>

### §326. Estoppel.

Parties who would ordinarily be included under the general class of those having a right to contest a will may, however, have so acted as to estop themselves from contesting its validity. The general and well-recognized principles of the law of estoppel are applicable, and need no discussion further than an illustration of their application to the facts which arise on contest.

Where a testator has made a contract with his children or other heirs and next of kin, by which they agree upon valuable consideration not to contest his will for any reason, circuitry of action is avoided by treating such a contract as estopping them from contesting testator's will.<sup>174</sup>

Such a contract is held to be valid and enforceable, and not contrary to public policy, and may be pleaded as defense by the executor in a suit to contest the will.<sup>175</sup>

Such a contract binds only the parties thereto. It is accordingly reversible error to exclude evidence tending to show that one of the plaintiffs did not enter into the agreement.<sup>176</sup> So upon the familiar principle that no one can be permitted to occupy antagonistic and inconsistent positions upon an issue in litigation, no one who is a beneficiary under the will and with full knowledge of the facts, receives and retains his legacy, can contest the will.<sup>177</sup>

Where the facts material to the contest are not known to

<sup>173</sup> Reese v. Nolan, 99 Ala. 203; 13 So. 677; Lyons v. Hammer, 84 Ala. 197; Kumpe v. Coons, 63 Ala. 448; Hall v. Hall, 47 Ala. 290; Clemens v. Patterson, 38 Ala. 721.

<sup>174</sup> Garcelon's Estate, 104 Cal. 570; Gore v. Howard, 94 Tenn. 577.

<sup>175</sup> Garcelon's Estate, 104 Cal. 570.

<sup>176</sup> Gore v. Howard, 94 Tenn. 577.

<sup>177</sup> Bartlett v. Manor, 146 Ind. 621; Thurston v. Prather, —Ky.—; 47 S. W. 871; Couchman v. Couchman, —Ky.—; no off. rep., 47 S. W. 858; 20 Ky. L. Rep. 877; 44 L. R. A. 136; Madison v. Larmon, 170 Ill. 65; Andrews v. Andrews,

contestant, or, are fraudulently concealed from him, he is not estopped to contest by his conduct in accepting the legacy.<sup>178</sup>

It is held, in some jurisdictions, that a beneficiary who returns his legacy to the executor before bringing suit to contest the will, is not estopped from contesting.<sup>179</sup> But where beneficiary was induced to accept the legacy by fraudulent concealment of material facts, it was held that beneficiary was not obliged to return the legacy as a condition precedent to bringing suit.<sup>180</sup>

Where the share of the beneficiary under the will is less than it would be if it were set aside, it is held in some jurisdictions that the beneficiary may accept and retain his legacy under the will without being thereby estopped to contest the will.<sup>181</sup>

An executor, however, is not estopped to contest the will, or to claim property disposed of by it as his own.<sup>182</sup>

### §327. Who may defend.

The executor, under the practice now prevalent in most states, should be a party to the contest, and may defend the will.<sup>183</sup> It is proper even after contest has begun to appoint an administrator with the will annexed, and make him a party to the contest if the executor does not qualify.<sup>184</sup> And it is held that an executor, named by the first will, may contest probate of a second will, whereby the first is revoked, as part of his duty of defending the will.<sup>185</sup> But where the will affects

110 Ill. 223; *Gorham v. Dodge*, 122 Ill. 528; *White v. Mayhall*, — Ky. —; 25 S. W. 881; *Miller's Estate*, 159 Pa. St. 562; *Miller's Estate*, 166 Pa. St. 97; *Pryor v. Pendleton*, 92 Tex. 384.

*Apparently contra*, *Fifield v. Van Wyck*, 94 Va. 557.

<sup>178</sup> *White v. Mayhall*, — Ky. —; 25 S. W. 881 (where the fact of the incapacity of testator was fraudulently concealed).

<sup>179</sup> *Miller's Estate*, 159 Pa. St. 562; *Miller's Estate*, 166 Pa. St. 97.

<sup>180</sup> *White v. Mayhall*, — Ky. —; 25 S. W. 881.

<sup>181</sup> *Bates v. Smith*, 3 Cincinnati Law Bull. 344 (Ohio).

<sup>182</sup> *Tyler v. Wheeler*, 160 Mass. 206.

<sup>183</sup> *Whetton's Will*, 98 Cal. 203; *Campbell v. Campbell*, 130 Ill. 466; *Hesterberg v. Clark*, 166 Ill. 241; *Bardell v. Brady*, 172 Ill. 420.

<sup>184</sup> *Crocker v. Balch*, — Tenn. (1900); 55 S. W. 307.

<sup>185</sup> *Connelly v. Sullivan*, 50 Ill. App. 627.

the title to real estate only, and no interest in or power concerning the same is devised to the executor, he is held not to be a necessary party to a contest.<sup>186</sup>

The legatees are necessary parties,<sup>187</sup> and the husband of a legatee is a proper and necessary party.<sup>188</sup>

One who has acquired the legal title to testator's real estate from a devisee under a probated will, is a proper party defendant to a suit to contest such will.<sup>189</sup>

### §328. Pleadings.

In contest proceeding some pleading on the part of contestant at least is required. The form of the petition filed by contestant depends largely upon local procedure and upon the issue in probate and contest.<sup>190</sup>

<sup>186</sup> Fox v. Fee, 49 N. Y. Supp. 292, citing Miller v. R. R. 132 U. S. 662, distinguishing McArthur v. Scott, 113 U. S. 340.

<sup>187</sup> Moore v. Gubbins, 54 Ill. App. 163.

<sup>188</sup> Burnett v. Milnes, 148 Ind. 230 (A suit to vacate a judgment refusing to admit a will to probate.)

<sup>189</sup> Roberts v. Abbott, 127 Ind. 83.

<sup>190</sup> See Sec. 329.

Where the issue is fixed by statute, and is the common law issue, '*devisavit vel non*' (—) is the writing, purporting to be the last will and testament of A. B. deceased, the last will and testament of A. B. deceased (—), an approved form of petition is as follows:

In the Court of ———.

——— County,

State of ———.

E. F. and G. H.,

Plaintiffs,

v.

K. L., as executor of the last will and testament of A. B., deceased, M. N. and O. P.,

Defendants.

#### Petition.

A. B. died on the — day of —, A. D. 19—. Plaintiffs are his children and his sole heirs at law.

On the — day of — A. D. 19—, a certain paper writing purporting to be the last will and testament of the said A. B. deceased, which said writing was dated the — day of — A. D. 19—, was presented to the — court of said — County and was admitted to probate by the said court of said County on the — day of — A. D. 19—, and is recorded in Volume — page — of the Record of Wills in said court.

Letters testamentary thereon were thereupon issued by said court to the defendant, K. L. as sole executor thereof, who thereon gave bond and qualified.

By the terms of said paper writing all the defendants herein are named as the several legatees and devisees of said A. B. deceased.

Said paper writing is not the last will and testament of said A. B. deceased.

Under some codes, the separate grounds of attack, such as lack of mental capacity, undue influence, duress, fraud and the like, need not be separately paragraphed.<sup>191</sup> But the petition must make out a *prima facie* case of the invalidity of the will.<sup>192</sup> Thus, a contest on the ground of mistake, can not be maintained when it appears from the whole caveat that the mistake was not such as was contemplated by statute.<sup>193</sup>

### §329. Issue in probate and contest.

The different jurisdictions may be divided into two classes according to the rule as to the issue in probate and contest. In the first class the issue is fixed by statute and is practically the old common law issue *devisavit vel non*—is it the last will and testament of testator or not. In jurisdictions of this class since the issue is fixed by statute, and can not be varied by the pleadings, the form which the issue assumes in the pleadings is immaterial.<sup>194</sup>

Wherefore plaintiffs pray that an issue may be made up whether said paper writing is the last will and testament of said A. B., deceased, or not; that upon the trial of said issue, said paper writing may be declared not to be the last will and testament of said A. B. deceased, and for such other and further relief as plaintiffs may be entitled to in law or equity by reason of the premises.

\_\_\_\_\_,  
Attorney for  
Plaintiffs.

State of \_\_\_\_\_  
\_\_\_\_\_ County, ss.

E. F. being first duly sworn says that he is one of the plaintiffs herein, and that the allegations of the foregoing petition are true as he verily believes.

Sworn to before me by the aforesaid E. F. and by him subscribed in my presence this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 19—.

[Official Capacity.]

In *Dew v. Reid*, 52 O. S. 519, this form of petition was used with the addition of certain grounds of contest, which were treated by the court as surplusage.

<sup>191</sup> *McDonald v. McDonald*, 142 Ind. 55.

<sup>192</sup> *Lyons v. Campbell*, 88 Ala. 462.

<sup>193</sup> *Meeks v. Lofley*, 99 Ga. 170.

<sup>194</sup> *Fraser v. Jennison*, 106 U. S. 191; *Sinnett v. Bowman*, 151 Ill. 146; 37 N. E. 885; *In re Hathaway*, 46 Mich. 326; *Pratt v. Hargreaves*, 75 Miss. 8918; 23 So. 519; *Carl v.*



Hence, the petition may in such states be amended after the limit for contesting the probate has expired by adding new grounds of contest, since under the statutory issue every ground of attack upon the validity of the will may be employed.<sup>195</sup> Nor need the petition allege such specific grounds as undue influence and insanity in order to introduce evidence upon such points.<sup>196</sup> Thus it is sufficient to assign as the only ground of appeal that "said instrument was not the last will and testament of said deceased."<sup>197</sup> And where the petition in contest alleges only want of sound mind and memory, and undue influence as the grounds of contest, contestant may at the trial introduce evidence tending to show that the will offered was not executed in accordance with the law.<sup>198</sup>

Where such issue is prescribed by statute, no advantage can be taken of an omission to file an answer,<sup>199</sup> and it is error to render judgment upon demurrer to the answer, without the intervention of a jury.<sup>200</sup> In jurisdictions of the other class either the statutes or the rules of court require that the grounds of contest shall be specifically stated, and that no evidence shall

Gabel, 120 Mo. 283; 25 S. W. 214; Gordon v. Burris, 141 Mo. 602; Dew v. Reid, 52 O. S. 519; Windisch, etc., Co. v. Opp, 17 Ohio C. C. 465; Liscomb v. Eldredge, 20 R. I. 335; 38 Atl. 1052.

<sup>195</sup> Sennett v. Bowman, 151 Ill. 146; 37 N. E. 885.

<sup>196</sup> Pratt v. Hargreaves, 75 Miss. 898; 23 So. 519; Carl v. Gabel, 120 Mo. 283; 25 S. W. 214.

<sup>197</sup> Lane v. Hill, 68 N. H. 275 and 308.

<sup>198</sup> Dew v. Reid, 52 O. S. 519, citing and following Green v. Green, 5 O. 279; Brown v. Griffiths, 11 O. S. 329; Walker v. Walker, 14 O. S. 157; Haynes v. Haynes, 33 O. S. 598.

<sup>199</sup> Crenshaw v. Johnson, 120 N. Car. 270; Green v. Green, 5 O. 279.

<sup>200</sup> Walker v. Walker, 14 O. S. 157; Holt v. Lamb; 17 O. S. 374.

In states of this class by statute the issue may be made up by a journal entry.

In the Court of \_\_\_\_\_,

\_\_\_\_\_ County,

E. F. and G. H.,

Plaintiffs,

v.

K. L., as executor of the last will and testament of A. B., deceased, M. N. and O. P.,

Defendants.

Entry.

It is hereby ordered by the court that an issue be and the same is hereby made according to law, whether the paper writing produced, purporting to be the last will and testament of A. B. deceased, is the last will and testament of said A. B. deceased, and that a jury be impaneled to try said issues.

be introduced upon issues not thus specified.<sup>201</sup> But where this is required it is held sufficient to state the ultimate facts, without pleading the evidence by which such ultimate facts are to be established. Thus it is sufficient to allege that the will "was not duly executed."<sup>202</sup>

An issue as to whether the will were caused by the "undue importunities, suggestions and persuasions of another person or other persons" was sustained as not too general,<sup>203</sup> and contestants may allege as many grounds as they expect to attempt to establish by evidence. Thus, it is error to compel them to elect between an allegation of forgery and one of undue influence.<sup>204</sup>

The issue should not, however, be duplicated. Thus, where one issue was made up as to the statutory definition of testamentary capacity—if testator had a sound and disposing mind and was capable of making a valid deed or contract, it was held proper to refuse to permit an additional issue as to whether testator had 'sufficient mental capacity to know his property,' etc., under the common law definition of testamentary capacity.<sup>205</sup>

Where an issue had been awarded in the language of the statute as to whether testator was of "sound and disposing mind and capable of executing a valid deed or contract," it was proper to refuse another issue on insane delusion.<sup>206</sup>

<sup>201</sup> *Barksdale v. Davis*, 114 Ala. 623; *Thompson v. Rainier*, 117 Ala. 318; *Redfield's Estate*, 116 Cal. 637 (construction of petition); *In re Kile*, 72 Cal. 131; *Learned's Estate*, 70 Cal. 141; *Dalrymple's Estate*, 67 Cal. 444; *Livingston's Appeal*, 63 Conn. 68; 26 Atl. 470; *McDonald v. McDonald*, 142 Ind. 55; *Wenning v. Teeple*, 144 Ind. 189; *Hudson v. Hughan*, 56 Kan. 152; *Meyer v. Henderson*, 88 Md. 585; 42 Atl. 241.

<sup>202</sup> *Barksdale v. Davis*, 114 Ala. 623; *Thompson v. Rainier*, 117 Ala. 318; 23 So. 782; *Wenning v. Teeple*,

144 Ind. 189; *National Safe Deposit, etc., Company v. Sweeney*, 3 App. D. C. 401.

<sup>203</sup> *National Safe Deposit, etc., Company v. Sweeney*, 3 App. D. C. 401.

<sup>204</sup> *McDonald v. McDonald*, 142 Ind. 55.

<sup>205</sup> *National Safe Deposit, etc., Co. v. Sweeney*, 3 App. D. C. 401; *Connelly v. Beal*, 77 Md. 116; *Pegg v. Warford*, 4 Md. 385; *Warford v. Van Sickel*, 4 Md. 397.

<sup>206</sup> *National Safe Deposit, etc. Co. v. Sweeney*, 3 App. D. C. 401.

The issue in a contest ought not to be obscured by introducing questions as to the title of certain realty,<sup>207</sup> or as to the question of the satisfaction of a legacy,<sup>208</sup> or as to the legitimacy of an alleged child.<sup>209</sup>

It was held error to frame the issue "whether the execution of said paper writing was procured by undue influence exercised and practiced upon said J. V. and constraining his will therein," as the court thereby attempted to define the degree of undue influence which would invalidate the will.<sup>210</sup>

### §330. Procedure at trial.—Open and close.

The order of introducing evidence upon the trial of a will contest differs greatly in the different states, and it is usually controlled by statute.

In most states the proponent has the right to open and close since he has the burden of proof as to the validity of the will, under the theory entertained in most jurisdictions.<sup>211</sup> This is also the rule where the question is as to the domicile of decedent and the location of his personal property, in order to determine the jurisdiction of the court, and no question is made as to the validity of the will.<sup>212</sup> Concurrent with this right is the right of the proponent to open and close the argument.<sup>213</sup>

Where the object of the suit is on the part of proponents to establish one will, and on the part of contestants to have this will declared invalid and an earlier one admitted to probate,

<sup>207</sup> Vidal's Succession, 44 La. Ann. 41.

<sup>208</sup> Owens v. Sinklear, 110 Mo. 54.

<sup>209</sup> Warter v. Warter, L. R. 15 P. D. 35.

<sup>210</sup> Brewer v. Barrett, 58 Md. 587; Sumwalt v. Sumwalt, 52 Md. 338.

<sup>211</sup> Overby v. Gordon, 13 App. D. C. 392; Bardell v. Brady, 172 Ill. 420; Bevelot v. Lestrade, 153 Ill. 625; Moyer v. Swygart, 125 Ill. 262; Tate v. Tate, 89 Ill. 42; Rigg

v. Wilton, 13 Ill. 15; Sheehan v. Kearney (Miss.), 21 So. 41; 35 L. R. A. 102; Patten v. Cilley, 67 N. H. 520; Green v. Green, 5 Ohio, 278; Brown v. Griffiths, 11 O. S. 329; Banning v. Banning, 12 O. S. 437; Gable v. Rauch, 50 S. Car. 95; *In re* Bock, 37 S. Car. 348.

<sup>212</sup> Overby v. Gordon, 13 App. D. C. 392.

<sup>213</sup> Banning v. Banning, 12 O. S. 437; Raudebaugh v. Shelley, 6 O. S. 307.

the court has discretion to direct which party shall open and close.<sup>214</sup>

The rule is the same where the contestant assails the validity of the earlier will on the ground that it has been revoked by a later will.<sup>215</sup>

While in most states the proponent has the right to open and close, the states may be divided into two classes upon the question of the extent to which contestant must go into his case in the first instance.

In some states, by special statute, proponents open, make out a *prima facie* case by introducing in evidence the will and a certified transcript of the evidence taken in the probate court, and the order of probate, and rest. Contestants then offer their evidence, and in rebuttal proponents may offer further evidence as to the execution of the will, the capacity of testator and the like.<sup>216</sup>

In other states proponent must offer all his evidence in chief upon opening his case. After he rests, contestants offer their evidence. Proponent is then limited strictly to rebutting evidence, and may be refused to offer further evidence as to execution, capacity of testator and the like.<sup>217</sup> Even in these states the proponent may rest on the *prima facie* case made out by the will, the order of probate and the evidence of the subscribing witnesses in the form allowed by local procedure;<sup>218</sup> and if the court in its discretion sees fit to allow proponent to introduce evidence of testator's capacity and the like after contestants have introduced their evidence, it will not be reversible error, unless contestants are prevented from having a fair trial by exceptional circumstances.<sup>219</sup>

After the jury has answered part of the questions of fact, which dispose of part of the issues, and before the evidence on

<sup>214</sup> *Bardell v. Brady*, 172 Ill. 420.

<sup>215</sup> *McCutchen v. Loggins*, 109 Ala. 457; 19 So. 810.

<sup>216</sup> *Sheehan v. Kearney*, — Miss. —; 21 So. 41; 35 L. R. A. 102; *Runyan v. Price*, 15 O. S. 1; *Mears v. Mears*, 15 O. S. 90.

<sup>217</sup> *Craig v. Southard*, 148 Ill. 37.

<sup>218</sup> *Slingloff v. Brimer*, 174 Ill. 561; *Hesterberg v. Clark*, 166 Ill. 241.

<sup>219</sup> *Slingloff v. Brimer*, 174 Ill. 561; *Craig v. Southard*, 148 Ill. 37; *Titus v. Gage*, 70 Vt. 13; 39 Atl. 246.

the remaining issues has been submitted, contestant may dismiss the action without prejudice to a new action.<sup>220</sup>

The right to withdraw objections to the probate of a will before a hearing thereon, is clearly recognized in some states.<sup>221</sup> But it is held in other jurisdictions that, as there are no parties to probate proceedings, it is impossible to withdraw or dismiss proceedings.<sup>222</sup> The proponent has a right to be present at the hearing and can not be excluded because he is also a witness.<sup>223</sup>

### §331. Right to a jury in contest.

Since the right to make a will is a creature of statute law,<sup>224</sup> it is regularly held that in a contest of a will, the constitutional right to a jury, in such cases as were triable to a jury at the course of the common law, does not exist.<sup>225</sup>

In many states the parties have no right by statute law to have a jury trial in a contest of a will.<sup>226</sup> In some states the court having probate powers may direct an issue of *devisavit vel non* to the law courts for a jury trial. This may be discretionary with the court.<sup>227</sup> In other jurisdictions it is mandatory.<sup>228</sup> In others the court directs the issue only after a preliminary hearing, in which the evidence adduced against the will is such that the court would not feel obliged to disturb a verdict against the proponents of the will. If such evidence is not adduced the court refuses the issue.<sup>229</sup>

<sup>220</sup> *Osborne v. Davies*, 60 Kan. 695.

<sup>221</sup> *Young v. Wark*, 76 Miss. 829. Where this is done, the legal effect as to further procedure is as if no objections had ever been filed. *Lane v. Hill*, 68 N. H. 275, 398. But it is too late after submission to a jury.

<sup>222</sup> *Collins v. Collins*, 125 N. C. 98.

<sup>223</sup> *Heaton v. Dennis* (Tenn.), 52 S. W. 175.

<sup>224</sup> See Sec. 323.

<sup>225</sup> *Cummins v. Cummins*, 1 Marv. (Del.) ('95), 423; 31 Atl. 816.

<sup>226</sup> *Cummins v. Cummins*, 1 Marv. (Del.), 31 Atl. 816.

<sup>227</sup> *Cummins v. Cummins*, 1 Marv. (Del.) 423; 31 Atl. 816.

<sup>228</sup> *Dugan v. Northcutt*, 7 App. D. C. 351; *Lane v. Hill*, 68 N. H. 275, 398.

<sup>229</sup> *Lillibridge's Estate*, 133 Pa. St. 211; *Stewart's Will*, 149 Pa. St. 111; *Fow's Estate*, 147 Pa. St. 264; *Loeser's Estate*, 167 Pa. St. 498; *Pensyl's Estate*, 157 Pa. St. 465;

Thus, where the subscribing witnesses testified positively to the genuineness of the signature and the facts of execution, and the only adverse evidence was the opinion of certain witnesses that the signature of testator was a forgery, the contest was properly refused.<sup>230</sup> But if the evidence is such as to sustain a verdict in favor of parties desiring the issue, the issue will be awarded.<sup>231</sup> And where the evidence tends to show both mental incapacity and undue influence, an issue should be awarded on both grounds.<sup>232</sup>

In other jurisdictions the parties in cases where contest assumes the form of a petition to revoke probate, may have a jury only where the original probate was "without contest." Hence, where written opposition to the admission of a will to probate was filed, which was demurred to, and the demurrer was sustained, it was held that this did not amount to a "contest." The petitioner might, therefore, have a jury trial in his suit to revoke probate.<sup>233</sup>

Where the court transmits such issues it can not transmit issues on the validity of part of the will only, such part not being distinct from the rest;<sup>234</sup> nor can it transmit new issues after directing prior issues on the validity of the will.<sup>235</sup>

In other states a jury trial is allowed in will contests as in actions at law.<sup>236</sup> And in some states the statute not only allows a jury, but makes its intervention necessary, so that it

Rowson's Estate, 175 Pa. St. 150; Rice's Estate, 173 Pa. St. 298; Harvey's Estate, 181 Pa. St. 207; Coleman's Estate, 185 Pa. St. 437; Cahill's Estate, 180 Pa. St. 131; Widowson's Estate, 189 Pa. St. 338; 41 Atl. 977; Hope v. Campbell (H. L.) (1899), A. C. 1.

<sup>230</sup> Douglass's Estate, 162 Pa. St. 567.

<sup>231</sup> Gardner's Estate, 164 Pa. St. 420. (Where the impossibility of testator's getting possession of his will as balanced against the presumption of its revocation arising

from its nonexistence at his death, raised an issue for the jury.)

<sup>232</sup> Armor's Estate, 154 Pa. St. 517.

<sup>233</sup> Robinson's Estate, 106 Cal. 493.

<sup>234</sup> Fisher v. Boyce, 81 Md. 46.

<sup>235</sup> Meyer v. Henderson, 88 Md. 585; 41 Atl. 1073.

<sup>236</sup> Camp v. Shaw, 52 Ill. App. 241; 163 Ill. 144; Garland v. Smith, 127 Mo. 567, 583; 28 S. W. 191; 29 S. W. 836; *In re Laundry*, 148 N. Y. 403.

is error for the court to render judgment on demurrer.<sup>237</sup> And in other jurisdictions the court has no power to grant a nonsuit in a contest.<sup>238</sup>

In some jurisdictions the parties may, by agreement, waive a jury and submit the issues to the court;<sup>239</sup> and in Illinois, even though the statute says that will contests "shall" be tried to a jury, the jury can be waived, since "shall" is construed as "may."<sup>240</sup>

In still other jurisdictions a jury is allowed in will contests, but its verdict is not conclusive as at common law, but is advisory merely, as in feigned issues in equity.<sup>241</sup>

### §332. General powers of the court.

Where notice is to be given to interested parties, it is not reversible error for the court, after assigning an application to probate a will for hearing, to take it off the assignment docket in order to give an absent heir fuller notice than he was, strictly speaking, entitled to.<sup>242</sup>

Where the parties interested are not entitled to notice, it is error for the court to refuse to hear an application for admission of a will to probate until notice has been given.<sup>243</sup>

After an application for admission of a will to probate, the court may allow proponent to withdraw the will before a final submission of the case, and such withdrawal, even after a caveat has been filed, will work a discontinuance, so that the will may subsequently be re-propounded.<sup>244</sup>

<sup>237</sup> Walker v. Walker, 14 O. S. 157; Holt v. Lamb, 17 O. S. 374; Cooch v. Cooch, 18 Ohio, 146. In Ohio a court has power to direct a nonsuit in case of a total failure of evidence upon a material point. Edwards v. Davis, 30 Weekly Law Bull. 283; Wagner v. Ziegler, 44 O. S. 59.

<sup>238</sup> McMahon v. McMahon, 100 Mo. 97; Young's Will, 123 N. Car. 358; Hulson v. Sawyer, 104 N. Car. 1.

<sup>239</sup> Clausenius v. Clausenius, 179

Ill. 545; Whipple v. Eddy, 161 Ill. 114.

<sup>240</sup> Whipple v. Eddy, 161 Ill. 114.

<sup>241</sup> Medill v. Snyder, 61 Kan. 15; 58 Pac. 962; Jones v. Roberts, 96 Wis. 427; 70 N. W. 685; Bryant v. Pierce, 95 Wis. 331; 70 N. W. 297.

<sup>242</sup> State v. Buckner, 45 La. Ann. 247.

<sup>243</sup> Cornelius v. Malone, 34 Oreg. 192.

<sup>244</sup> Fisher's Will, 49 N. J. Eq. 517.

Evidence as to when witness heard of testator's death is harmless error and not reversible.<sup>245</sup>

A new trial may be allowed in a will contest on motion in a proper case;<sup>246</sup> and such motion is usually necessary to allow a review of the weight and sufficiency of the evidence in error proceedings.<sup>247</sup> And even where there is no opposition to a probate of a testament of personalty, the court may be justified in refusing to admit it to probate, where the same instrument had been found to be procured from an incompetent testator by fraud and undue influence in a contest by the heir to test its validity as a devise of realty.<sup>248</sup>

### §333. Charge of court.

There are but few rules on the subject of the charge of the court to the jury which are peculiar to the law of wills or find there a different form of expression from ordinary cases. No attempt can be made here either to repeat in detail the rules which govern the charge of the court in general, or to repeat the rule of substantive law which have been given already, and which in proper cases the court must give in its charge to the jury.<sup>249</sup>

<sup>245</sup> Fenton's Will, 97 Io. 192.

<sup>246</sup> Ellis v. Ellis, — Ky. —; 46 S. W. 521.

<sup>247</sup> Tucker v. Cole, 169 Ill. 150.

<sup>248</sup> Bartholick's Will, 141 N. Y. 166.

<sup>249</sup> Since many forms of charges, either approved or specifically criticised by courts of last resort, have been given under the respective topics to which they refer, no attempt will be made to give an exhaustive set of forms of charges here. Three typical forms will be given.

(Charge as to presumption of sanity.) "Every person is presumed to be of sound mind until the contrary is shown." *Sturdevant's Appeal*, 71 Conn. 392; *Blough v. Parry*, 144 Ind. 463.

(Full charge as to sanity.) "It is not necessary that at the time of the execution of said instrument said A B should be possessed of all the physical or mental health or vigor of a person enjoying the ordinary strength and faculties of body and mind. He might indeed harbor insane delusions and be an actual monomaniac on a topic entirely disconnected from the disposition of his estate, and at the same time be fully capable of making a valid will. The law requires merely that he should be possessed of sufficient intelligence and memory fairly and rationally to know and comprehend the effect of what he was doing, to appreciate his relations to the natural objects of his



All that will be attempted here will be to state some of the applications, peculiar to will contests, of the general rules on the subject of the charge of the court.

The court, in its charge to the jury, must, in some way, refer to the instrument offered as the last will of testator, but how to do so without expressing in some way the court's opinion of the instrument has proved of some difficulty. It is not erroneous for the court to refer to such instrument as a "will" or to decedent as "testator";<sup>250</sup> nor is it reversible error for the court to refer to such instrument as the "pretended will" where the rest of the charge made it clear that the trial court used this expression only to identify the instrument and not to express the opinion that the will was not valid. This expression was, however, criticized by the supreme court.<sup>251</sup> The expression "purported will" has met with more expression of approval from the court of last resort than the others.<sup>252</sup>

If the court has charged correctly upon a point it is not error to refuse to give an additional correct charge upon such point.<sup>253</sup>

If the court has charged fully upon the general question of unsoundness of mind and the different forms thereof, it is

bounty, and understand the character and consequences of the provisions of his will; and that he should be possessed of sufficient intelligence and memory to understand the nature of the business in which he was engaged, to recollect the property of which he wished to dispose, the persons to whom he wished to convey it and the manner in which he desired to distribute it among them. If testator, at the time of the execution of said instrument had the degree of understanding and memory here stated, he possessed testamentary capacity and was in legal contemplation of sound mind and could make a valid will. *St. Leger's App.* 34 Conn. 434.

(Charge as to undue influence af-

fecting part of the will.) "A will may be void in part and valid in part; if the jury should find that the legacy given to A N by the provisions of the will was obtained by her undue influence, then the legacy only would be void, and not the remaining provisions of the will, unless the jury should further find that the undue influence extended to the entire will." *Harrison's Appeal*, 48 Conn. 202.

<sup>250</sup> *Hollenbeck v. Cook*, 180 Ill. 65; *Goble v. Rauch*, 50 S. Car. 95; 27 S. E. 555.

<sup>251</sup> *Keithley v. Stafford*, 126 Ill. 507.

<sup>252</sup> *Egbers v. Egbers*, 177 Ill. 82.

<sup>253</sup> *Daly v. Daly*, 183 Ill. 269; 55 N. E. 671.

not error to refuse to charge specifically upon illusions and hallucinations,<sup>254</sup> nor to refuse to give a further definition of "insane delusion."<sup>255</sup>

If no evidence is offered upon a certain issue the court may instruct the jury to disregard that issue,<sup>256</sup> or may ignore that issue entirely;<sup>257</sup> but it will be error to charge upon such issue.<sup>258</sup> But the charge should not ignore the presumptions and inferences which may be considered by the jury together with direct evidence.<sup>259</sup>

So, where the issue is that of undue influence it is not error to assume due execution of the will in the charge to the jury.<sup>260</sup>

If the evidence is conflicting it is error for the court either to grant a non-suit or to direct a verdict.<sup>261</sup>

Where the court is not requested by either party to charge upon an issue upon which evidence is adduced, such omission is not reversible error;<sup>262</sup> and where too many issues were sent to the jury and the court instructed them to find only on the proper issues, it was held not to be reversible error.<sup>263</sup>

If the jury, upon sufficient evidence, find specially for contestants on two issues, error in the charge on one issue is no ground for reversal, as the other finding supports the judgment.<sup>264</sup>

If the charge, as a whole, is so clear as not to mislead, it is not erroneous, even though detached clauses might be subject to criticism. Thus, a charge, which is well based on evidence, to find for the propounders if the testator was of sound mind,

<sup>254</sup> Wallis v. Luhring, 134 Ind. 447; 34 N. E. 231.

<sup>255</sup> Farmer v. Farmer, 129 Mo. 530.

<sup>256</sup> Entwistle v. Meikle, 180 Ill. 9; West v. West, 144 Mo. 119; 46 S. W. 139; Stevens v. Leonard 154 Ind. 67; 56 N. E. 27.

<sup>257</sup> Ellis v. Ellis, — Ky. —; 46 S. W. 521.

<sup>258</sup> Nieman v. Schnitker, 181 Ill. 400; Boone v. Ritchie (Ky.), 1899; 53 S. W. 518.

<sup>259</sup> Hudson v. Adams, 20 Ky. Law Rep. 1267; 49 S. W. 192.

<sup>260</sup> Graybeal v. Gardiner, 146 Ill. 337; 34 N. E. 528.

<sup>261</sup> Gay v. Sanders, 101 Ga. 601.

<sup>262</sup> Turner's Guardian v. King, 32 S. W. 941.

<sup>263</sup> Adams v. Rodman, 102 Wis. 456; modified 102 Wis. 464.

<sup>264</sup> Putt v. Putt, 149 Ind. 30; 48 N. E. 356.

and against them if the will was caused by undue influence, was not so inconsistent as to require reversal.<sup>265</sup>

An omission to charge fully upon incapacity is a harmless error where a subsequent charge supplies the omission.<sup>266</sup> So, where certain facts, if true, clearly were undue influence, it was held not to be reversible error for the court in one part of his charge to tell the jury that such facts "tended to show undue influence," where in the rest of his charge he made it clear that such facts were undue influence if true.<sup>267</sup>

An erroneous charge to the effect that one of contestants would take as much if the will were sustained as if it were overthrown, is reversible error.<sup>268</sup>

A charge that withdraws competent evidence from the consideration of the jury is erroneous. Thus, it is error to charge that forgetfulness has no tendency to prove want of capacity.<sup>269</sup> A charge which assumes certain facts as proved which were not in evidence is also erroneous.<sup>270</sup>

The court should not, in its charge, give excessive and undue prominence to part of the evidence to the exclusion of the rest.<sup>271</sup>

The court is not obliged to charge the jury upon abstract law questions. Thus where the executor was not offered as a witness by either party, but his competency was disputed in argument by counsel, the court is not obliged to charge as to his competency.<sup>272</sup>

<sup>265</sup> *Bramel v. Bramel*, — Ky. —; 39 S. W. 520; *Barkley v. Cemetery Association*, 153 Mo. 300; *Gordon v. Burris*, 153 Mo. 223.

<sup>266</sup> *Folks v. Folks*, — Ky. (1900); 54 S. W. 837; *Gordon v. Burris* 153 Mo. 223; *Turner's Appeal*, 72 Conn. 305.

<sup>267</sup> *Manley's Exr. v. Staples*, 65 Vt. 370.

<sup>268</sup> *Culp v. Culp*, 142 Ind. 159.

<sup>269</sup> *Bush v. Delano*, 113 Mich. 34.

<sup>270</sup> *Nieman v. Schnitker*, 181 Ill. 400; *Powers' Ex'r v. Powers* (Ky.), 52 S. W. 845; *Fox v. Martin*, 104

Wis. 581; 80 N. W. 921; *McIntosh v. Moore* (Tex. Civ. App.) (1899), 53 S. W. 611. But a charge which states an hypothetical case is not objectionable as assuming such case. *Gordon v. Burris* (Mo.) (1899), 153 Mo. 223. Thus a charge that a will was invalid if caused by undue influence is not objectionable as assuming the existence of the undue influence.

<sup>271</sup> *Coats v. Lynch*, 152 Mo. 161.

<sup>272</sup> *Crenshaw v. Johnson*, 120 N. Car. 270.

As the credibility of witnesses and weight of evidence, especially of opinion evidence, is peculiarly for the jury, the court should decline to charge upon such points.<sup>273</sup> It is, therefore, error for the court to charge the jury that other witnesses may have had better opportunities for observation than the subscribing witnesses, where there is no evidence that other witnesses were present.<sup>274</sup>

In Pennsylvania the court may, in its charge, show its own opinion as to the credibility of the witnesses without committing error.<sup>275</sup>

It is error for the court to coerce the jury into an agreement, by refusing to discharge them after it is evident that they will not agree voluntarily, by threatening to retain them an indefinite time and to have them published as unfit to be jurymen, and by charging them that their agreement is not a matter of conscience but of judgment.<sup>276</sup>

It is error for the court to allow an attorney, after a witness has testified that testatrix had a very strong mind and remarkable memory to say, "I agree with you; I have known her most of my life."<sup>277</sup> But where the verdict of the jury is advisory merely the admission of incompetent and immaterial evidence can not be ground for reversal.<sup>278</sup> Nor is error in urging an agreement reversible.<sup>279</sup>

### §334. Evidence sufficient to support a verdict.

Where a jury is allowed by statute in will contests, and its verdict is not advisory merely, but has the effect of the verdict of a jury at common law, the same principles of law that apply to the verdicts of juries in other cases are applicable.

If the evidence upon a point in issue is conflicting the ques-

<sup>273</sup> Burney v. Torrey, 100 Ala. 157; Turner's Appeal, 72 Conn. 305.

<sup>274</sup> Nieman v. Schnitker, 181 Ill. 400.

<sup>275</sup> McCormick v. McCormick, 194 Pa. St. 107; 45 Atl. 88.

<sup>276</sup> Miller v. Miller, 187 Pa. St. 572; 41 Atl. 277.

<sup>277</sup> Goldthorp v. Goldthorp, 106 Io. 722; 77 N. W. 471.

<sup>278</sup> Bryant v. Pierce, 95 Wis. 331; 70 N. W. 297.

<sup>279</sup> Jones v. Roberts, 96 Wis. 427; 70 N. W. 685.

tion is for the consideration of the jury, including not only the direct evidence, but the inferences that may be drawn therefrom;<sup>280</sup> and this proposition is especially true in cases of mental capacity and undue influence.<sup>281</sup> Where the evidence is conflicting, therefore, the jury should pass upon the question of the validity of the will under proper instructions from the court, and the verdict should not be disturbed unless clearly and manifestly against the weight of the evidence.<sup>282</sup>

Thus, when the evidence tended to show that two of testator's sons exerted influence over him, and that immediately after interviews with them testator spoke of changing his will, and did change it, it was held enough to go to the jury.<sup>283</sup>

But where the verdict is entirely unsupported by the evidence, or in some jurisdictions where it is clearly contrary to the weight of the evidence, the court will set it aside.<sup>284</sup>

Thus, where the only evidence of mental incapacity is that testator was in bad health and somewhat absent-minded, a verdict against his capacity should be set aside.<sup>285</sup> So, where the only evidence as to capacity is that testator was old and feeble, and that his mind at the date of making the will was not as good as formerly;<sup>286</sup> and so where the only evidence

<sup>280</sup> *Caven v. Agnew*, 186 Pa. St. 314.

<sup>281</sup> *Lischy v. Schrader*, — Ky. —; 47 S. W. 611; *Crockett v. Davis*, 81 Md. 134; *Gordon v. Burris*, 141 Mo. 602; *Rivard v. Rivard*, 109 Mich. 98; *Caven v. Agnew*, 186 Pa. St. 314.

<sup>282</sup> *Brooke's Appeal* 68 Conn. 294; *Harp v. Parr*, 168 Ill. 459; *Kelley v. Kelley*, 168 Ill. 501; *Peteřfish v. Becker*, 176 Ill. 448; *Bever v. Spangler*, 93 Io. 576; *Allison's Estate*, 104 Io. 130; *Hudson v. Hughan*, 56 Han. 152; *Morris v. Morton's Ex'r*, — Ky. —; 20 S. W. 287; *Wills v. Tanner*, — Ky. —; 39 S. W. 422; *Howat v. Howat's Ex'r*, — Ky. —; 41 S. W. 771; *Hudson v. Adams*,

— Ky. —; 49 S. W. 192; *Johnson v. Johnson*, — Ky. —; 45 S. W. 456; *Hiss v. Wick*, 78 Md. 439; *Campbell v. McGuiggan*, — N. J. Eq. —; 34 Atl. 383; *Hurley v. O'Brien*, — Oreg. —; 54 Pac. 947; *McMaster v. Scriven*, 85 Wis. 162; *Spehn v. Huebschen*, 83 Wis. 313; *West v. West*, 144 Mo. 119; 46 S. W. 139.

<sup>283</sup> *Rivard v. Rivard*, 109 Mich. 98.

<sup>284</sup> *Wilcoxon v. Wilcoxon*, 165 Ill. 454; *Farnum v. Boyd*, 56 N. J. Eq. 766.

<sup>285</sup> *McFadin v. Catron*, 138 Mo. 197; *In re Cline*, 24 Ore. 175.

<sup>286</sup> *O'Connor v. Madison*, 98 Mich. 183; *Von de Veld v. Judy*, 143 Mo. 348.

of incapacity was that testator was becoming forgetful, incoherent and garrulous.<sup>287</sup>

Where the evidence is totally wanting on a necessary point the court may sustain a demurrer to the evidence,<sup>288</sup> or may direct a verdict on the issue upon which there is a total failure of proof,<sup>289</sup> even in jurisdictions where the intervention of a jury is necessary.

Where there are two issues, such as incapacity and undue influence, a verdict for contestants on both issues will not be set aside because of a total failure of proof on one issue only.<sup>290</sup>

As the credibility of the witnesses is peculiarly a question for the jury, a verdict of the jury on the finding of the trial court where the case is tried to the court, is not necessarily contrary to the weight of the evidence, where the testimony of a trustee of a secret trust was not believed, though uncontradicted, the evidence disclosing a very strong bias on his part.<sup>291</sup>

### §335. Form of verdict and judgment.

The form of the judgment in contest proceedings is largely determined by local statutes and procedure. The issue usually is merely the validity of the will in dispute, and therefore in a suit to contest a will as a forgery, where the evidence disclosed that a lost will was the last will and testament of testator, under which lost will contestants were beneficiaries, the court should merely pass on the validity of the alleged forgery, and not establish the lost will.<sup>292</sup>

Where the finding in the contest is that the purported will is not the last will of testator, the decree may revoke probate and all proceedings thereunder.<sup>293</sup>

<sup>287</sup> Wood v. Lane, 102 Ga. 199; Holmberg v. Phillips, — Io. —; 78 N. W. 66; Riley v. Sherwood, 144 Mo. 354.

<sup>288</sup> Von de Veld v. Judy, 143 Mo. 348.

<sup>289</sup> Ellis v. Ellis, — Ky. —; 46 S. W. 521; West v. West, 144 Mo. 119; 46 S. W. 139. See Sec. 333.

<sup>290</sup> Fenton's Will, 97 Io. 192; 66 N. W. 99.

<sup>291</sup> Trustees of Amherst College v. Ritch, 151 N. Y. 282.

<sup>292</sup> McDonald v. McDonald, 142 Ind. 55.

<sup>293</sup> Sinnet v. Bowman, 151 Ill. 146.

In Missouri the verdict of the jury is final, and it is not necessary to enter judgment thereon.<sup>294</sup> In some states the jury is required to bring in a general verdict for or against the will.<sup>295</sup> In other states the verdict must be a special one.<sup>296</sup>

In any case the findings upon which the judgment is based must be consistent. It is, therefore, error to enter judgment on a finding that testator was competent, that he made his will under the influence of an insane delusion, and that he made it under undue influence.<sup>297</sup> But it is not ordinarily held necessary that the order of probate should make a separate finding as to each fact necessary to establish the validity of the will.<sup>298</sup>

Thus, an order which shows that the witnesses were examined, and that thereupon the will was ordered filed and admitted to probate, is sufficient without a special finding of due execution.<sup>299</sup>

Where, on formal and regular hearing, the probate court orders the will admitted to probate and record, such will is considered as recorded, even though the actual writing out of the record has not yet been done.<sup>300</sup>

In some states the formal order of probate is not necessary to make a record which establishes the validity of the will. Where the law authorizes record only after the court has ordered the will admitted to probate, a record which shows that the will is exhibited, filed and recorded, establishes presumptively at least that the will was properly recorded in compliance with an order admitting it to probate.<sup>301</sup> And where the court of probate jurisdiction allows the executor to act as such, it may be presumed that the court first secured proof of such will and ordered its admission to probate.<sup>302</sup>

<sup>294</sup> *Gordon v. Burris*, 141 Mo. 602.

<sup>295</sup> See Sec. 324.

<sup>296</sup> *In re Langan*, 74 Cal. 353.

<sup>297</sup> *Gwin v. Gwin*, — Ida. —; 48 Pac. 295.

<sup>298</sup> *Baker v. Cravens*, 150 Ind. 199; *Evansville, etc. Company v. Winsor*, 148 Ind. 682.

<sup>299</sup> *Holman v. Riddle*, 8 O. S. 384.

<sup>300</sup> *McClaskey v. Barr*, 54 Fed. 781, affirming 47 Fed. 154.

<sup>301</sup> *Keister v. Keister*, 178 Ill. 103; *Lawrence v. Oglesby*, 178 Ill. 123; *Rothwell v. Jamison*, — Mo. —; 49 S. W. 503.

<sup>302</sup> *Witt v. Cutter*, 38 Mich. 189; *Holliday v. Ward*, 19 Pa. St. 405; *Counts v. Wilson*, 45 S. Car. 571.

Clerical irregularities in making out the order of probate or in recording the will do not invalidate the proceedings if otherwise regular.

So, where the will of Martha V. Baker was offered for probate, which fact clearly appeared from the record, the validity of the probate was not defeated by the fact that the entry of probate recited that the will of "Mary Baker" was filed.<sup>303</sup> And where the will was executed in due form and presented for probate and admitted to probate, the fact that the clerk copied it erroneously was not allowed to defeat the rights of the parties claiming thereunder.<sup>304</sup> And a statute requiring orders to be entered at length and signed was held to be directory only.<sup>305</sup> A statute that the evidence of subscribing witnesses should be reduced to writing was held to be directory only, and its violation did not invalidate the will.<sup>306</sup> But where the instrument offered for probate was not executed according to law, an order of the court having probate powers that it be admitted to record "to have such effect as it may" is not an order admitting it to probate as the last will of decedent.<sup>307</sup>

### §336. Effect and operation of order of probate.

An order of probate in common form is in almost every state as binding as a probate in solemn form where not contested in the manner prescribed by statute. The effect of such order will be considered with the effect of an order of probate in solemn form in the following sections. It is conclusive not only in the state in which it is probated, but in sister states.<sup>308</sup>

### §337. Direct attack.

As has already been said, the modern statutes generally provide for direct attack upon probate in common form by means of appeal, suit to contest will in the nature of appeal, and the

<sup>303</sup> Baker v. Cravens, 150 Ind. 146; Hillyer v. Schenck, 15 N. J. Eq. 199. 398.

<sup>304</sup> McNeely v. Pearson (Tenn. Ch. App.) 42 S. W. 165.

<sup>306</sup> Reese v. Nolan, 99 Ala. 203.

<sup>307</sup> Chase v. Stockett, 72 Md. 235.

<sup>305</sup> McCrea v. Haraszthy, 51 Cal.

<sup>308</sup> Martin v. Stovall (Tenn.) 52 S. W. 296.



like. Such direct attack is provided for by statute or by settled rules of law and equity. It is not only permitted but is actually provided for by law, and its validity is beyond all question.<sup>309</sup>

In Louisiana a will may be attacked on the final "homologation" of executor's accounts if all the parties interested are before the court. As this is said to be a species of direct attack, it is not regarded by the court as an exception to the rule forbidding collateral attack.<sup>310</sup>

In other states one interested adversely to the will who is not notified of the pendency of proceedings to admit such will to probate, may move to have the order admitting such will to probate vacated; and upon such hearing no presumption exists as to the validity of the original probate, and the will is practically offered for probate *de novo*.<sup>311</sup>

But these states all treat such an application as a direct attack upon the order of probate, and not a collateral attack. In allowing such application they do not, in form, at least, recognize collateral attack.<sup>312</sup> But where an application by one not properly notified of the pendency of the original proceedings to probate the will, to vacate the order of probate, is held to be a collateral attack upon such order, it is not allowed.<sup>313</sup>

<sup>309</sup> See Sec. 323; *Herring v. Ricketts*, 101 Ala. (93), 340; 13 So. 502; *Justus's Succession*, 45 La. Ann. 190.

<sup>310</sup> *Shaffer's Succession*, 50 La. Ann. 601; *Fuentes v. Gaines*, 25 La. Ann. 85.

<sup>311</sup> *Herring v. Ricketts*, 101 Ala. 340; *Knox v. Paull*, 95 Ala. 505; *Dickey v. Vann*, 81 Ala. 425; *Hall v. Hall*, 47 Ala. 290; *Randolph v. Hughes*, 89 N. Car. 428; *Feuchter v. Keyl*, 48 O. S. 357; *Hotchkiss v. Ladd*, 62 Vt. 209; *Heminway v. Roberts*, 98 Wis. 501.

<sup>312</sup> "Under a practice established in this state by a series of decisions which, from their long standing should not now be questioned, it is

settled that any distributee of the estate of the testator, entitled to notice of the probate of the will, and not having received such notice prior to the probate, may make an application to the court in which the will was probated to vacate and revoke the probate, and that the same should be granted if it appear that the applicant was entitled to notice and none was given."

*Kirby v. Kirby*, 40 Ala. 492, quoted in *Herring v. Ricketts*, 101 Ala. (1893) 340; 13 So. 502, citing *Dickey v. Vann*, 81 Ala. 425; *Hall v. Hall*, 47 Ala. 290; *Lovett v. Chisholm*, 30 Ala. 88.

<sup>313</sup> *Twombly's Will*, 120 Cal. 350.

### §338. Appeal and error.

Appeal, using the word as a name for a proceeding which takes the law and the facts up together for review by the appellate court, is allowed from a judgment in a will contest only when specifically provided for by statute. Thus, appeal from a contest was once allowed in Ohio,<sup>314</sup> but by subsequent change of statute this right has been abolished.<sup>315</sup>

The right of prosecuting error to a judgment in a contest proceeding is usually the same as in other civil cases,<sup>316</sup> and exceptions may be taken on trial.<sup>317</sup>

An order admitting a will to probate is a final order in a "case," and may be reviewed on error if the provisions of the general statutes on the subject of error are complied with.<sup>318</sup>

### §339. Collateral attack.—On whom is probate binding.

In some jurisdictions an order of probate, whether made on probate in common form or probate in solemn form, is binding only upon those who are made parties to the proceeding or else are properly notified of the pendency of such proceeding.<sup>319</sup> But where notice is not given as required this can be taken advantage of only by those who were entitled to have notice. Thus where notice to heirs residing in a foreign country was not given to consul of such country, as required by statute, no advantage of such omission can be taken by the debtors of testator.<sup>320</sup>

In other jurisdictions the order of probate is binding, not only upon those who are notified of the pendency of such proceedings, but also upon such as were entitled to become parties to such proceedings and had actual knowledge of the same in time to become parties thereto.<sup>321</sup> In other jurisdictions the

<sup>314</sup> Mitchell v. Hogg, 10 O. S. 447.

<sup>315</sup> McMaster v. Keller, 1 Ohio C. C. 476.

<sup>316</sup> Glancy v. Glancy, 17 O. S. 134.

<sup>317</sup> Holman v. Riddle, 8 O. S. 384.

<sup>318</sup> Ormsby v. Webb, 134 U. S. 47.

<sup>319</sup> Medlock v. Merritt, 102 Ga. 212; 29 S. E. 185; Hightower v. Williams, — Ga. —; 30 S. E. 862; Larson v. How, 71 Minn. 250; Holt v. Lamb, 17 O. S. 374.

<sup>320</sup> Rice v. Hosking, 105 Mich. 303; 63 N. W. 311.

<sup>321</sup> Young v. Holloway (1895), Prob. 87; 11 Rep. 596.

order of probate is strictly a proceeding *in rem*, and is binding upon the whole world, irrespective of their knowledge of the pendency of proceedings.<sup>322</sup>

### §340. Collateral attack not allowed.

It is a general principle of law that collateral attack is not permitted to be made upon any judgment or order of court by anyone who is bound thereby. The general rule applies to orders and decrees admitting a will to probate. No person who is bound thereby can afterwards attack such order collaterally when its validity is involved in another judicial proceeding.<sup>323</sup> Thus an order of probate after contest can be set aside for fraud only on direct application for such purpose under the statute. It can not be attacked collaterally by instituting new proceedings in contest;<sup>324</sup> nor by raising the question of the validity of the will in an action by the execu-

<sup>322</sup> Dugan v. Northcutt, 7 App. D. C. 351; Crippen v. Dexter, 13 Gray, 330; Brigham v. Fayerweather, 140 Mass. 411; McDaniel v. McDaniel, 86 Md. 623; McCambridge v. Walraven, 88 Md. 378; Bogardus v. Clark, 4 Paige, 623; Tompkins v. Tompkins, 1 Story C. C. 472; Woodruff v. Taylor, 20 Vt. 65; Wills v. Spraggins, 3 Grat. 555; *In re Storey*, 20 Ill. App. 183.

<sup>323</sup> Gaines v. Chew, 2 How. 619; Armstrong v. Lear, 12 Wheat. 169; Tarver v. Tarver, 9 Pet. 174; Broderick's Will, 21 Wall. 503; Gaines v. Fuentes 92 U. S. 10; Richardson v. Green, 61 Fed. 423; Boyer v. Decker, 5 App. Div. 623 (N. Y.); 40 N. Y. Supp. 469; Maund v. Maund, 94 Ga. 479; Gay v. Sanders, 101 Ga. 601; 28 S. E. 1019; Calloway v. Cooley, 50 Kan. 743 (judgment as a validity of foreign will); Smith v. Holden, 58 Kan. 535; McDaniel v. McDaniel, 86 Md. 623; McCambridge v. Walraven, 88 Md. 378; 41 Atl. 928; Stanley v.

Safe Deposit Co. 87 Md. 450; Sly v. Hunt, 159 Mass. 151; 21 L. R. A. 680; 38 Am. St. Rep. 403; Holman v. Perry, 4 Met. (Mass.) 492; Wilkins v. Hukill, 115 Mich. 594; 73 N. W. 898; Varner v. Johnston, 112 N. Car. 570; 17 S. E. 483; McClure v. Spivey, 123 N. Car. 678; Bolton v. Schriever, 135 N. Y. 65; Le Grange v. Ward, 11 Ohio, 257; Brown v. Burdick, 25 O. S. 260; Mosier v. Harmon, 29 O. S. 220; Davis v. Kirksey, 14 Tex. Cir. App. 380; McSpadden v. Farmer (Tex. Civ. Ann.), 23 S. W. 814; Halbert v. De Bode (Tex. Cir. App.), 28 S. W. 58; Dicke v. Wagner, 95 Wis. 260; Carey's Estate, 49 Vt. 236; Morton v. Onion, 45 Vt. 145.

*But see In re Craft's Estate*, 164 Pa. St. 520; Appeal of Martin, 30 Atl. 493; Hegarty's Appeal, 75 Pa. St. 503; Robeno v. Marlatt, 136 Pa. St. 35; 20 Atl. 512.

<sup>324</sup> McCambridge v. Walraven, 88 Md. 378; 41 Atl. 928.

tor to sell testator's real estate to pay his debts;<sup>325</sup> nor in an action to recover property in which the will is offered in evidence to show title.<sup>326</sup> This is true even if contest proceedings are pending.<sup>327</sup>

But in some states the probate of a will devising real property is only *prima facie* evidence of its validity, and is therefore liable to collateral attack in any suit in which such will may be offered in evidence.<sup>328</sup> Where probate is only *prima facie* evidence of the validity of the will, it may be attacked collaterally in a suit in equity to set aside a decree of foreclosure rendered in a suit against the executor under the will, by showing that the will was not made in contemplation of marriage, and was therefore revoked by testator's subsequent marriage and the birth of a posthumous child, and that therefore the executor acting as such was not the lawful executor.<sup>329</sup> And where such probate is *prima facie* evidence of the validity of the will, it is error to charge that it is of no effect whatever.<sup>330</sup>

### §341. What questions are determined by probate.

An order admitting a will to probate, if made by a court of competent jurisdiction, is conclusive upon all who, under the local rules of procedure, are bound thereby, as to every fact necessary to be established in order to authorize the admission of the will to probate, except in some states as to certain facts which are jurisdictional in their nature and which the court can not adjudicate. Thus a finding by a court of competent

<sup>325</sup> Maund v. Maund, 94 Ga. 479.

<sup>326</sup> Varner v. Johnston, 112 N. Car. 570; 17 S. E. 483; Warfield v. Fox, 53 Pa. St. 382; Wilson v. Gaston, 92 Pa. St. 207; Cochran v. Young, 104 Pa. St. 333.

<sup>327</sup> Brown v. Burdick, 25 O. S. 260.

<sup>328</sup> Barbour v. Moore, 4 App. D. C. 535; Belton v. Summer, 31 Fla. 139; Corley v. McElmeel, 149 N. Y. 228.

"In a collateral proceeding its

(probate's) effect as *prima facie* evidence of the validity of the will as to real property, may be overcome by other evidence showing the will to be invalid."

Belton v. Summer, 31 Fla. 139, citing Troy v. Evans, 97 U. S. 1; Kelly v. Jackson, 6 Pet. (U. S.) 622.

<sup>329</sup> Belton v. Summer, 31 Fla. 139.

<sup>330</sup> Barbour v. Moore, 4 App. D. C. 535.

jurisdiction that a certain instrument is "the last will and testament of deceased" is conclusive as to the mental capacity of testator at the time he made such will with reference to his testamentary capacity and as far as such will is concerned.<sup>331</sup>

But it is held in Kentucky that probate is not conclusive as to the power of a testatrix to dispose of her estate by will.<sup>332</sup>

Probate also establishes the absence of such undue influence as in law vitiates a will, as far as the will in question is concerned.<sup>333</sup> It also establishes the fact that the will probated was not fraudulently substituted for the genuine will.<sup>334</sup> An order of probate made by a court of competent jurisdiction is conclusive as to the form and regularity of the proceedings in probate,<sup>335</sup> and can not be attacked collaterally by showing that the will was admitted to probate upon the evidence of only one subscribing witness.<sup>336</sup>

Unless the statute specially requires it, the record of probate does not have to show a finding as to each element of proof. Thus where the record discloses that only one witness testified the probate was nevertheless valid.<sup>337</sup> It is said that an order of probate is conclusive as to the legality of the form of the will.<sup>338</sup> Where one of the subscribing witnesses was incompetent, but this fact did not appear on the face of the will, an order admitting such will to probate was not a nullity and could not be attacked collaterally.<sup>339</sup> An order dismissing an appeal because of defect of parties is no bar to an appeal to which all

<sup>331</sup> *Smith v. Holden*, 58 Kan. 535; *Sly v. Hunt*, 159 Mass. 151; 21 L. R. A. 680; 38 Am. St. Rep. 403; *Varner v. Johnston*, 112 N. Car. 570; 17 S. E. 483.

<sup>332</sup> *Gregory v. Oates*, 92 Ky. 532; 13 Ky. L. Rep. 761; 18 S. W. 231; *Craine v. Edwards*, 13 Ky. L. Rep. 499; 17 S. W. 211 (1892); 92 Ken. 109.

<sup>333</sup> *Wilkins v. Hukill*, 115 Mich. 594; 73 N. W. 898.

<sup>334</sup> *Harp v. Parr*, 168 Ill. 459.

<sup>335</sup> *Stanley v. Safe Deposit and Trust Company*, 88 Md. 401; *Maund*

*v. Maund*, 94 Ga. 479; *McClure v. Spivey*, 123 N. Car. 678; 31 S. E. 857.

<sup>336</sup> *McClure v. Spivey*, 123 N. Car. 678; 31 S. E. 857; *Mosier v. Harmon*, 29 O. S. 220.

<sup>337</sup> *Baker v. Cravens*, 150 Ind. 199.

<sup>338</sup> *Tygart v. Peeples*, 9 Rich. Eq. 46; *Craig v. Beatty*, 11 S. Car. 375; *Blount v. Walker*, 28 S. Car. 545; *Burkett v. Whittemore*, 36 S. Car. 428.

<sup>339</sup> *Chicago Title and Trust Co. v. Brown*, 183 Ill. 42.

interested are made parties,<sup>340</sup> nor does a decree entered by consent dismissing an appeal bar others who were not parties to such appeal.<sup>341</sup>

A probate court has as a rule jurisdiction to admit to probate only the wills and testaments of persons domiciled within their territorial jurisdictions or owning property therein. An interesting question is presented when it is sought to attack the validity of the order of probate by showing that testator was not domiciled within the jurisdiction of such probate court at the time of his death, and that the order admitting the will to probate is therefore a nullity. It is generally held that though such fact is jurisdictional the court has nevertheless upon such point jurisdiction to hear and determine the fact; and where the court passes upon such fact, either directly or inferentially, no collateral attack can be made upon the order of probate by showing that testator did not, in fact, have his domicile within the jurisdiction of said court.<sup>342</sup> Hence, where a will has been admitted to probate in a county of which testator was not a resident at his death, upon false testimony, this order can not be attacked collaterally by a proceeding to probate the will *de novo* in the proper county.<sup>343</sup>

An order of probate obtained in another jurisdiction after the will has been probated and contest proceedings instituted in the first jurisdiction, is not such an adjudication of testator's domicile in the second jurisdiction that it can not be attacked in the original suit. Indeed, it is not even evidence of testator's domicile in the second jurisdiction.<sup>344</sup> The probate court has also authority to pass on the validity of the notice given. No collateral attack can be made on this ground.<sup>345</sup>

<sup>340</sup> *Miller's Estate*, 159 Pa. St. 562.

<sup>341</sup> *Lischy v. Schrader* (Ky.), 47 S. W. 611; 20 Ky. L. R. 843.

<sup>342</sup> *Hahn v. Kelly*, 34 Cal. 391; *Wight v. Wallbaum*, 39 Ill. 554; *Dequindre v. Williams*, 31 Ind. 444; *Stewart v. Row*, 10 La. Rep. 530; *McDaniel v. McDaniel*, 86 Md. 623; *Johnson v. Beazley*, 65 Mo. 250; *Obert v. Hammel*, 18 N. J. L. 73;

*Bolton v. Schriever*, 135 N. Y. 65; 18 L. R. A. 242; *Fisher v. Bassett*, 9 Leigh (Va.) 119.

*Contra* in Kentucky, *Miller v. Swan*, 91 Ky. 36.

<sup>343</sup> *Cunningham v. Tuley*, 154 Ind. 270 (1900), 56 N. E. 27.

<sup>344</sup> *Overby v. Gordon*, 13 App. D. C. 392.

<sup>345</sup> *Stanley v. Safe Deposit Co.*, 87 Md. 450; 88 Md. 401.

A court of probate in admitting a will to probate does not in most states have any jurisdiction to construe the will so as to conclude the parties to such proceeding. Its action does not conclude the parties as to any facts except that the testator possessed the requisite capacity, was not under undue influence and made the will in the manner required by statute.<sup>346</sup> In accordance with this principle a court can not exclude from probate an instrument executed in due form by a competent testator who was not under restraint, on the sole ground that the instrument itself was not testamentary in its character.<sup>347</sup> When a court of probate powers admits a will to probate, this action of the court is conclusive as to the form of the will, but is not conclusive upon the parties as to its construction, its legal effect, or its validity, except so far as the form of the instrument, testator's capacity and freedom from restraint, and the fact that the will was not revoked are concerned.<sup>348</sup> Thus the order of the probate court in admitting a will to probate and allowing the residuary legatee to give bond did not conclusively establish the validity of such residuary bequests, nor did it work a transfer of the estate to such residuary legatee.<sup>349</sup> Nor does the admission of a will to probate preclude inquiry as to whether such will was a valid execution of a power;<sup>350</sup> nor does the probate of a will devising real estate determine the capacity of the devisee to take there-

<sup>346</sup> *Vestry of St. John's Parish v. Bostwick*, 8 App. D. C. 452; *Merriam's Estate*, 136 N. Y. 58; *Hegarty's Appeal*, 75 Pa. St. 503; *Burkett v. Whittemore*, 36 S. Car. 428; *Jones v. Roberts (Jones's Estate)*, 84 Wis. 465; 54 N. W. 917.

<sup>347</sup> *Barney v. Hays*, 11 Mont. 99. "The respondent claims that these instruments when examined and construed are not of a testamentary character; that the issues which have been commented on are irrelevant and immaterial and therefore there was no error in denying the probate of said will and codicil. It

is obvious that the statute *supra* and the authorities preclude such view of the subject." *Barney v. Hays*, 11 Mont. 99, citing *Cobb's Estate*, 49 Cal. 599; *Sanderson's Estate*, 74 Cal. 199.

<sup>348</sup> *Merriam's Estate*, 136 N. Y. 58; *Burkett v. Whittemore*, 36 S. Car. 428; *Jones v. Roberts*, 84 Wis. 465; *Jones v. Roberts*, 54 N. W. 917.

<sup>349</sup> *Jones v. Roberts (Jones's Estate)*, 84 Wis. 465, 54 N. W. 917.

<sup>350</sup> *Burkett v. Whittemore*, 36 S. Car. 428.

under. Hence a devise to the United States was not, after admission to probate, liable to direct attack by the heirs on the sole ground that the United States was not authorized to take such devise, as the decree of probate was not an adjudication of such fact.<sup>351</sup> So where a will written in one language is probated as translated, the court is not bound by the translation, if inaccurate, but may look to the original.<sup>352</sup> But in some states the probate court is given jurisdiction to construe the will and to decide what interest is passed thereby; and such finding is conclusive if not appealed from.<sup>353</sup>

Where the order of probate is not a nullity, the acts of the executor before the will is set aside are valid and are not subject to attack even if the will is set aside afterward on a direct proceeding.<sup>354</sup> Where the court had no jurisdiction to make the order admitting the will to probate, such order is a nullity and may be attacked collaterally wherever relied on.

What facts prevent the jurisdiction of the court from attaching is often a question of great difficulty. Where the record of probate shows affirmatively that the alleged will was not executed in accordance with law, it is held in some jurisdictions that the court had no jurisdiction to admit such instrument to probate as a will, and the order of probate is therefore a nullity and may be attacked collaterally.<sup>355</sup> But the

<sup>351</sup> Merriam's Estate, 136 N. Y. 58.

<sup>352</sup> Cliff's Trusts (1892), 2 Ch. 229; Williamson's Will, 6 Ohio N. P. 79. A different view was taken in *Caulfield v. Sullivan*, 85 N. Y. 153, where it was held that the translation was proof against collateral attack.

<sup>353</sup> *Brown v. Stark*, 47 Mo. App. 370; *Ward v. Congregational Church*, 66 Vt. 490; 29 Atl. 770.

<sup>354</sup> *Smith v. Smith*, 168 Ill. 488; *Jones v. Jones*, 14 B. Mon. 464; *Woods v. Nelson*, 9 B. Mon. 600.

<sup>355</sup> *Hooks v. Stamper*, 18 Ga. 471; *Gay v. Sanders*, 101 Ga. 601; *Wall v. Wall*, 123 Pa. St. 545; *Bowlby v. Thunder*, 105 Pa. St. 173.

"A judgment of the court of ordinary ordering the probate of such a paper attested by one witness only, gives the paper no effect as a will in any proceeding in which its validity may be called into question. The court of ordinary is without jurisdiction to render such judgment, which is therefore void. The will . . . had been proved and admitted to record; and yet it had no attesting witnesses, as appears from the probate itself. . . It is conceded that it had no subscribing witnesses. The will was therefore utterly void and of no effect. It was competent, therefore, to move at any time, to set aside the judgment of the ordinary admitting



appearance and consent of adult heirs at the probate of such a will, will bind them where the estate is afterwards distributed, though such probate is of no effect as to minors.<sup>356</sup>

As a court of probate has, as a rule, jurisdiction to admit to probate only wills of deceased testators, an order admitting to probate a will of a living man is held to be without the jurisdiction of the court, and may be attacked collaterally. The text-book writers have discussed the question of the effect of the probate of the will of one who is thought to be dead but who subsequently proves to be alive at the time. The unanimous opinion of the writers upon this subject is that the court of probate powers has no jurisdiction to admit to probate the will of one who is alive, and that the order admitting the will to probate may be attacked collaterally whenever the validity of the will is presented for adjudication. This question does not seem to have been presented to the courts for adjudication, and the authorities cited in support of the proposition are all of them cases where no will was left by the person alleged to have deceased; and his estate was settled on the theory that he died intestate. In such a case the authorities are almost unanimous to the effect that the court had no jurisdiction to make an order appointing an administrator, or to order any sale of the property of the alleged decedent; and that such orders may be attacked collaterally by the alleged decedent in an action to recover his property.<sup>357</sup>

this paper to probate. It was a nullity on its face; and in favor of such a judgment nothing can be presumed." *Hooker v. Stamper*, 18 Ga. 471.

"A will attested by only two witnesses is void, and can derive no aid from probate and being admitted to record. The judgment of probate is not merely erroneous, but a nullity on its face. No motion to set it aside is requisite, nor is it ever too late to urge its invalidity." *Cureton v. Taylor*, 89 Ga. 490." *Gay v. Sanders*, 101 Ga. 601.

<sup>356</sup> *Gay v. Sanders*, 101 Ga. 601.

<sup>357</sup> "The general question as to whether any court has or can have jurisdiction to grant letters of administration on the estate of a living person has been much discussed, and while the authorities are not entirely harmonious, yet the great weight thereof is clearly against the existence of any such jurisdiction. The ground upon which most of the decisions rest is that in order to confer jurisdiction upon a court to grant letters of administration upon a person's estate, that person must in fact be dead."

Carr v. Brown, 20 R. I. 215, citing Griffith v. Frazier, 8 Cranch, 9; Scott v. McNeal, 154 U. S. 34; Duncan v. Stewart, 25 Ala. 408; Stevenson v. Superior Court, 62 Cal. 60; French v. Frazier, 7 J. J. Marsh. (Ky.) 425; Thomas v. The People, 107 Ill. 517; Johnson v. Beazley, 65 Mo. 250; Jochumsen v. Bank, 3 Allen (Mass.) 87; Waters v. Stickney, 12 Allen (Mass.) 1; Day v. Floyd, 130 Mass. 488; Morgan v. Dodge, 44 N. H. 255; State v. White, 7 Ired. (N. Car.) 116; Devlin v. Commonwealth, 101 Pa. St. 273; D'Arusment v. Jones, 72 Tenn. 251; Withers v. Patterson, 27 Tex. 491; Melia v. Simmons, 45 Wis. 334, and the notes to Bolton v. Schriever, 18 L. R. A. 242, 135 N. Y. 65.

Of these cases, Johnson v. Beazley, Waters v. Stickney, Day v. Floyd, Morgan v. Dodge and Withers v. Patterson, contain merely *obiter dicta* on this point. The other cases cited are express adjudications upon the point. To the same effect are Burns v. Van Loam, 29 La. Ann. 560; Andrews v. Avory, 14 Gratt. (Va.) 229.

This case overrules Southwick v. Probate Court, 18 R. I. 402, 28 Atl. 334, insofar as that case recognizes the validity of the statute authorizing probate of the will and settlement of the will of one who has been absent and unheard of for seven years. This last case, however, presented for direct adjudication only the question of the form and sufficiency of the notice of such hearing, and the validity of the statute was tacitly assumed by both parties and the court. To the same effect is Smith v. Combs, 49 N. J. Eq. 420.

The only cases opposed to this weight of authority are Roderigas v. East End Savings Institution, 63 N. Y. 460; 76 N. Y. 316; Plume v. Howard Savings Institution. 46 N.

J. L. 211. In Roderigas v. East End Savings Institution, 63 N. Y. 460, an administrator was appointed for the estate of a person absent in Cuba. This administrator drew the money of his alleged decedent out of the bank. On the return of the person who was alleged to have died, such person sued to recover this money from the bank. It was held that he could not attack the order finding that he was dead. This decision was rendered by four judges, three dissenting. Subsequently, in 76 N. Y. 316, when this case came before the Court of Appeals for the second time, the record disclosed that the petition for the appointment of an administrator only alleged the death of alleged decedent "upon the best of the knowledge, information and belief" of the petitioner. It was held that as no proof was offered of death of alleged decedent, and the petition did not allege such death positively, the court never acquired jurisdiction over his estate, and its orders were nullities subject to collateral attack. This case, in 63 N. Y. 460, has been approved only in two later cases. In a New Jersey case, Plume v. Savings Institution, 46 N. J. L. 211, the authority of an administrator was attacked collaterally, but only because the record did not show specifically that the intestate was dead. It was not claimed that in point of fact he was alive. In an obiter the court expressed approval of Roderigas v. East End Savings Institution, *upra*, but this case can not be regarded as following the New York decision. In Lavin v. Emigrant Industrial Savings Bank, 18 Blatch. 1, the court said that Roderigas v. Savings Institution had no support else where in the authorities of the English or American courts.

In a recent Rhode Island case<sup>358</sup> a state statute specifically gave the court of probate jurisdiction, the right to administer the estate of anyone who should be absent over seven years as if he were dead. This statute was held to be unconstitutional as taking private property without due process of law.

A recent Washington case<sup>359</sup> followed the case of *Roderigas v. Savings Bank*, 63 N. Y. 460, but was reversed by United States Supreme Court,<sup>360</sup> as taking property without due process of law. Under this decision the attempt to administer the estate of one who is alive raises a federal question, and a decision of a state supreme court upholding such administration will be reversed by the United States Supreme Court on error. In some courts it is held that an administrator who pays only after suit, is protected, even if supposed decedent is alive.<sup>361</sup>

### §342. Effect of saving right of contest to certain parties.

Where in a contest proceeding the alleged last will of testator is found invalid, the rule supported by the weight of authority is that it is not invalid alone as to those contesting the will, but that it is invalid *in toto* as to all parties interested therein.<sup>362</sup>

In California the general doctrine is qualified by holding that where one of the heirs was a minor, and brought suit to contest the will within the time limit after his disability, was removed, it would not enure to the benefit of the other heirs who allowed the time limit after their disabilities were removed to expire.<sup>363</sup>

If the right to contest the will is saved for one of the parties interested, it is saved for all;<sup>364</sup> and if the judgment in the contest is erroneous as to one it is erroneous as to all.<sup>365</sup>

<sup>358</sup> Carr v. Brown, 20 R. I. 215.

<sup>359</sup> Scott v. McNeal, 5 Wash. 309.

<sup>360</sup> Scott v. McNeal, 154 U. S. 34.

<sup>361</sup> Day v. Floyd, 130 Mass. 488.

<sup>362</sup> Clements v. McGinn, — Cal. —; 33 Pac. 920; *Freud's Estate*, 73 Cal. 555; *Bartholick's Estate*, 141 N. Y. 166.

<sup>363</sup> *Samson v. Samson*, 64 Cal. 327.

<sup>364</sup> *Powell v. Koehler*, 52 O. S. 103.

<sup>365</sup> *Wells v. Wells*, 144 Mo. 198; 45 S. W. 1095.

**§343. Effect of judgment refusing to admit will to probate.—  
Re-propounding.**

In some jurisdictions, usually under early systems of procedure, no means is given by appeal or error of direct attack upon a judgment of the probate court refusing to admit a will to probate. In such jurisdictions it is usually permitted any party interested in having a will admitted to probate to re-propound it after it has been refused admission to probate, if he adduces new evidence.<sup>366</sup> In some jurisdictions an order refusing to admit a will to probate is not a final order, and is not appealable.<sup>367</sup> The policy of modern legislation is to provide a means of finally determining the validity of a will when offered for probate. It is often provided that an appeal may be taken from an order of the court of probate jurisdiction, refusing to admit the will to probate. When the final order is made, whether in the probate court or the appellate court, from which no appeal can be taken to a higher court—that is to say, from which order it is impossible to take both facts and evidence to a higher court for another trial—it is generally held that error will lie from such final order to the courts of last resort, as in other cases.<sup>368</sup> Where such means of direct attack upon an order refusing to admit a will to probate is allowed, the rule in force generally is that no person who was served with notice of the proceedings in the probate court, in time to appeal therefrom, can re-propound the will which has been refused admission to probate. The methods of direct attack provided by statute are exclusive as far as such parties are concerned.<sup>369</sup> But such order refusing admission of the will to probate is not binding upon parties interested in having the will admitted to probate who were not notified of the pendency of proceedings in the probate court. Such parties not

<sup>366</sup> *Swazey v. Blackman*, 8 Ohio, 5; *Hunter's Will*, 6 Ohio, 499; *Chapman's Will*, 6 Ohio, 148; *Feuchter v. Key*, 48 O. S. 357; *Lopez's Succession*, 33 La. Ann. 368.

<sup>367</sup> *Smith's Estate*, 98 Cal. 636.

*Contra*, *Preston v. Trust Co.*, 94 Ky. 295.

<sup>368</sup> *M. E. Missionary Society v. Ely*, 56 O. S. 405.

<sup>369</sup> *M. E. Missionary Society v. Ely*, 56 O. S. 405.

being concluded by this order may re-propound the will for probate.<sup>370</sup>

In New York the statute makes no provision as to the effect of a refusal to admit to probate a will passing real estate for which probate is unnecessary. Such order is not binding upon devisee, but he may subsequently, in a partition suit between the heirs to which he is made a party, offer the will already refused, and have its validity tried to a jury.<sup>371</sup> As the reasons given for refusing to allow a will, once refused admission to probate, to be re-propounded, do not apply where a later will is offered for probate, it is held that a will which has once been refused admission to probate may be re-propounded with a codicil whereby it is republished.<sup>372</sup>

#### §344. Costs.

In a few jurisdictions contestant must file a bond to secure costs,<sup>373</sup> but usually this is not required.<sup>374</sup> The theory of costs in probate and contest proceedings, entertained by most courts, is that in the absence of a statute directing that costs be taxed against the losing party, as in an action at law, the court has the same discretionary power as in equity cases to tax costs according to right and to the equities of the case.<sup>375</sup> Courts which entertain this view of their power over costs may allow to the executor his costs for successfully defending the will,

<sup>370</sup> *Vestry of St. John's Parish v. Bostwick*, 8 App. D. C. 452; *Feuchter v. Keyle*, 48 O. S. 357; *In re Stacey's Will*, 6 Ohio Dec. 142; 4 Ohio N. P. 143.

<sup>371</sup> *Corley v. McElmeel*, 149 N. Y. 228.

<sup>372</sup> *Barney v. Hays*, 11 Mont. 99.

<sup>373</sup> *Harrison v. Stanton*, 146 Ind. 366; *Starkweather v. Bell* (S. D.) (1899), 80 N. W. 183; *Grover's Succession*, 49 La. Ann. 1050. But this statute applies only to formal contests and does not apply where similar questions are raised in a

partition suit. *Putt v. Putt*, 149 Ind. 30.

<sup>374</sup> *Cash v. Lust*, 142 Mo. 630.

<sup>375</sup> *McKinney's Estate*, 112 Cal. 447 (this rule is enacted into a statute in California); *Shaw v. Camp*, 56 Ill. App. 23, affirmed, 163 Ill. 144; *Wilbur v. Wilbur*, 138 Ill. 446; *Alvord v. Stone*, 78 Me. 296; *Wallace v. Sheldon*, 56 Neb. 55; 76 N. W. 418; *McClary v. Stull*, 44 Neb. 175; *Mayo v. Jones*, 78 N. Car. 402; *Jones v. Roberts*, 96 Wis. 427; 71 N. W. 883; *Gorkow's Estate*, 20 Wash. 563.

to be paid out of the funds of the estate in his hands,<sup>376</sup> while if the executor exerted undue influence over testator, whereby he induced him to make the will in litigation, costs may be awarded against such executor upon a judgment adverse to the will.<sup>377</sup> A defeated contestant, who has carried on litigation in good faith, and upon reasonable cause for appeal, may have his costs paid out of the estate.<sup>378</sup> So where one who is named in a will as executor and legatee offers a will for probate and fails, the court may in its discretion allow him his costs,<sup>379</sup> and such allowance is not made invalid by the fact that at the time of such allowance there was no administrator of such estate.<sup>380</sup> When this view is entertained, an administrator with the will annexed can not take the pauper's oath on appeal, as the costs are payable out of the estate.<sup>381</sup> In the absence of special reasons for making the costs payable out of the estate, the courts, in the furtherance of justice, often compel the unsuccessful proponent of the will to pay the costs of the application,<sup>382</sup> and the same rule will apply to unsuccessful contestants.<sup>383</sup> The word "costs," as used in this connection, means actual taxable costs, and not expenses other than taxable costs,<sup>384</sup> and when contestants have multiplied costs unnecessarily by acting separately, the court will allow only necessary costs.<sup>385</sup> When defeated contestant has, through a mistaken view of the law, which proponent shared, resisted probate upon immaterial is-

<sup>376</sup> *Brilliant v. Wayne Circuit Judges*, 110 Mich. 68; 67 N. W. 1101; *Hoppe's Will*, 102 Wis. 54.

<sup>377</sup> *McKinney's Estate*, 112 Cal. 447.

<sup>378</sup> *Olmstead's Estate*, 120 Cal. 447; 52 Pac. 804; *Cheever v. North*, 106 Mich. 390; *Jones v. Roberts*, 96 Wis. 427; 71 N. W. 883; *Clapp v. Fullerton*, 34 N. Y. 190; *Le Fevre v. Le Fevre*, 59 N. Y. 434; *In re Wilson*, 103 N. Y. 374 (the rule given in the text was questioned in this case).

<sup>379</sup> *Olmstead's Estate*, 120 Cal. 447.

<sup>380</sup> *Olmstead's Estate*, 120 Cal.

447, citing *Jackman's Will*, 26 Wis. 143; *Downie's Will*, 42 Wis. 66.

<sup>381</sup> *Crocker v. Balch*, Tenn. (1900), 55 S. W. 307.

<sup>382</sup> *Moyer v. Swyart*, 125 Ill. 262; *Shaw v. Moderwell*, 104 Ill. 64.

<sup>383</sup> *Crawford v. Thomas* (Ky.) (1899), 54 S. W. 197.

<sup>384</sup> *Cheever v. North*, 106 Mich. 390; *Brilliant v. Wayne Circuit Judges*, 110 Mich. 68; 67 N. W. 1101.

<sup>385</sup> *Browning v. Mostyn*, 66 L. J. P. 37. So when unnecessary amendments have been made. *Coke v. French*, 76 Law. T. 163.

sues, there is in law no reasonable ground for such resistance, and contestant can not have costs out of the estate.<sup>386</sup> While no fixed line can be drawn between the different courts, since the taxation of costs in such cases as contest is peculiarly within the discretion of the court, the rule practically enforced in many courts ordinarily is, in the absence of special circumstances, that the defeated party should pay the costs of the proceeding.<sup>387</sup>

### §345. Attorney fees.

In most jurisdictions attorney's fees are not regarded as costs unless by virtue of a statutory provision, and accordingly are not to be paid out of the estate, but by the party incurring them, even where the circumstances are such that he may recover his costs.<sup>388</sup> In some states the opinion is expressed that attorney's fees are to be allowed in the discretion of the court.<sup>389</sup> But even where such view is taken, attorney's fees are not allowed where attorney had a contract with defeated contestants for a certain proportion of the estate if successful,<sup>390</sup> nor for services rendered to one legatee alone,<sup>391</sup> nor for services rendered to unsuccessful proponent;<sup>392</sup> nor to unsuccessful contestant, unless some circumstances stronger than good faith on his part and probable cause for contest render them proper.<sup>393</sup> There is a diversity of opinion upon this last point, however, some courts allowing a defeated contestant his

<sup>386</sup> *Burr v. Burr*, 53 N. J. Eq. 627.

<sup>387</sup> *Browning v. Mostyn*, 66 L. J. 37; *Egbers v. Egbers*, 177 Ill. 82; *Wallace v. Sheldon*, 56 Neb. 55; 76 N. W. 418.

<sup>388</sup> *Olmstead's Estate*, 120 Cal. 447; 52 Pac. 804; *Morvant's Succession*, 46 La. Ann. 301; *Bonanza's Succession*, 47 La. Ann. 1451; *Beauregard's Succession*, 49 La. Ann. 1176; *Brown v. Corey*, 134 Mass. 249; *Titlow's Estate*, 163 Pa. St. 35.

<sup>389</sup> *Turner's Guardian v. King*, 32 (Ky.) S. W. 941; *McClary v. Stull*, 44 Neb. 175.

<sup>390</sup> *McClary v. Stull*, 44 Neb. 175.

<sup>391</sup> *Atkinson v. May's Estate*, 57 Neb. 137; 77 N. W. 343.

<sup>392</sup> *Clark v. Turner*, 50 Neb. 290; 69 N. W. 843. At any rate, no allowance can be made in the contest proceeding, but application should be made to the court of probate powers in settling the estate.

<sup>393</sup> *Wallace v. Sheldon*, 56 Neb. 55; 76 N. W. 418.

costs and attorney's fees where there was probable cause for contest.<sup>394</sup>

Where the executor is a necessary party to the contest he may employ counsel to defend the will, and charge their expenses against the estate.<sup>395</sup> Where the executor is not a necessary party to the contest he can not charge the services of such counsel as he may see fit to employ against the estate,<sup>396</sup> and where fees are allowed, the court will grant reasonable ones. Thus when the estate was worth about five thousand dollars, and the questions presented by the contest were simple, and the trial lasted six days, it was held that fees should be allowed not to exceed three hundred dollars a side, and to but one attorney on a side.<sup>397</sup>

When the executor defends the will in his official capacity unsuccessfully, he is usually not personally responsible for the attorney's fees thus incurred.<sup>398</sup>

#### §346. Validity of agreements with reference to contest.

A contract between the parties interested respectively in obtaining and resisting the probate of a will, if made with full knowledge of the facts, and if free from misrepresentation, fraud, and deceit, is upheld by the courts as a valid contract. Thus contracts between the heirs or next of kin on the one hand, and the beneficiaries on the other, by which the heirs or next of kin agree not to contest the will, are upheld.<sup>399</sup> So are similar contracts made between the testator, in his lifetime,

<sup>394</sup> Gorkow's Estate, 20 Wash. 563.

<sup>395</sup> Heffner's Succession, 49 La. Ann. 407; Bower's Accounts (Ohio), 17 Weekly Law Bull. 80; Fitzsimmons v. Safe Deposit Co., 189 Pa. St. 514; 42 Atl. 41; Lassiter v. Travis, 98 Tenn. 330; 39 S. W. 226.

<sup>396</sup> Andrews v. Andrews, 7 O. S. 148.

<sup>397</sup> Campbell v. McGuiggin, N. J. Prer. 95; 34 Atl. 383.

<sup>398</sup> Fenner v. McCan, 49 La. Ann. 600.

<sup>399</sup> Boughey v. Minor (1893), P. 181. Waller v. Marks, 100 Ky. 541 (a contract not to oppose probate and to withdraw contest in consideration of the payment by the proponent, if successful, of the legacy which testatrix had intended to give promisor).



and his heirs or next of kin.<sup>400</sup> So a contract entered into between the heirs and devisees, to distribute the estate as in cases of intestacy on consideration of abstaining from litigation, is valid.<sup>401</sup> So is a contract to distribute the estate according to the will without probating it;<sup>402</sup> or to set aside an order admitting the will to probate with consent of the court, and distribute the estate without reference to the will.<sup>403</sup> And in a proceeding to probate a will it was held that a contract to suppress the will and distribute the estate as in intestacy was a valid defense.<sup>404</sup>

The propriety of this view of the law is very doubtful. After the will is probated the beneficiaries may contract with reference to the property given them by will just as they may with reference to property acquired in any other way.<sup>405</sup> If two legatees agree upon any division of their legacies between themselves, another legatee can not be heard to object.<sup>406</sup> But, to concede to the beneficiaries the right to suppress a will, usually a criminal act, and to refuse probate to a will which is in itself perfectly valid, by reason of a subsequent agreement between the heirs and the beneficiaries, is so contrary to the policy of the law of wills that on sound principle the position seems untenable.

Where the contract is made between certain of the opposing claimants in fraud of other claimants, it is void.<sup>407</sup> Thus an agreement between two of the heirs of testator by which one of them was to furnish the money necessary to conduct a collusive contest, in which B, the other, was to be plaintiff, and A one of the defendants, A to receive compensation for the loss of his legacy by being paid by B, if successfùl, was held

<sup>400</sup> Garcelon's Estate, 104 Cal. 570; Gore v. Howard, 94 Tenn. 577.

<sup>401</sup> Stringfellow v. Early, 15 Tex. Civ. App. 597, citing Phillips v. Phillips, 8 Watts, 195.

<sup>402</sup> Knight v. Knight, 113 Ala. 597.

<sup>403</sup> L. & N. R. R. v. Sanders (Ky.), 44 S. W. 644.

<sup>404</sup> Stringfellow v. Early, 15 Tex. Civ. App. 597.

<sup>405</sup> *Contra* Finch v. Finch, 14 Ga. 362.

<sup>406</sup> Napier v. Anderson, 95 Ga. 618.

<sup>407</sup> Wilkins v. Hukill, 115 Mich. 594.

<sup>407</sup> See following note.

void where the object of the agreement was to exclude a devisee from any share under the will.<sup>408</sup> It is held that where probate binds the world, the heirs and beneficiaries can not submit a contest to arbitration.<sup>409</sup> Where the court enters a consent decree setting the will aside, the parties who consented thereto can not afterwards be heard to complain of the decree.<sup>410</sup> But an attorney has not, by virtue of his employment, authority to consent to a verdict without evidence to support it; and his acts do not bind any of his clients except such as consented thereto.<sup>411</sup>

<sup>408</sup> Gray v. McReynolds, 65 Io. 461; Ridenbaugh v. Young, 145 Mo. 274.

<sup>409</sup> Carpenter v. Bailey, 127 Cal. 582; 60 Pac. 162.

<sup>410</sup> Cooch v. Cooch, 18 Ohio, 146.

<sup>411</sup> Jordan v. Russell, 8 Weekly Law Bull. 91.

## CHAPTER XVIII.

### PROBATE AND CONTEST OF LOST AND SPOLIATED WILLS AND FOREIGN WILLS.

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#### I—LOST AND SPOLIATED WILLS.

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##### §347. Definition.

The term "lost will" is used to denote all wills which have not been revoked by testator, but can not be produced for admission to probate.<sup>1</sup> A totally spoliated will is a special type of lost will, which has been entirely destroyed by some one other than testator without his authority.<sup>2</sup>

##### §348. Effect on probate of loss or total spoliation of will.

The effect of the inability of proponents to produce the will for probate is different in the different states, according to the importance which the state attaches to its production. On the one hand, the party who destroyed the will ought not to be permitted to gain by his wrongful act; while on the other, many

<sup>1</sup> If the will was destroyed, torn cancelled, and the like, by testator, with intent to revoke it, or by some one by the testator duly authorized, it is, of course, revoked, and is of no validity whatever. See Chapter XIV, Secs. 246-252.

<sup>2</sup> We have seen that the destruction of the will through accident, or by testator while incompetent, or by some one not authorized by testator in the manner prescribed by law, does not work a revocation. See Sec. 261.

revoked wills might be probated under a liberal admission of lost wills to probate. Accordingly the states may be divided as to their views upon this point into two classes. In states of one class, any lost will may be admitted to probate upon proper evidence of its execution and contents, and of the fact that it was not revoked by testator.<sup>3</sup> In states of the other class only such lost wills as can be proved to have existed, in due legal form, and unrevoked after the death of testator, or his insanity, or other cause which deprived him of capacity to revoke his will, can be admitted to probate.<sup>4</sup> An omission in the finding that the will was in existence after testator's death does not, however, make such order subject to collateral attack.<sup>5</sup> The subject of probate of lost wills is the subject of very exhaustive legislation, more minute in detail than the legislation upon ordinary probate matters; and a lost will can be admitted to probate only when it comes within the provisions of the statute.<sup>6</sup>

### §349. The court.

The statutes provide what court shall have jurisdiction to admit a lost will to probate. It is usually the court of ordinary probate jurisdiction.<sup>7</sup> In some other states courts of general equity powers have jurisdiction to entertain actions to establish a lost will.<sup>8</sup>

<sup>3</sup> *Mills v. Millward*, L. R. 15 P. D. 20; *Sullivan v. Sullivan*, 114 Mich. 189; *Coddington v. Jenner*, 57 N. J. Eq. 528; 41 Atl. 874; *Gardner's Estate*, 164 Pa. St. 420; *Valentine's Will*, 93 Wis. 45; 67 N. W. 12; *Steinke's Will*, 95 Wis. 121.

<sup>4</sup> *Kidder's Estate*, 57 Cal. 282; *Jones v. Caster*, 139 Ind. 382; *Sinclair's Will*, 5 O. S. 290; *Laurence's Estate*, 7 Ohio Dec. 246; 5 Ohio, N. P. 20; *Harris v. Harris*, 10 Wash. 555. In New York a will may be admitted to probate only if it was in existence at the death of testator, or was fraudulently destroyed

in his lifetime. Hence, under no circumstances could a lost will be probated where it was destroyed by testator's own act. *Perry v. Perry*, 49 N. Y. S. R. 291; 21 N. Y. Supp. 133.

<sup>5</sup> *Converse v. Starr*, 23 O. S. 491.

<sup>6</sup> *Jones v. Casler*, 139 Ind. 382; *Sinclair's Will*, 5 O. S. 290.

<sup>7</sup> *Morningstar v. Selby*, 15 O. 345; *Domestic, etc. Missionary Society v. Eells*, 68 Vt. 497; *Valentine's Will*, 93 Wis. 45; 67 N. W. 12.

<sup>8</sup> *Hall v. Allen*, 31 Wis. 691; *Valentine's Will*, 93 Wis. 45.

**§350. Parties.**

In an action to admit a lost will to probate the beneficiaries under the will, and those who would take if such will were not admitted to probate, are parties.<sup>9</sup>

**§351. Notice.**

Notice is almost always specifically provided for in cases of probate of lost wills, even where notice may be dispensed with in ordinary wills.<sup>10</sup> If the parties interested do not reside in the county, notice must be given by publication, notice to the administrator not being sufficient.<sup>11</sup>

**§352. Petition.**

The statute and the peculiarities of the case make a petition in action to establish a lost will far more necessary than in an ordinary probate proceeding, where the will can be offered and an oral motion to admit to probate can be made. Accordingly it is usually required that a lost will be admitted to probate only on petition,<sup>12</sup> and this petition must allege all necessary facts to entitle the will to be admitted to probate as a lost will. Thus, where it is required that the will, in order to be admitted to probate, shall be in existence after the death of testator, the petition must allege that fact,<sup>13</sup> and, unless the statute requires it, an answer need not be verified.<sup>14</sup>

**§353. Jury.**

The rules applicable to ordinary probate generally control here, unless expressly altered by statute. Thus, unless ex-

<sup>9</sup> Taylor v. Bennett, 1 Ohio C. C. 95; Valentine's Will, 93 Wis. 45; 67 N. W. 12.

<sup>10</sup> Goods of Pearson (1896), P. 289.

<sup>11</sup> Baugarth v. Miller, 26 O. S. 541.

<sup>12</sup> Wright v. Fultz, 138 Ind. 594; Jones v. Casler, 139 Ind. 382; Harris v. Harris, 10 Wash. 555.

<sup>13</sup> Jones v. Casler, 139 Ind. 382 (where an allegation that the will was destroyed after the death of testator shows this with sufficient certainty); Harris v. Harris, 10 Wash. 555 (where an allegation that "deceased at the time of his death left a will" is held sufficient).

<sup>14</sup> Wright v. Fultz, 138 Ind. 594.

pressly provided by statute, no right to a jury trial exists in an action to admit a lost will to probate,<sup>15</sup> and the court need not duplicate instructions to the jury. Thus, after charging that the jury may consider the declarations of testator *only* on one point, it is not error to refuse to charge that such declarations can not be considered on another point.<sup>16</sup>

### §354. Contest.

Where the statute provides a proceeding like contest as a direct attack upon an order admitting a lost will to probate, such method is exclusive, and error will not lie to the order of probate.<sup>17</sup> Upon contest of a lost or spoliated will, it is for the jury to determine what the provisions of the will, as legally executed by testator, were.<sup>18</sup> The issue in such cases is not restricted to the validity of the will as admitted to probate.<sup>19</sup> However, a verdict and judgment will not be set aside where the evidence is insufficient as to some property of small value,<sup>20</sup> but clear as to the bulk of the property.

## II—FOREIGN WILLS.

### §355. Definition of foreign will.

A foreign will, in the sense that the term is used in the law of probate, is a will executed in a state or country by a testator there domiciled, admitted to probate there upon the death of such testator, and subsequently offered for probate or registry in another state. The question of what law controls the validity of such will is discussed elsewhere.<sup>21</sup> Accordingly, where a will is admitted to probate in a state in which testator was not domiciled at his death, but in which he left property, a subsequent probate in the jurisdiction in which the testator was domiciled at his death, must be an original probate of the will

<sup>15</sup> Wright v. Fultz, 138 Ind. 594.

<sup>16</sup> McDonald v. McDonald, 142 Ind. 55.

<sup>17</sup> Hollrah v. Lasance, 16 Ohio, C. C. 187.

<sup>18</sup> Behrens v. Behrens, 47 O. S. 323; Haynes v. Haynes 33, O. S. 598; Banning v. Banning, 12 O. S.

437; Holman v. Riddle, 8 O. S. 384; Brundige v. Benton, 17 Weekly Law Bull. (Ohio), 243.

<sup>19</sup> Haynes v. Haynes, 33 O. S. 598.

<sup>20</sup> Banning v. Banning, 12 O. S. 437.

<sup>21</sup> See Chapter IV.

as a domestic will, and not as a foreign will.<sup>22</sup> In this chapter it is assumed that the will is valid as to its form in the jurisdiction in which testator was not domiciled; and that the only question for discussion is as to the necessity, method, and effect of probating it in such jurisdiction.

### §356. Nature of probate of foreign will.

In some states original probate of a foreign will is allowed, though such probate can only affect the property of testator within the state where the will is admitted to probate.<sup>23</sup> The usual practice, however, is to provide that after the will is admitted to probate in the state of testator's domicile it be propounded in any other state in which testator has property.<sup>24</sup> The court having jurisdiction to admit such will to probate is the court within whose territorial jurisdiction such property of testator is situated,<sup>25</sup> and it is error to admit the will to probate unless evidence is offered to show that there is property of testator to administer within the territorial jurisdiction of the court before which the will is offered for probate.<sup>26</sup> The statutes for admitting a domestic will to probate, and for the effect of the order of probate, are generally taken as analogies in cases of foreign wills where applicable.<sup>27</sup> However, the legislature often provides different statutes for the two classes of wills. When this is the case it is very dangerous to assume that the statute for domestic wills can have any effect in case of foreign wills.<sup>28</sup> Further, in details of procedure a distinction is

<sup>22</sup> *Tarbell v. Walton* (Vt.) (1899), 45 Atl. 748.

<sup>23</sup> *Walton v. Hall*, 66 Vt. 455.

<sup>24</sup> *Calloway v. Cooley*, 50 Kan. 743; *Clow v. Plummer*, 85 Mich. 550; *Mower v. Verplanke*, 101 Mich. 209; 105 Mich. 398; *Putnam v. Pitney*, 45 Minn. 242; *Southard's Will*, 48 Minn. 37; *Babcock v. Collins*, 60 Minn. 73; 61 N. W. 1020.

<sup>25</sup> *Putnam v. Pitney*, 45 Minn. 242; *Southard's Estate*, 48 Minn. 37.

<sup>26</sup> *Southard's Will*, 48 Minn. 37.

<sup>27</sup> *Whalen v. Nesbet*, 95 Ky. 464.

<sup>28</sup> *Barr v. Chapman* (Ohio C. P.); 30 W. L. B. 264 (right of appeal from refusal to admit to probate exists in domestic, but not in foreign, wills); *Hardin v. Jamison*, 60 (Minn.) 112; 61 N. W. 1018 (executor named in domestic will has first right to be appointed, but not where named in foreign will).

often made in the states of the United States between a foreign will admitted to probate in a sister state and a foreign will from a country other than the United States.<sup>29</sup> Upon the admission of the foreign will to probate, even if delayed until after a sale made in pursuance of a power conferred by will, the probate in such foreign state will relate back to testator's death and perfect such sale.<sup>30</sup>

### §357. Parties and procedure.

Any person having a legal interest under the foreign will may apply for its admission to probate.<sup>31</sup> An allegation in the petition that proponent was "interested as a subsequent purchaser of the estate of the deceased" was held sufficient to show a legal interest.<sup>32</sup> Unless the statute requires a petition for admitting such will to probate, none is necessary.<sup>33</sup> Notice is usually required to be given by publication, and as the will is offered for probate where testator's property is situate, but where testator was not domiciled, the proceeding is even more in the nature of a proceeding *in rem*, than the probate of a domestic will.<sup>34</sup> At the hearing in a proceeding to admit a foreign will to probate, the certified copy of the will and of the order admitting it to probate in the foreign jurisdiction are necessary to be offered in evidence,<sup>35</sup> and the court has no jurisdiction to admit the will to probate unless the certified transcript of the order of probate in the foreign court is produced.<sup>36</sup> The certified copy of the will and the transcript of the order of probate in the foreign state raise a presumption that all necessary legal formalities at such probate were complied

<sup>29</sup> *Carpenter v. Denoon*, 29 O. S. 379.

<sup>30</sup> *Babcock v. Collins*, 60 Minn. 73; 61 N. W. 1020.

<sup>31</sup> *Mower v. Verplanke*, 101 Mich. 209; 105 Mich. 398.

<sup>32</sup> *Mower v. Verplanke*, 101 Mich. 209; 105 Mich. 398.

<sup>33</sup> *Evansville Ice, etc. Company v. Winsor*, 148 Ind. 682.

<sup>34</sup> But in Ohio notice by publica-

tion was required only in case of wills made out of the United States. *Carpenter v. Denoon*, 29 O. S. 379. The question is entirely one of statutory requirement.

<sup>35</sup> *Mower v. Verplanke*, 101 Mich. 209; *Clow v. Plummer*, 85 Mich. 550.

<sup>36</sup> *Mower v. Verplanke*, 101 Mich. 209; *Clow v. Plummer*, 85 Mich. 550.



with,<sup>37</sup> and such evidence is conclusive of the validity of the foreign probate, and is not subject to collateral attack,<sup>38</sup> unless such transcript shows on its face that the will was not properly admitted to probate, in which case it is held that the order of the foreign court is not conclusive.<sup>39</sup> Where both parties proceed on the theory that real estate of testator is in the jurisdiction of the court, the omission to introduce formal proof of that fact is not reversible error.<sup>40</sup> Admission to probate and record of a foreign will in one county passes title to all the real estate in that state, unless the statute specifically requires such will to be recorded in each county where the land is situate.<sup>41</sup> It has been held error to admit the copy of the will to probate, as the order should show that the original will was admitted.<sup>42</sup> The rules applicable to probate of domestic wills are not always made applicable by statute to the probate of foreign wills. Thus even where probate of a domestic will is an *ex parte* proceeding, no resistance being allowed, the probate of a foreign will may give opportunity for contest,<sup>43</sup> and error, and not appeal, is the remedy for a refusal to admit the will to probate;<sup>44</sup> or the will may be repropounded on new evidence.<sup>45</sup> When a foreign will is admitted to probate it has the same standing in law as a domestic will.<sup>46</sup>

<sup>37</sup> Newman v. Steel Company, 80 Fed. 228; Moody v. Johnston, 112 N. Car. 798.

<sup>38</sup> Dickey v. Vann, 81 Ala. 425; Calloway v. Cooley, 50 Kan. 743; 32 P. 372; Babcock v. Collins, 60 Minn. 73; 61 N. W. 1020.

<sup>39</sup> Currell v. Villars, 72 Fed. 330; Nelson v. Potter, 50 N. J. L. 324; Barr v. Closterman, 2 Ohio, C. C. 387.

<sup>40</sup> Barr v. Closterman, 2 Ohio, C. C. 387.

<sup>41</sup> Carpenter v. Denoon, 29 O. S. 379.

<sup>42</sup> St. Joseph's Convent of Mercy v. Garner, 53 S. W. 298; 66 Ark. 623. However, being merely error-

eous, such decree could not be attacked collaterally.

<sup>43</sup> Barr's Will, 30 Weekly Law Bull. 386; Barr v. Closterman, 2 Ohio C. C. 387.

<sup>44</sup> Barr v. Closterman, 2 Ohio C. C. 387.

<sup>45</sup> Barr v. Closterman, 3 Ohio C. C. 441. The court may revoke an order admitting a foreign will to probate where such order is obtained by fraud. Barr v. Closterman, 7 Ohio C. C. 371.

<sup>46</sup> Hoysradt v. Tionesta Gas Company, 194 Pa. St. 251; 45 Atl. 62. (Hence a power of sale given by such will is effective to pass a valid legal title.)

**§358. Registry of foreign will.**

In other states where the foreign will affects the title to real property situate within such state, it is merely required that the foreign will shall be recorded in the county where the land is situate—usually in the recorder's office<sup>47</sup>—and unless the foreign will is thus recorded, it can not affect the title to such realty.<sup>48</sup> But such will may be recorded even after litigation upon the title to the realty has been taken to the state supreme court, and when recorded will date back to testator's death.<sup>49</sup>

<sup>47</sup> Wells, Fargo & Co. v. Walsh,  
88 Wis. 534.

<sup>48</sup> Wells, Fargo & Co. v. Walsh,  
87 Wis. 67.

<sup>49</sup> Wells, Fargo & Co. v. Walsh,  
88 Wis. 534; so Carpenter v. De-  
noon, 29 O. S. 379.

## CHAPTER XIX.

### EVIDENCE IN PROBATE AND CONTEST.

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#### I—COMPETENCY OF WITNESSES AND GENERAL PRINCIPLES CONTROLLING ADMISSIBILITY OF EVIDENCE.

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##### §359. Scope of discussion.

The law of evidence in probate and contest is connected with the substantive law of wills even more closely than the law of evidence upon most topics is connected with the corresponding substantive law. This is true especially in the topics of mental capacity and undue influence. On account of this importance arising out of the close and vital connection between the substantive law of wills and the law of evidence, a discussion of the latter will be undertaken here; not with the purpose of investigating the law of evidence in general, but only of presenting those questions which from their nature most frequently arise, and which serve to explain and illustrate the doctrines of the substantive law.

##### §360. Common law rule as to competency.

As we have seen, the common law absolutely excluded the testimony of certain classes of persons from the consideration of the jury. The reason and extent of the rule is thus stated by

the standard American authority on Evidence: "It is obviously impossible that any test of credibility can be infallible. All that can be done is to approximate to such a degree of certainty as will ordinarily meet the justice of the case. The question is not whether any rule of exclusion may not sometimes shut out credible testimony, but whether it is expedient that there should be any rule of exclusion at all. If the purposes of justice require that the decision of causes should not be embarrassed by statements generally found to be deceptive, or totally false, there must be some rule designating the class of evidence to be excluded; and in this case, as in determining the ages of discretion, and of majority, and in deciding as to the liability of the wife for crimes committed in company with the husband, and in numerous other instances, the common law has merely followed the common experience of mankind. It rejects the testimony (1) of parties; (2) of persons deficient in understanding; (3) of persons insensible to the obligations of an oath; and (4) of persons whose pecuniary interest is directly involved in the matter at issue; not because they may not sometimes state the truth, but because it would be ordinarily unsafe to rely upon their testimony."<sup>1</sup> Under the rules of coverture neither husband nor wife could testify when the other was a party, nor when the pecuniary interest of the other was directly involved.<sup>2</sup> And the principle of excluding parties as well as that of excluding those who were directly interested financially applied to exclude an executor under the will, as he was a party to the record, and liable in the first instance for costs.<sup>3</sup>

At common law one convicted of certain infamous crimes was thereby rendered incompetent as a witness. But where the witness had been convicted of perjury, and under the local statute was incompetent to testify, it was held that the pardon of the executive given to one who wrote and signed a will for testator at his request, before such pardon, rendered him a competent witness to the will.<sup>4</sup>

<sup>1</sup> Greenleaf on Evidence, Vol. I, Sec. 326.

<sup>2</sup> Greenleaf, Vol. I, Secs. 334, 335.

<sup>3</sup> Greenleaf on Evidence, Vol. I, Sec. 347.

<sup>4</sup> Diehl v. Rogers, 169 Pa. St. 316; 47 Am. St. Rep. 908.

**§363. Modern statutory rules.—Communications with decedent held inadmissible.**

The rules of common law, as to competency of witnesses, will not be discussed in detail as they have been greatly modified or abolished by statute in most states. Persons deficient in understanding, such as the insane, the young, and the like, are not allowed to testify. The other classes of incompetents at common law are, except in some specified cases, allowed to testify, their former disqualification possibly affecting their credibility but not their competency.<sup>5</sup>

An exceptional case in which parties are not allowed to testify as to certain facts, in many states, exists where among other capacities the adversary party sues or defends as executor, administrator, heir, devisee or legatee of a deceased person. This case, of course, always arises in a contest of a will. The admissibility of the evidence of the heirs, devisees, and the like, depends upon the terms of the statute already referred to. If no exception is made in favor of will contests, no person who is a party to the contest can testify as to facts occurring before the death of the alleged testator.

Under these statutes heirs and devisees are, of course, incompetent,<sup>6</sup> so is the executor,<sup>7</sup> and by statute in many states so is husband or wife of a party,<sup>8</sup> as is the husband of a residuary legatee.<sup>9</sup>

Under this rule the question is not who are adverse parties on the record, but who are adverse in interest. Thus, in a suit to establish a will, the executor under such will was made a co-defendant with the disinherited heirs, and was then

<sup>5</sup> See Secs. 196, 198.

<sup>6</sup> *Hopkins v. Wheeler* (R. I.) (1900), 45 Atl. 551; *Perkin's Estate*, 109 Io. 216; 80 N. W. 335; *Furenes v. Eide*, 109 Io. 511; 80 N. W. 539.

And see *Allison's Est.* 104 Io. 130.

<sup>7</sup> *Bardell v. Brady*, 172 Ill. 420.

<sup>8</sup> *Smith v. Smith*, 168 Ill. 488; *Bevelot v. Lestrade*, 153 Ill. 625.

<sup>9</sup> *Valentine's Will*, 93 Wis. 45 (held incompetent to testify that on the day before the death of testatrix the will was in her possession). Where one of the parties has died, pending contest, an adversary party can not testify to admissions made by decedent against his interest. *Manogue v. Herrell*, 13 App. D. C. 455.

called as witness by plaintiffs. His co-defendants objected, and it was held that he was incompetent.<sup>10</sup> An executor who has resigned is a competent witness under this rule, even where his account is unsettled and his fees unpaid.<sup>11</sup>

Where the surviving attesting witness testifies to the facts of execution, without contradiction, it is not reversible error to allow a legatee to testify to the same facts.<sup>12</sup> Even where the statute forbids testimony of a party as to any transaction with deceased, without exception in favor of wills, a son, who is also a devisee, may testify to finding the will among the valuable papers of testator, where this is material. This is not a transaction with the deceased.<sup>13</sup>

In Kentucky the statute forbids evidence of transactions with a decedent "to the extent of affecting one who is living." Under this statute a devisee may testify to the facts of execution.<sup>14</sup>

### §362. Communications with decedent admissible in will contest.

In many other states an express statutory provision allows parties to testify in a suit involving the validity of a will, even where the adversary party is heir, devisee, executor, and the like. Under such statute the competency of parties in interest is clearly recognized.<sup>15</sup> Thus, in contest the execu-

<sup>10</sup> *Bardell v. Brady*, 172 Ill. 420.

<sup>11</sup> *Smith v. Smith*, 168 Ill. 488.

<sup>12</sup> *Hopkins v. Wheeler*, R. I. (1900), 45 Atl. 551.

<sup>13</sup> *Cox v. Lumber Co.* 124 N. Car. 78.

<sup>14</sup> *Flood v. Pragoff*, 79 Ky. 607; *Hardin v. Taylor*, 78 Ky. 593.

<sup>15</sup> *Henry v. Hall*, 106 Ala. 84; *Spiegelhalter's Will*, 1 Penn. (Del.) 5; *Denning v. Butcher*, 91 Io. 425; *King v. King*, — Ky. —; 42 S. W. 347; *Stewart v. Harriman*, 56 V. H. 25; *Sawyer v. Bennett*, 8

*Mich.* 411; *Wilson's Will*, 103 N. Y. 374; *Children's Aid Society v. Loveridge*, 70 N. Y. 387; *Rugg v. Rugg*, 83 N. Y. 592; *Wilson's Will*, 103 N. Y. 374; *Bradshaw v. Roberts* (Tex. Civ. App.) 52 S. W. 574; *Richardson v. Richardson*, 35 Vt. 238; *Buckman's Will*, 64 Vt. 313; *Foster v. Dickerson*, 64 Vt. 233; *Manley v. Staples*, 65 Vt. 370; *Martin v. McAdams*, 87 Tex. 225; 27 S. W. 255; *Hays v. Ernest*, 32 Fla. 18; 13 So. 451.

tor may testify,<sup>16</sup> and so may his wife.<sup>17</sup> The devisees may testify in contest under such statutes,<sup>18</sup> and so may the husband or wife of a legatee or devisee.<sup>19</sup>

### §363. Competency of subscribing witnesses.

The testimony of a lawful subscribing witness can not be rejected on account of the incompetency of such witness.<sup>20</sup> Accordingly a subscribing witness who was competent at the time of execution may testify concerning the facts of execution even where by reason of facts subsequently arising he has become incompetent through interest, or because the adversary party is an executor, heir or the like.<sup>21</sup>

A probate judge may act as subscribing witness to a will,<sup>22</sup> but he can not testify in a proceeding before himself, against objection.<sup>23</sup>

### §364. Confidential communications to one not a subscribing witness.

Under modern statutes, which alter the common law rules of competency, it is generally provided that an attorney or a physician can not testify as to confidential communications made to them in their professional capacities, by a client or patient, without the consent of such client or patient. This exception often causes complications where an attending physician or an attorney is offered as a witness to the facts of execution or the capacity of testator.

A physician who is not a subscribing witness can not be

<sup>16</sup> *Bettison v. Bromley*, 12 East. 250; *Hays v. Ernest*, 32 Fla. 18; *Millay v. Wiley*, 46 Me. 230; *Kittredge v. Hadgman*, 67 N. H. 254; *Jordan's Estate*, 161 Pa. St. 393.

<sup>17</sup> *Lyon's Will*, 96 Wis. 339.

<sup>18</sup> *Hays v. Ernest*, 32 Fla. 18; *Goldthorp's Estate*, 94 Io. 336; *Cox v. Lumber Co.* 124 N. Car. 78; *Franklin v. Franklin*, 90 Tenn. 44; *Gamble v. Buchtee*, 87 Tex. 643; *Martin v. McAdams*, 87 Tex. 225; 27 S. W. 255.

<sup>19</sup> *Holt's Will*, 56 Minn. 33; *Gamble v. Butchee*, 87 Tex. 643; 30 S. W. 861.

<sup>20</sup> *Entwistle v. Meikle*, 180 Ill. 9.

<sup>21</sup> *Sullivan's Will*, 114 Mich. 189; *Holt's Will*, 56 Minn. 33; 22 L. R. A. 481; *Lyon's Will*, 96 Wis. 339.

<sup>22</sup> See Sec. 199.

<sup>23</sup> *Estes v. Bridgforth*, 114 Ala. 221.

called upon to testify to facts learned by him in his professional capacity.<sup>24</sup> It has been held that an attorney of the testator may testify as to the facts of execution, that he incorporated testator's instructions into the will as executed, and that testator was sane.<sup>25</sup> And testator's attorney has been allowed to testify that a compromise agreement, by which testator was to support a child which he claimed was not his own, was not a revocation of a will disinheriting such child.<sup>26</sup>

It was held proper to require an attorney to testify to conversations had between himself and decedent, which were confidential, but not professional, as a basis for inquiring into his opinion of the mental condition of decedent.<sup>27</sup>

Upon the issue as to the destruction of a will during testator's lifetime, an attorney is not competent to testify that contestant had consulted him during testator's life in a professional capacity as to the effect of such destruction of such will.<sup>28</sup>

### §365. Confidential communications to a subscribing witness.

Where the attorney who drew the will is an attesting witness, it is held that he may testify even to such facts of execution as were communicated to him in his professional capacity by testator.<sup>29</sup>

This rule rests on the theory that by voluntarily calling his attorney as an attesting witness, the testator impliedly consents that the attorney may testify to any confidential communications made to him with reference to the execution of the will.

In Louisiana the notary may be called as a witness to impeach his formal certificate of his acts, attached to the will.<sup>30</sup>

<sup>24</sup> Gurley v. Peck, 135 Ind. 440.

<sup>25</sup> O'Brien v. Spalding, 102 Ga. 490; Harp v. Parr, 168 Ill. 459.

<sup>26</sup> Padelford's Estate, 190 Pa. St. 35.

<sup>27</sup> Turner's Appeal, 72 Conn. 305.

<sup>28</sup> McIntosh v. Moore (Tex. Civ. App.), 1899, 53 S. W. 611.

<sup>29</sup> McMaster v. Scriven, 85 Wis. 162.

<sup>30</sup> Solari v. Barras, 45 La. Ann. 1128.



An attorney who drew decedent's will, and was a subscribing witness thereto, is competent to testify to its contents.<sup>31</sup>

### §366. Evidence of subscribing witnesses.

In some jurisdictions great weight is given to the evidence of the subscribing witnesses.<sup>32</sup> In other jurisdictions it is held that the evidence of a subscribing witness is of no greater weight than that of other persons having equal opportunity to know the facts,<sup>33</sup> and it is error to charge that their evidence is paramount.<sup>34</sup> Unless specially required by statute, it is not necessary on contest to call the attesting witnesses to testify at all.<sup>35</sup>

Under the statutes regulating the probate of wills it is often required that all of the subscribing witnesses who are in the jurisdiction should be called as witnesses.<sup>36</sup> They need not all, however, be examined at the outset before the will is offered in evidence.<sup>37</sup> Even where it is error to admit the will to probate in the absence of any of the subscribing witnesses, the probate can not be attacked collaterally because less than all were called.<sup>38</sup> And in some jurisdictions it is specifically provided that a will may be proved by the testimony of one subscribing witness alone,<sup>39</sup> though even in such jurisdictions it is held, as to facts of execution, that

<sup>31</sup> *Kern v. Kern*, 154 Ind. 29; 55 N. E. 1004. (The reason here suggested is that the rule forbidding an attorney to testify applies only during the client's lifetime.)

<sup>32</sup> *Ball v. Kane*, 1 Penn. (Del.), 90.

<sup>33</sup> *Burney v. Torrey*, 100 Ala. 157; *Crandall's Appeal*, 63 Conn. 365.

<sup>34</sup> *Higinbotham v. Higinbotham*, 106 Ala. 314. (Issue of undue influence and insanity.) *McTaggart v. Thompson* 14 Pa. St. 149. (Issue of insanity.)

<sup>35</sup> *Harp v. Parr*, 168 Ill. 459; *Ingall's Will*, 148 Ill. 287; *Rigg v. Wilton*, 13 Ill. 15. This point was

left undecided in *Hobart v. Cook*, 167 Mass. 55.

<sup>36</sup> *Howes v. Colburn*, 165 Mass. 385; *Hobart v. Cook*, 167 Mass. 55.

<sup>37</sup> *Howes v. Colburn*, 165 Mass. 385; *Morton v. Heidorn*, 135 Mo. 608; *Crenshaw v. Johnson*, 120 N. Car. 270.

<sup>38</sup> *Brinkley v. Sanford*, 99 Ga. 130; 25 S. E. 32; *Mosier v. Harmon*, 29 O. S. 220.

<sup>39</sup> *In re Page*, 118 Ill. 576; *Welch v. Welch*, 9 Rich. (S. Car.) 133; *Stephenson v. Stephenson*, Tex. Civ. App., 25 S. W. 649; *Lambert v. Cooper's*, 29 Gratt. (Va.), 61; *Thornton v. Thornton*, 39 Vt. 122.

when the subscribing witness who is summoned can not testify to the necessary facts, it is necessary to call all the subscribing witnesses or to account for their absence satisfactorily before calling other witnesses.<sup>40</sup>

On the issue of sanity it is not necessary in contest proceedings to call all the subscribing witnesses.<sup>41</sup> On contest proof of execution is not limited to subscribing witnesses. Any competent witness who has knowledge of the facts may testify as to what occurred at the execution of the will.<sup>42</sup>

The fact that one of the subscribing witnesses omitted to testify to the mental capacity of testatrix does not prevent the will from being admitted in evidence in probate proceedings,<sup>43</sup> and it is error to exclude others than subscribing witnesses who have opportunity of knowing the capacity of testator,<sup>44</sup> or the facts of the execution of the will.<sup>45</sup>

It is not error, when the execution of the will is not in issue, to admit the will in evidence and afterwards call the subscribing witnesses.<sup>46</sup>

### §367. Record of evidence given at probate.

In some states, by statute, proponent may introduce the copy of the testimony of the subscribing witnesses adduced at probate in common form, instead of offering the witnesses themselves.<sup>47</sup> In such states the use of the original affidavit of subscribing witnesses, instead of a certified copy of such affidavit, is, if erroneous at all, not such error as can be raised in the appellate court where not raised on trial.<sup>48</sup> In other

<sup>40</sup> *Elwell v. Convention*, 76 Tex. 514.

<sup>41</sup> *Kaufman v. Caughman*, 49 S. Car. 159.

<sup>42</sup> *Robinson v. Brewster*, 140 Ill. 649; *Hobart v. Hobart*, 154 Ill. 610; *Morton v. Heidorn*, 135 Mo. 608; *Mays v. Mays*, 114 Mo. 536; *Holmes v. Holloman*, 12 Mo. 535.

<sup>43</sup> *Kaufman v. Caughman*, 49 S. Car. 159. (In this case the other

subscribing witness testified to the capacity of testator.)

<sup>44</sup> *Whitelaw v. Sims*, 90 Va. 588.

<sup>45</sup> *Trembly v. Trembly*, 11 Weekly Law Bull. (Sup.), 50.

<sup>46</sup> *Hobart v. Cook*, 167 Mass. 55.

<sup>47</sup> *Meeks v. Lofey*, 99 Ga. 170;

*Hesterberg v. Clark*, 166 Ill. 241;

*Slingloff v. Bruner*, 174 Ill. 561.

<sup>48</sup> *Harp v. Parr*, 168 Ill. 459.

states the will must be proved *de novo*, and the record of the proof on probate is inadmissible.<sup>49</sup>

On contest, evidence may be taken by deposition in conformity to the general statutes on the subject.<sup>50</sup>

### §368. Admissibility of will.

The will is always admissible after due proof of execution, and should be introduced in evidence. It is provided in many states that a certified copy of the will may be introduced in evidence to make a *prima facie* case. In such case the original will is also admissible, and it is error to compel election between the original will and the authenticated copy.<sup>51</sup>

Unless the statute provides that a certified copy of the will may be introduced in evidence, the original will should be offered in evidence, and a certified copy thereof is inadmissible.<sup>52</sup> But where it is not claimed that the will is a forgery, and contestant had the original, it is harmless error to allow proponent to introduce a certified copy.<sup>53</sup> And where the petition set out the will, and alleged probate, it was held not to be reversible error to refuse to allow defendant to introduce the will in evidence.<sup>54</sup>

In Maryland the original will must remain in the custody of the register, and be produced at trial in obedience to a *sub-pena duces tecum*. It is, therefore, error to order the original will to be transmitted to the probate court.<sup>55</sup>

Under some systems of foreign law the original will must be held by the officer before whom it was executed. In such case, if the will is offered for original probate in the jurisdiction of the domicile of such testator, it has been held proper to permit a copy to be offered in evidence and admitted to probate.<sup>56</sup>

<sup>49</sup> Thomas's Will, 111 N. Car. 409.

<sup>50</sup> Schnee v. Schnee, 61 Kan. 643; 60 Pac. 738.

<sup>51</sup> Pratt v. Hargreaves, 75 Miss. 897.

<sup>52</sup> Craig v. Southard, 148 Ill. 37.

<sup>53</sup> Nicewander v. Nicewander, 151 Ill. 156; 37 N. E. 698.

<sup>54</sup> Kostelecky v. Scherhart, 99 Io. 120; 68 N. W. 591.

<sup>55</sup> Connelly v. Beall, 77 Md. 116.

<sup>56</sup> Goods of Lemme (1892), P. 89. (In this case, under the Limited Probate allowed in English law, the probate was limited until the original might be produced.)

**§369. Definition of burden of proof.**

The term "burden of proof" is used of every issue raised in probate and contest, whether execution, mental capacity, undue influence or revocation is involved. The meaning of the term is, therefore, properly discussed at the outset. "Burden of proof" means the necessity of maintaining the affirmative side of the issue by a preponderance of the evidence, that is, by offering more admissible evidence, estimated by its impression on the mind of the tribunal which decides questions of fact, than the adversary adduces. If the evidence is evenly balanced, the party upon whom the burden of proof rests must fail. It is in this sense that this phrase is here used. Another meaning given to "burden of proof," by good authority, is the necessity of establishing one's side of the issue *prima facie* in the first instance.

Ordinarily there is no inconsistency between these two definitions. The party who is bound to establish his side of the issue *prima facie* is also bound to maintain the issue on his part by a preponderance of the evidence. But in some classes of cases special statutes direct specifically which party shall open the case, how far he shall proceed, and what evidence on his part shall make a *prima facie* case for him. Such statutes do not change the pre-existing rules as to which party must establish the issue on his part by a preponderance of the evidence, unless they expressly so state. There is no implication as to the preponderance of the evidence to be drawn from a statute which merely directs the conduct of the trial.

In cases where such statutes control, it is, therefore, possible for one side to be obliged to open and to make out a *prima facie* case, while the other side is bound to maintain the issue on its part by a preponderance of evidence.

In many states proceedings for probate and contest of wills are controlled by such statutes as have been described. In discussing upon which side the burden of proof rests in cases, the expression "burden of proof" will, as has already been stated, be used in the sense of the necessity of maintaining the issue by a preponderance of evidence.

It is sometimes said not only in cases involving the validity of wills, but in cases of all kinds, that the burden of proof shifts from side to side during the trial of the case. With all deference to the authorities which use this expression, it must be either an erroneous statement of what does actually happen, or neither of the definitions of burden of proof is the correct one. The issues determine which side is obliged to maintain the issue by a preponderance of the evidence.<sup>57</sup>

The general rules of procedure, or the special statutes which apply in the particular case, determine which side must open and make out a *prima facie* case. On neither of these points can there be any change during the progress of the trial.

When it is said that the burden of proof shifts, it is evidently another way of saying that now one side, and now the other has a preponderance of the evidence adduced up to that time.

As the phrase "burden of proof" has two meanings already, which are to some extent contradictory, it is inadvisable to add a third meaning which is inconsistent with both of the meanings already in use, and which is synonymous with the expression "preponderance of evidence"—a phrase which has a technical legal meaning.

Our legal nomenclature is defective enough and possesses enough names with two or more meanings, and enough synonyms for the same legal idea, without adding to the existing confusion by mixing "burden of proof" and "preponderance of evidence" further.

As a rule, however, the distinction between preponderance of evidence and the burden of proof is a technical one. The meaning of the court will usually appear, whichever mode of

<sup>57</sup> "Generally speaking the burden of proof in the sense of the duty of producing evidence passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the claim by a preponderance of the evidence, rests throughout

upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case, he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end." *Egbers v. Egbers*, 177 Ill. 82.

expression is used. It is, therefore, generally not reversible error to tell the jury that the burden of proof shifts.<sup>58</sup>

## II—EVIDENCE OF EXECUTION.

### §370. Burden of proof.

The burden of proof of the execution of a will in legal form is upon the parties propounding such will for probate, to prove each fact necessary to a valid execution.<sup>59</sup> This is especially true where there is no attestation clause.<sup>60</sup> So under the English practice where the attestation clause is insufficient, the will can not be probated informally by the affidavit of the executor, but the witnesses must attend and testify.<sup>61</sup>

Where the law imposes the burden of proof upon proponents on certain issues, and requires contestants to specify the points upon which they intend to rely in showing that the purported will is not the last will and testament of testator, the burden is not removed from proponents by failure of contestants to attack the will upon the issues upon which proponents have the burden of proof.<sup>62</sup> But if contestants prove execution as part of their case, proponents need not offer evidence on that point.<sup>63</sup> However, even if contestants expressly admit execution, the subscribing witnesses may be called to testify as to execution.<sup>64</sup>

This burden of proof is the duty of establishing the facts necessary to the validity of the will by a preponderance of

<sup>58</sup> *Slingloff v. Bruner*, 174 Ill. 561.

<sup>59</sup> *Overby v. Gordon*, 13 App. D.C. 392; *Smith v. Henline*, 174 Ill. 184; *Barlow v. Waters*, — Ky. —; 28 S. W. 785; *McFadin v. Catron*, 120 Mo. 252; *Gordon v. Burris*, 141 Mo. 602; *Murry v. Hennessy*, 48 Neb. 608; *Seebrook v. Fedawa*, 30 Neb. 424; *Swain v. Edmunds*, 54 N. J. Eq. 438; 53 N. J. Eq. 142; *Thomas's Will*, 111 N. Car. 409;

*Kennedy v. Upshaw*, 66 Tex. 442; *Roberts v. Welch*, 46 Vt. 164.

<sup>60</sup> *Swain v. Edmunds*, 54 N. J. Eq. 438; 53 N. J. Eq. 142.

<sup>61</sup> *In re Sweet* (1891), P. 400.

<sup>62</sup> *Livingston's Appeal*, 63 Conn. 68; 26 Atl. 470.

<sup>63</sup> *Hesterberg v. Clark*, 166 Ill. 241.

<sup>64</sup> *Commonwealth v. McCarthy*, 119 Mass. 354.

evidence. Accordingly it is error to charge the jury that if there is a doubt in their minds as to the validity of the will they must find against the will.<sup>65</sup>

Where the will is claimed by contestants to be a forgery, it is unquestionably not necessary to establish the criminal act in the proceeding in contest beyond a reasonable doubt.<sup>66</sup>

It is sometimes said that the burden of proof may be increased by circumstances, as where a testator was accustomed to write his name in full, and after his death a will was offered for probate signed by a mark and witnessed by two relatives of the beneficiaries.<sup>67</sup> In other jurisdictions this same idea would probably be expressed by saying that evidence which on its face suggested fraud would not, unsupported, amount to a preponderance in favor of proponents. The case given is rather one of failure of evidence than of increase in burden of proof.

**§371. Presumption where signatures of testator and subscribing witnesses are duly proved.**

In their duty of establishing the facts essential to the validity of the will by a preponderance of the evidence, proponents are, however, not obliged in all cases to prove each fact by direct evidence; but they may rely upon presumptions. There is, at the outset, no presumption that the alleged testator executed the will in question or any will. But "when a paper propounded as a will is shown to have been signed by the alleged testator and the requisite number of witnesses, in the absence of any satisfactory evidence to the contrary the presumption is that all the formalities have been complied with."<sup>68</sup>

This presumption, as has been said before, is especially strong where the attestation clause is perfect, and recites the performance of all the facts necessary to the validity of the

<sup>65</sup> *Brown v. Walker*, — Miss. —; 11 So. 724.

<sup>67</sup> *Donnelly v. Broughton* (1891), App. Cas. 435.

<sup>66</sup> *McDonald v. McDonald*, 142 Ind. 55.

<sup>68</sup> *In re Brock*, 37 S. Car. 348; 16 S. E. 38.

will,<sup>69</sup> although the presence of an attestation clause does not dispense with direct evidence of the facts of execution where this is available.<sup>70</sup> But where the will recites that certain acts were done, and omits certain essential facts, there is no presumption that these omitted facts were done.<sup>71</sup>

**§372. Presumption where subscribing witness forgets facts of execution.**

It is not necessary to interrogate each subscribing witness upon all of the requisite elements of the will. It is sufficient where all are called, if their evidence put together establishes the requisite facts.<sup>72</sup>

In view of the principles already laid down it is evident that the forgetfulness of the accessible subscribing witness, as to certain necessary facts of execution, does not avoid the *prima facie* case made out by proof of the genuineness of the signatures of testator and the subscribing witnesses.<sup>73</sup> So, where the subscribing witnesses identify their signatures, but have no recollection of having attested the instrument, or of the circumstances of execution, the presumption that it was properly executed will uphold it in the absence of clear and satisfactory proof to the contrary.<sup>74</sup> Thus, where the accessi-

<sup>69</sup> *Hobart v. Hobart*, 154 Ill. 610, affirming 53 Ill. App. 133; *Farley v. Farley*, 50 N. J. Eq. 434; *Tappen v. Davidson*, 12 C. E. Gr. 459; *Barnes v. Barnes*, 66 Me. 286; *Carpenter v. Denoon*, 29 O. S. 379.

<sup>70</sup> *Raleigh, etc., Ry. Co. v. Glendon, etc., Co.*, 113 N. Car. 241. (Thus in a foreign will either the foreign certificate of probate, or the evidence of the subscribing witnesses was held necessary to establish the validity of the will.)

<sup>71</sup> *Swain v. Edmunds*, 54 N. J. Eq. 438; 53 N. J. Eq. 142.

<sup>72</sup> *Welch v. Welch*, 9 Rich. (S. Car.), 133; *Kaufman v. Caughman*, 49 S. Car. 159.

<sup>73</sup> *Tyler's Estate*, 121 Cal. 405; 53 Pac. 928; *Gillis v. Gillis*, 96 Ga. 1; *Canatsey v. Canatsey*, 130 Ill. 397; *Slingloff v. Bruner*, 174 Ill. 561; *Hobart v. Hobart*, 154 Ill. 610; *Nickerson v. Buck*, 12 Cush. (Mass.), 332; *In re Kellum*, 52 N. Y. 517; *In re Hunt*, 110 N. Y. 278; *Luper v. Werts*, 19 Ore. 122; *Sullivan's Will*, 114 Mich. 189; *Abbot v. Abbot*, 41 Mich. 540; *Gable v. Rauch*, 50 S. Car. 95; 27 S. E. 555; *Welch v. Welch*, 9 Rich. (S. Car.), 133; *Will of O'Hagan*, 73 Wis. 78.

<sup>74</sup> *Will of O'Hagan*, 73 Wis. 78; *In re Hunt*, 110 N. Y. 278.



ble subscribing witness testified that she signed as witness in the presence of testator and at his request, but could not remember that she saw the signature of testator, it was held to make out a *prima facie* case for the validity of the will.<sup>75</sup>

Where one of the subscribing witnesses did not remember seeing the signature of testatrix upon the will when he signed, but did remember that he signed below the other witness, and the other witness testified that he was requested by testatrix to sign below her signature, and that there was a signature to the will before he signed, it was held error to take the case from the jury.<sup>76</sup>

**§373. Presumption where subscribing witness is beyond the jurisdiction of court.**

If one or more of the subscribing witnesses to a will are dead, or absent from the jurisdiction of the court before which the will is offered for probate, proof of the genuineness of the signatures of such attesting witnesses and of testator is sufficient, with the aid of this presumption that the remaining acts were properly done, to establish the validity of the will.<sup>77</sup>

The same rule applies where one of the subscribing witnesses is dead or beyond the jurisdiction of the court, and the rest do not remember the facts of execution. Proof of the genuineness of the signatures of testator and the witnesses will, with the aid of the presumption under discussion, establish the validity of the will.<sup>78</sup>

This legal presumption is, of course, greatly aided by the direct testimony of such subscribing witnesses as can be produced at probate, or whose evidence can be taken by deposi-

<sup>75</sup> *Hobart v. Hobart*, 154 Ill. 610.

<sup>76</sup> *Laudy's Will*, 161 N. Y. 429; *so Gwillim v. Gwillim*, 3 Sw. & Tr. 200; 29 L. J. P. 31.

<sup>77</sup> *Barnewall v. Murrell*, 108 Ala. 366; *Robinson v. Brewster*, 140 Ill. 649; *Hobart v. Hobart*, 154 Ill. 610; *Taylor v. Cox*, 153 Ill. 220; *Scott v.*

*Hawk*, 107 Io. 723; *Allison's Estate*, 104 Io. 130; 73 N. W. 489; *Nickerson v. Buck*, 12 Cush. 332; *Sullivan's Will*, 114 Mich. 189; *Jackson v. Van Dusen*, 5 Johns. (N. Y.), 144.

<sup>78</sup> *Tyler's Estate*, 121 Cal. 405; *Slingloff v. Bruner*, 174 Ill. 561.

tion, that the acts necessary to a legal execution actually took place. Under these circumstances a will may be admitted to probate upon such evidence.<sup>79</sup> This presumption obtains even where the deposition of such absent subscribing witness has been taken outside the jurisdiction of the probate court on other issues.<sup>80</sup>

**§374. Presumption where subscribing witness denies facts of execution.**

Even where a subscribing witness denies the existence of certain facts necessary for the legal execution of the will, the maxim "*omnia praesumuntur rite acta*" may prevail over such direct evidence. The subscribing witness, by acting as such, in effect formally declares that all the facts necessary to the legal execution of the will exist, and he has in advance seriously discredited his subsequent denial of these facts under oath. The presumption of the performance of the necessary acts may, therefore, not be overcome by such adverse testimony,<sup>81</sup> and a will may be admitted to probate, though the subscribing witnesses testify adversely thereto.<sup>82</sup>

The subscribing witnesses are especially discredited where they testify in favor of the will at probate and against it at contest;<sup>83</sup> or where they hesitate and evade before denying the validity of the execution of the will.<sup>84</sup>

**§375. Presumption from character of scrivener who supervised execution.**

Evidence that the will was drawn and the execution super-

<sup>79</sup> (Jones's Will), *Jones v. Jones*, 96 Wis. 427.

<sup>80</sup> *Allison's Estate*, 104 Io. 130; 73 N. W. 489.

<sup>81</sup> *Dayman v. Dayman*, 71 Law T. 699; *Gillis v. Gillis*, 96 Ga. 1; *Gwin v. Gwin* (Ida.), 48 Pac. 295; *Bernsee's Will*, 141 N. Y. 389; *Orser v. Orser*, 24 N. Y. 51; *In re Stacey*, 6 Ohio Dec. 499; *Rice's Estate*, 173 Pa. St. 298.

<sup>82</sup> *Mays v. Mays*, 114 Mo. 536 (issue of sanity); *Orser v. Orser*, 24 N. Y. 51; *Loughney v. Loughney*, 87 Wis. 92; *Theological Seminary v. Calhoun*, 25 N. Y. 422.

<sup>83</sup> *Pilkington v. Gray* (1899), A. C. 401; 68 L. J. P. C. N. S. 63; *Rice's Estate*, 173 Pa. St. 298.

<sup>84</sup> *Bernsee's Will*, 141 N. Y. 389.

vised by one who was experienced in such subjects is competent, as a presumption of fact may thereupon arise that the execution was properly accomplished.<sup>85</sup> Evidence that testator himself was an experienced lawyer is also admissible to raise this presumption.<sup>86</sup> This evidence is, of course, not conclusive as to due execution.<sup>87</sup>

### §376. Declarations of testator.—*Res gestae*.

The ordinary rule is that the declarations of a testator are admissible only when they are contemporaneous with and explanatory of the facts of execution.<sup>88</sup> It is a little difficult to tell exactly what declarations are so contemporaneous as to be admissible under the *res gestae* rule and what are not. Declarations of testator at execution that he had heard the will read to him upon a previous occasion are admissible to show that he was acquainted with its contents.<sup>89</sup> Thus, the declarations of testator to his attorney that the specific paper was his will were held admissible.<sup>90</sup>

In an extreme case declarations of testator before the execution of the will made to his son who brought the attorney to draft the will, and declarations made to such son immediately after the execution of the will in the son's absence, were held sufficient to establish due execution.<sup>91</sup>

Testator's declarations to subscribing witnesses at execution that the will was his, and that he had fully witnessed it, constitute some evidence that his name was written by another in his presence and at his request, where it was shown that he did not sign it himself.<sup>92</sup>

<sup>85</sup> Sullivan's Will, 114 Mich. 189; Nelson's Will, 141 N. Y. 152; Gable v. Rauch, 50 S. Car. 95. (Where the scrivener, who was also attesting witness, had been probate judge for twelve years.)

<sup>86</sup> Stewart v. Stewart, 56 N. J. Eq. 761; Nelson's Will, 141 N. Y. 152.

<sup>87</sup> Purdy's Will, 25 Misc. (N. Y.), 458; 55 N. Y. Supp. 644.

<sup>88</sup> Walton v. Kendrick, 122 Mo. 504; Waterman v. Whitney, 11 N. Y. 157; Gordon's Will, 50 N. J. Eq. 397.

<sup>89</sup> McCommon v. McCommon, 151 Ill. 428.

<sup>90</sup> Scott v. Hawk, 107 Io. 723.

<sup>91</sup> Scott's Estate, 147 Pa. St. 89.

<sup>92</sup> Walton v. Kendrick, 122 Mo. 504; 25 L. R. A. 701.

### §377. Declarations of testator.—Not *res gestae*.

The great weight of authority is that declarations made at any period of time after execution, no matter how short, are narratives of past events, and are inadmissible to establish due execution.<sup>93</sup> Thus, declarations by testator that he had not made a will are inadmissible to show that the will offered for probate was a forgery.<sup>94</sup> So, declarations of testator made before the execution of the will, as to his intentions, are inadmissible upon the question of the execution of the will.<sup>95</sup> But testator's declarations that he had made a will have been held admissible to corroborate other testimony to that effect.<sup>96</sup>

The declarations of testator are admissible to show the genuineness of his handwriting, but not as to his intention.<sup>97</sup> Since declarations are usually admissible to show mental condition and states of feeling, testator's declarations made after execution are admissible to show that he knew that the instrument which he was executing was a will.<sup>98</sup>

### §378. Expert evidence.

The opinions of experts in handwriting are admissible upon questions of the genuineness of the signatures to the will.<sup>99</sup> So are the opinions of persons who, though not experts, are familiar with the handwriting in dispute.<sup>100</sup>

Papers admitted or proven to be the genuine handwriting of the person whose handwriting is in dispute are also admissible as standards of comparison.<sup>101</sup>

<sup>93</sup> *Leslie v. McMurty*, 60 Ark. 301; *Walton v. Kendrick*, 122 Mo. 504; *Wells v. Wells*, 144 Mo. 198; *Gordon's Will*, 50 N. J. Eq. 397.

<sup>94</sup> *Leslie v. McMurty*, 60 Ark. 301; *Wells v. Wells*, 144 Mo. 198. But in *Risse v. Gasch*, 43 Neb. 287, testator's declarations that he had not made a will were put in evidence; and the Supreme Court refused to disturb the verdict.

<sup>95</sup> *Throckmorton v. Holt*, 12 App. D. C. 552; *Swope v. Donnelly*, 190 Pa. St. 417; 42 Atl. 882.

<sup>96</sup> *Lane v. Hill*, 68 N. H. 275; 44 Atl. 393.

<sup>97</sup> *Morvant's Succession*, 45 La. Ann. 207.

<sup>98</sup> *Nelson's Will*, 141 N. Y. 152; *Sullivan's Will*, 114 Mich. 189.

<sup>99</sup> *Clark v. Ellis*, 28 S. W. (Ky.) 148; *Berg's Estate*, 173 Pa. St. 647. For a general discussion of what an expert is, see Sec. 389.

<sup>100</sup> *Berg's Estate*, 173 Pa. St. 647.

<sup>101</sup> *Clark v. Ellis*, —Ky. —; 28 S. W. 148.

The opinions of experts, adverse to the genuineness of the signatures, are, however, of little weight in comparison with the direct evidence of persons present at the execution of the will,<sup>102</sup> unless they are fortified and strengthened by other suspicious circumstances. Thus, where the will was suppressed until after the death of the only subscribing witness who was unbiased, this fact, together with testimony of experts adverse to the genuineness of the signatures, was held sufficient evidence on which to find against the will, though the other subscribing witness, a son of the chief beneficiary, testified to its genuineness.<sup>103</sup>

### §379. Evidence negating execution.

Evidence tending to show that the will was not, and could not have been, executed as alleged is admissible. Thus, evidence is admissible that testator,<sup>104</sup> or one of the alleged subscribing witnesses,<sup>105</sup> was not present at the time and place of the alleged execution of the will.

The fact that the signature appended to the will is in substantially different form from the usual signature of testator is a circumstance to be considered in determining the genuineness of such signature.<sup>106</sup>

Where the subscribing witnesses make out a *prima facie* case of due execution, this is not rebutted by the evidence of one of the subscribing witnesses who testifies that he thought that the will was written on a differently shaped piece of paper from that which was offered for probate as the will.<sup>107</sup> So the mere fact that the will was written on two pieces of paper, so pasted together that the execution clause was entirely on one sheet,<sup>108</sup> or the fact that the signature of tes-

<sup>102</sup> Conway v. Ewald, — (N. J. Prer.), —; 42 Atl. 338; Douglass's Estate, 162 Pa. St. 567; 29 Atl. 715.

<sup>103</sup> Clark v. Ellis, — Ky. —; 28 S. W. 148.

<sup>104</sup> Risse v. Gasch, 43 Neb. 287.

<sup>105</sup> Barbour v. Moore, 10 App. D. C. 30.

<sup>106</sup> Risse v. Gasch, 43 Neb. 287.

<sup>107</sup> Harp v. Parr, 168 Ill. 459. (On this point he was contradicted by the scrivener and the other subscribing witness.)

<sup>108</sup> Lamb v. Lippencott, 115 Mich. 611; 73 N. W. 887.

tator was in ink of a different kind from that in which the body of the will was written,<sup>109</sup> were each held insufficient to establish forgery. So, where the only evidence in opposition to the *prima facie* case made out by proof of the handwriting is that of one witness who admits that the signature resembled that of testatrix, but that it was not hers "because she never wanted to make such a will," it was held that there was nothing to go to the jury.<sup>110</sup>

### §380. Evidence of *animus testandi*.

Where it is shown that testator signed the will, it is *prima facie* evidence that he signed it understandingly.<sup>111</sup> Where the instrument is regular in form, and testamentary in expression, it requires the clearest and most convincing evidence to show that it was not executed by testator with testamentary intent.<sup>112</sup>

In order to show the *animus testandi* it is not necessary to show that the testator actually read the will.<sup>113</sup> Nor where he is illiterate is it necessary to show that the will was read to him.<sup>114</sup> Even where the desire of testator would have originally violated the rule against perpetuities, and when this was explained to him he asked that the will be drawn as near his original wish as could be done under the law, it was held unnecessary to show that the will as finally drawn was, in fact, read over to testator.<sup>115</sup> But where the evidence disclosed that the will as drawn was in partial disregard of the expressed wishes of testatrix, and it was never read over

<sup>109</sup> *Davis v. Elliott*, 55 N. J. Eq. 473; 36 Atl. 1092. (In this case the evidence tended to show that while there were several bottles of ink on the table only one pen and kind of ink were used.)

<sup>110</sup> *Berg's Estate*, 173 Pa. St. 647.

<sup>111</sup> *Sheer v. Sheer*, 159 Ill. 591.

<sup>112</sup> *Sullivan's Will*, 114 Mich. 189; *Boehm v. Kress*, 179 Pa. St. 386.

<sup>113</sup> *Walton v. Kendrick*, 122 Mo. 504; *Boehm v. Kress*, 179 Pa. St. 386.

<sup>114</sup> *Maxwell v. Hill*, 89 Tenn. 584.

<sup>115</sup> *Sheer v. Sheer*, 159 Ill. 591. (The scrivener who drew the will testified: "I drew it as near like his directions as it could be done under the law"; and no evidence contradicted this.)

to her in its final form, it was held that the presumption of the *animus testandi* was rebutted.<sup>116</sup>

The statement of a subscribing witness that testator knew what he was about is not sufficient where the evidence shows that testator did not recognize anyone and was unconscious.<sup>117</sup>

### §381. Questions of law and fact.

What facts are necessary to the due execution of a will is a question of law to be determined by the court.<sup>118</sup> Whether in the particular case these facts exist, is a question of fact peculiarly for the tribunal which is to decide the facts, whether that is the jury or the court.

## III—EVIDENCE OF INCAPACITY

### §382. Burden of proof.

Upon the question of whether the proponent of the will—the party who contends that the will is valid, or the contestant—the party who contends that the will is not valid, has the burden of proof upon the question of mental capacity, the courts are hopelessly divided. The weight of authority seems to be that the burden of proof is upon the party alleging incapacity; that is, upon the contestant.<sup>119</sup>

<sup>116</sup> Waite v. Frisbie, 45 Minn. 361.

<sup>117</sup> Chappell v. Trent, 90 Va. 849.

<sup>118</sup> Harp v. Parr, 168 Ill. 459; Bramel v. Bramel, — Ky. —; 39 S. W. 520.

<sup>119</sup> Barnewall v. Murrell, 108 Ala. 386; Eastis v. Montgomery, 95 Ala. 486; Knox v. Knox, 95 Ala. 495; Daniel v. Hill, 52 Ala. 430; Stubbs v. Houston, 33 Ala. 555, overruling Dunlap v. Robinson, 28 Ala. 100; McCulloch v. Campbell, 49 Ark. 367; Jenkins v. Tobin, 31 Ark. 306; Scott's Estate, — Cal. — (1900), 60 Pac. 527; Steele v.

Helm, 2 Marv. (Del.), 237; Smith v. Day (Del.), 45 Atl. 396; Blough v. Parry, 144 Ind. 463, disapproving Durham v. Smith, 120 Ind. 463, overruling Kenworthy v. Williams, 5 Ind. 375; Young v. Miller, 145 Ind. 652; Turner v. Cook, 36 Ind. 129; Moore v. Allen, 5 Ind. 521; Blake v. Rourke, 74 Io. 519; Boone v. Ritchie (Ky.), 53 S. W. 518; King v. King (Ky.), 42 S. W. 347; Howat v. Howat (Ky.), 41 S. W. 771; Barnes v. Barnes, 66 Me. 286; Tyson v. Tyson, 37 Md. 567; Higgins v. Carlton, 28 Md. 115; Carl v. Gabel, 120 Mo. 283; Payne v.

Where this is the rule the verdict must be in favor of proponents, if the evidence adduced is so evenly balanced that there can not be said to be a preponderance either way.<sup>120</sup> This is the rule even where the testator was a monomaniac. The burden of proof is on the party alleging incapacity to show that the will was affected thereby.<sup>121</sup> The burden of proof is on contestants to establish incapacity of permanent type before proponent could be called upon to show that the will was made in a lucid interval.<sup>122</sup>

A very large and respectable minority of the courts, however, take the position that the party propounding the will has the burden of proof as to every fact necessary to the validity of the will, including the mental capacity of the testator.<sup>123</sup>

The reason given for this view is not without force. It is that the right to make a will, of real estate at least, is not a

Banks, 32 Miss. 292; Sheehan v. Kearney, — Miss. —; 21 So. 41; Perkins v. Perkins, 39 N. H. 163; *In re Burn's Will*, 121 N. Car. 336; McCoon v. Allen, 45 N. J. Eq. 708; Elkinton v. Brick, 44 N. J. Eq. 154; Harris v. Vanderveer, 21 N. J. Eq. 561; Sanderson v. Sanderson, 52 N. J. Eq. 243; Delafield v. Parish, 25 N. Y. 9; Howard v. Moot, 64 N. Y. 262; Messner v. Elliott, 184 Pa. St. 41; Linton's Appeal, 104 Pa. St. 228; Grubbs v. McDonald, 91 Pa. St. 236; Egbert v. Egbert, 78 Pa. St. 326; Bartee v. Thompson, 8 Baxt. (Tenn.), 508; Key v. Holloway, 7 Baxt. (Tenn.), 575; Burton v. Scott, 3 Rand. (Va.), 399; Allen v. Griffin, 69 Wis. 529.

<sup>120</sup> Roller v. Kling, 150 Ind. 159.

<sup>121</sup> Young v. Miller, 145 Ind. 652; Edwards v. Davis, 30 Weekly Law Bull. 283; Taylor v. Trich, 165 Pa. St. 586.

<sup>122</sup> Murphree v. Senn, 107 Ala. 424; O'Donnell v. Rodiger, 76 Ala. 222; Henry v. Hall, 106 Ala. 84.

<sup>123</sup> Harrison's Will, 30 N. B. 164;

Livingstone's Appeal, 63 Conn. 68; *In re Barber's Estate*, 63 Conn. 393; Comstock v. Society, 8 Conn. 254; Evans v. Arnold, 52 Ga. 169; Johnston v. Stevens (Ky.), 23 S. W. 957; Baldwin v. Parker, 99 Mass. 79; Crowninshield v. Crowninshield, 2 Gray (Mass.), 524; Baxter v. Abbott, 7 Gray (Mass.), 71; Hall v. Perry, 87 Me. 569; *In re Thompson*, 92 Me. 563; Moriarity v. Moriarity, 108 Mich. 249; Prentis v. Bates, 93 Mich. 234, overruling same case, 88 Mich. 567; Taff v. Hosmer, 14 Mich. 309; *In re Layman's Will*, 40 Minn. 371; Maddox v. Maddox, 114 Mo. 35; Norton v. Paxton, 110 Mo. 456; Patten v. Cilley, 67 N. H. 520; Hardy v. Merrill, 56 N. H. 227; Murry v. Hennessey, 48 Neb. 608; Seebrook v. Fedawa, 30 Neb. 424; Hubbard v. Hubbard, 7 Ore. 42, Chrisman v. Chrisman, 16 Ore. 127; Williams v. Robinson, 42 Vt. 658; *In re Baldwin's Estate*, 13 Wash. 666; McMechen v. McMechen, 17 W. Va. 683.



common law right, but depends upon the statute in derogation of the common law; that a will to be valid must be proved to be within the terms of this statute, and that as one of the requisites of the statute is that the testator must be of sound mind, the proponent of the will has the duty of maintaining the issue on this fact by a preponderance of evidence.<sup>124</sup> Thus, where this rule is in force it is reversible error for the trial court to place the burden of proof upon contestants by charging "if there is more of the evidence . . . on the side of the contestants . . . the will ought to be overruled."<sup>125</sup>

In other jurisdictions the rule is expressed as follows: It is incumbent upon the proponents of the will to make a *prima facie* case by the evidence of the subscribing witnesses of all the requisites of a valid will, including the capacity of the testator. After proponents have made out such *prima facie* case, contestants must overcome this *prima facie* showing by substantial evidence,<sup>126</sup> or, as is said in other jurisdictions, by a preponderance of the evidence.<sup>127</sup>

Or it is sometimes said that the burden of making out a *prima facie* case is upon the proponents in the first instance, but that when they have done this by means of the evidence of the subscribing witnesses, the burden of proof is upon contestants to show lack of capacity.<sup>128</sup>

<sup>124</sup> *Crowninshield v. Crowninshield*, 2 Gray (Mass.), 524; *Baldwin v. Parker* 99 Mass. 79; *In re Baldwin's Estate*, 13 Wash. 666; *McMechen v. McMechen*, 17 W. Va. 683.

"The general rule that all persons are presumed sane until the contrary appears . . . does not apply in cases of this kind. There must be sufficient proof to make out a *prima facie* case of the sanity of testator at the time the will is made as one of the jurisdictional facts." *In re Baldwin's Estate*, 13 Wash. 666.

<sup>125</sup> *Moriarity v. Moriarity*, 108 Mich. 249.

<sup>126</sup> *Barber's Estate*, 63 Conn. 393; 22 L. R. A. 90; *Fulbright v. Perry County*, 145 Mo. 432.

<sup>127</sup> *Smith v. Henline*, 174 Ill. 184; *Craig v. Southard*, 162 Ill. 209; *Graybeal v. Gardner*, 146 Ill. 337; *Taylor v. Cox*, 153 Ill. 220; *Bevelot v. Lestrade*, 153 Ill. 625; *Pendlay v. Eaton*, 130 Ill. 69; *Hawkins v. Grimes*, 13 B. Mon. (Ky.), 257.

<sup>128</sup> *Hollenbeck v. Cook*, 180 Ill. 65; *Egbers v. Egbers*, 177 Ill. 82.

In Canada the burden rests upon proponent, if he was active in procuring the execution of the will.<sup>129</sup>

### §383. Presumption of sanity.

In most cases there is a presumption that any person whose capacity is under discussion is sane. The weight of authority is that this presumption obtains in cases involving the validity of wills, and that the testator is always presumed sane until evidence discloses the contrary state of mind.<sup>130</sup> It is, accordingly, proper to charge the jury that if the other evidence is equally balanced the presumption of sanity has probative force enough to turn the scale in favor of the will,<sup>131</sup> and it is error to refuse to charge that "every person is of sound mind until the contrary is shown."<sup>132</sup>

This presumption is not, of course, conclusive. It is at the utmost a *prima facie* presumption of law, liable to be rebutted by evidence.

In other jurisdictions it is said that there is no presumption of sanity.<sup>133</sup> While the rules as to presumption of sanity

<sup>129</sup> *Currie v. Currie*, 24 Can. S. C. 712. And a similar view is expressed in *Hegney v. Head*, 126 Mo. 619.

<sup>130</sup> *Barnewall v. Murrell*, 108 Ala. 366; *In re Barber's Estate*, 63 Conn. 393; *Sturdevant's Appeal*, 71 Conn. 393; *Ethridge v. Bennett*, 9 Houst. (Del.), 295; *Craig v. Southard*, 162 Ill. 209; *Blough v. Parry*, 144 Ind. 463; *Mayo v. Jones*, 78 N. Car. 402; *Perkins v. Perkins*, 39 N. H. 163; *Delafield v. Parish*, 25 N. Y. 9; *Messner v. Elliott*, 184 Pa. St. 41; *Grubbs v. McDonald*, 91 Pa. St. 236; *Newhard v. Yundt*, 132 Pa. St. 324; *Dean v. Dean*, 27 Vt. 746. "When proponent proves the formal execution of a will, including the attestation and subscription of the witnesses as required by law, a presumption of testamentary capacity arises, since every adult is presumed to be sane until the contrary appears, and since witnesses,

when they attest and subscribe a will as such, not only attest the fact of the testator's signing, but also the testator's sanity." *Kaufman v. Caughman*, 49 S. Car. 159.

<sup>131</sup> *Sturdevant's Appeal*, 71 Conn. 393. In this case the court said: "The presumption of sanity is not in itself evidence, but it may serve the purpose and supply the place of evidence by setting up something which must be overcome by proof to the contrary."

<sup>132</sup> *Sturdevant's Appeal*, 71 Conn. 392; *Blough v. Parry*, 144 Ind. 463.

<sup>133</sup> *In re Thompson*, 92 Me. 563; *Barnes v. Barnes*, 66 Me. 286; *Hubbard v. Hubbard*, 7 Oreg. 42; *Beazley v. Denson*, 40 Tex. 416; *Baldwin's Estate*, 13 Wash. 666. This proposition is so qualified, however, as not to be as completely in contradiction of the rule held in most states as at first appears.

are closely interwoven with those as to the burden of proof, they are nevertheless not identical, and they should be considered separately. In some jurisdictions, where the burden of proof is upon the proponents of the will, they are aided by the presumption of sanity, which may turn the preponderance in their favor where the other evidence is equally balanced,<sup>134</sup> and where the court has refused to charge that "every person is presumed of sound mind until the contrary is shown," this error is not cured by a charge that the "burden is on plaintiffs to show, by a fair preponderance, unsoundness of mind."<sup>135</sup>

### §384. Presumption of continuance of mental condition.

Where evidence is introduced which shows that testator, prior to the date of making the will, suffered from some form of mental disorder, which would deprive him of testamentary capacity, and this disorder is shown to be of a permanent type, a presumption arises that such incapacity continued down to and including the time of making the will.<sup>136</sup> Thus, a lunatic without lucid intervals,<sup>137</sup> and a person suffering from *senile dementia*,<sup>138</sup> are presumed, in the absence of proof to the contrary, to remain in that condition, and to be thereafter incapable of making a valid will.

It is necessary, in order to raise this presumption, to show that the insanity, or other form of incapacity, was of a permanent type; and a general charge that insanity is presumed to continue is properly refused.<sup>139</sup> It is held, however, improper in such a case to charge that the burden of proving that the will was made in a lucid interval rests on proponents.<sup>140</sup>

<sup>134</sup> Barber's Estate, 63 Conn. 393; Sturdevant's Appeal, 71 Conn. 393; 42 Atl. 70; Trish v. Newell, 62 Ill. 196.

<sup>135</sup> Blough v. Parry, 144 Ind. 463.

<sup>136</sup> O'Donnell v. Rodiger, 76 Ala. 222; Harrison v. Bishop, 131 Ind. 161; Roller v. Kling, 150 Ind. 159; Bever v. Spangler, 93 Io. 576; Chandler v. Barrett, 21 La. Arn. 58; Von de Veld v. Judy, 143 Mo.

348; *In re Hoopes' Estate*, 174 Pa. St. 373; Ely's Estate, 39 N. Y. Supp. 177.

<sup>137</sup> *In re Hoopes' Estate*, 174 Pa. St. 373.

<sup>138</sup> Bever v. Spangler, 93 Io. 576

<sup>139</sup> Murphree v. Senn, 107 Ala. 424; Manley's Exr. v. Staples, 65 Vt. 370.

<sup>140</sup> Merriman v. Merriman, 153 Ind. 631 (1899), 55 N. E. 734; and

But where the evidence discloses that at some time prior to the date of making the will testator suffered from some form of mental disorder, which deprived him at the time of testamentary capacity, and that this incapacity was of a temporary nature, no presumption of the continuance of such incapacity arises, and the presumption of sanity, if in force in that jurisdiction, will prevail.<sup>141</sup> Thus, evidence that testator suffered at one time from religious insanity, of a temporary type, raises no presumption of its continuance;<sup>142</sup> nor does the fact that testator was shown to be given to the habitual use of drugs<sup>143</sup> or stimulants<sup>144</sup> raise a presumption that the effect of such drugs and stimulants operated at the time of the execution of the will, and affected testator's mental capacity then.

Evidence that testator had a fit of epilepsy on the day he made his will, before its execution, does not establish a lack of capacity during the whole day.<sup>145</sup> Hence, the fact that testator once attempted suicide does not raise any presumption that, if such attempt was caused by insanity, the insanity existed at the date of the will.<sup>146</sup> And suicide by testator six weeks after the execution of his will does not raise a presumption that he was insane at the date of the execution of the will.<sup>147</sup> Nor is evidence that testator was very irritable three years before the execution of the will admissible.<sup>148</sup>

in Louisiana it is said that the execution of a sensible will raises the presumption that it was executed in a lucid interval. *Kingsbury v. Whitaker*, 32 La. Ann. 1055.

<sup>141</sup> *Johnson v. Armstrong*, 97 Ala. 731; *In re Wilson's Estate*, 117 Cal. 262; *Taylor v. Pegram*, 151 Ill. 106; *Williams v. Williams*, 90 Ky. 28; *Von de Veld v. Judy*, 143 Mo. 348; *Hix v. Whittemore*, 4 Met. (Mass.), 545; *Koegel v. Egner*, 54 N. J. Eq. 623; *Miller v. Oestrich*, 157 Pa. St. 264.

<sup>142</sup> *Williams v. Williams*, 90 Ky. 28.

<sup>143</sup> *Von de Veld v. Judy*, 143 Mo.

348; *Frost v. Wheeler*, 43 N. J. Eq. 573; *Miller v. Oestrich*, 157 Pa. St. 264.

<sup>144</sup> *Wilson's Estate*, 117 Cal. 262; *Ball v. Kane*, 1 Penne. (Del.), 90; *Lee's Will*, 46 N. J. Eq. 193; *Koegel v. Egner*, 54 N. J. Eq. 623; *Woolsey's Will*, 41 N. Y. Supp. 263. Apparently *contra*, *Cockran's Will*, 1 T. B. Mon. (Ky.), 263.

<sup>145</sup> *Johnson's Will*, 27 N. Y. Supp. 649; 57 N. Y. S. R. 846.

<sup>146</sup> *Koegel v. Egner*, 54 N. J. Eq. 623.

<sup>147</sup> *Bey's Succession*, 46 La. Ann. 773.

<sup>148</sup> *Blood's Estate*, 62 Vt. 359.

### §385. Nature of will as evidence of capacity.

With the exception of certain statutory provisions, which are elsewhere considered, a testator who has sound and disposing mind and memory, and is not under restraint, may make a will excluding the natural objects of his bounty in part, or entirely, from sharing in his estate.<sup>149</sup>

Under the civil law a will whereby the testator without just cause excluded from his estate those who were near to him in blood, as where a parent disinherited a child, or a child excluded a parent, was known as an inofficious will, and might be set aside by a form of contest known as *querela inofficiosi testamenti*.<sup>150</sup> But the common law recognizes no such limitation upon the testamentary power of a testator who possesses testamentary capacity, though in some jurisdictions special statutes, which are elsewhere considered, limit testator's power of devising his property to the exclusion of his immediate family. However, the nature of the will itself is clearly one of the controlling facts in passing upon doubtful testamentary capacity. Popular feeling upon this point coincides with the rules of law, and the jury or the court which decides upon the facts must be allowed to consider the nature of the will in connection with the other evidence in the case.<sup>151</sup>

In some jurisdictions the effect of a sensible will made by the testator, unaided, is to raise a presumption of sanity so strong that even if testator has been shown to be habitually insane it is presumed that the will was made in a lucid interval.<sup>152</sup>

<sup>149</sup> See Sec. 23.

<sup>150</sup> Bouv. Law Dict., "In officiosum." Dig. 2, 5, 3, 13. Paulus. Lib. 4, tit. 5, Sec. 1.

<sup>151</sup> Wilson's Will, 117 Cal. 262; Sturdevant's Appeal, 71 Conn. 393; 42 Atl. 70; Smith v. Smith, 75 Ga. 477; Kaenders v. Montague, 180 Ill. 300; Hollenbeck v. Cook, 180 Ill. 65; Aylward v. Briggs, 145 Mo.

604; Rivard v. Rivard, 109 Mich. 98; Prather v. McClelland (Tex. Civ. App.), 26 S. W. 657; Prather v. McClelland, 76 Tex. 574; Silverthorn's Will, 68 Wis. 372.

*Contra*, Barbour v. Moore, 4 App. D. C. 535.

<sup>152</sup> Succession of Bey, 46 La. Ann. 773; Kingsbury v. Whitaker, 32 La. Ann. 1055.

In jurisdictions which hold that the burden of proof shifts during the progress of the trial, the rule that a rational will raises a presumption of sanity is thus stated: If the will is "consistent in its provisions and rational on its face the presumption is that" the testator "was of sound mind at the time of its execution, and the burden shifts to contestant to show that he was not of sound mind at that time."<sup>153</sup> And on the other hand, if the will is unfair and unreasonable, it is said that the burden of proof shifts to the proponents to establish the mental capacity of the testator.<sup>154</sup>

The theory that the burden of proof never shifts has already been explained. In states where this theory is held, the nature of the will is to be considered merely as evidence, and the burden is, of course, unchanged.<sup>155</sup>

If the will is unjust and unreasonable in view of the relations of the parties, this fact may be shown by proper evidence, and may be considered by the jury as bearing upon testator's capacity.<sup>156</sup>

Such injustice may be considered even where the party who is unfairly treated makes no objection to the validity of the will. As it bears upon testator's capacity, any person having a right to contest the will may introduce evidence tending to establish its injustice. Thus, where testator's wife

<sup>153</sup> *Bramel v. Bramel*, — (Ky.), —; 39 S. W. 520; *Newcomb v. Newcomb*, 96 Ky. 120; *Maddox v. Maddox*, 114 Mo. 35.

<sup>154</sup> *Gay v. Gillilan*, 92 Mo. 250; *Maddox v. Maddox*, 114 Mo. 35; *Budlong's Will*, 126 N. Y. 423; *Caldwell v. Anderson*, 104 Pa. St. 199.

<sup>155</sup> *Ousley v. Witheron*, 13 Ohio C. C. 298.

<sup>156</sup> *Pooler v. Cristman*, 145 Ill. 405 (overruling *Rutherford v. Morris*, 77 Ill. 397; *Nicewander v. Nicewander*, 151 Ill. 156; *Sim v. Russell*, 90 Io. 656; *Manatt v. Scott*,

106 Io. 203; *Newcomb's Exrs. v. Newcomb*, 96 Ky. 120; *Maddox v. Maddox*, 114 Mo. 35; *In re Burns's Will*, 121 N. Car. 336.

"That the inequities of a will may be taken into consideration in determining the mental capacity of testator or whether undue influence has been used, is too well settled to require an extended examination of the authorities." *Manatt v. Scott*, 106 Io. 203, citing and following *Crandall's Appeal*, 63 Conn. 365; *Sim v. Russell*, 90 Io. 656; *Davis v. Calvert*, 5 Gill. & J. (Md.), 269; *Peck v. Cary*, 27 N. Y. 9.

had, by her property, given him the means of accumulating his property, and she was very unfairly treated in his will, but she did not contest it, it was held that the heirs might introduce evidence of these facts to show that the will was an unjust one.<sup>157</sup>

While the jury may consider the nature of the will, and its justice or injustice, this is only one out of many things to be considered, insufficient of itself to show lack of mental capacity.<sup>158</sup> Since the propriety of testators' will is not a matter for court or jury to pass upon, it is error to submit such question to the jury in any form.<sup>159</sup> So while circumstances of inequality and unfairness in the will may be considered in connection with other evidence as bearing upon the question of capacity, they must not be given undue prominence by the court in its charge. Thus, a charge that testamentary capacity is ability "to understand the obligations of testator, if any are shown to exist, towards any person," is erroneous as giving undue prominence to such obligations.<sup>160</sup> And a charge that the injustice of the will is to be considered to-

<sup>157</sup> *Pergason v. Etcherson*, 91 Ga. 785.

<sup>158</sup> *Henry v. Hall*, 106 Ala. 84; *Knox v. Knox*, 95 Ala. 495; *In re Kaufman's Will*, 117 Cal. 288; *Barbour v. Moore*, 4 App. D. C. 535; *Bennett v. Hibbert*, 88 Io. 154; *Barlow v. Waters* (Ky.), 28 S. W. 785; *Kaufman v. Caughman*, 49 S. Car. 159 (disinheritance of child).

"Apparent inequality or inequity in the provisions of a will will not alone warrant the presumption of mental capacity or undue influence. These may be considered as circumstances in connection with other facts bearing on the condition of the testator's mind." *Manatt v. Scott*, 106 Io. 203, citing and following *Knox v. Knox*, 95 Ala. 495; *In re Hess's Will*, 48 Minn. 504; *Maddox v. Maddox*, 114 Mo. 35; *Turnure v. Turnure*, 35 N. J. Eq. 437.

<sup>159</sup> *Barbour v. Moore*, 4 App. D. C. 535; *Nieman v. Schnitker*, 181 Ill. 400; *Carpenter v. Calvert*, 83 Ill. 62; *Freeman v. Easley*, 117 Ill. 317.

Thus where no evidence tending to show an insane delusion had been introduced it was held error to charge: "A person may have upon some subjects, and even generally, mind and memory and sense to know and comprehend ordinary transactions, and yet upon the subject of those who would naturally be the objects of his care and bounty, and of a reasonable and proper disposition to them of his estate, he may be of unsound mind," since this directed the attention of the jury to the propriety of the will. *Nieman v. Schnitker*, 181 Ill. 400.

<sup>160</sup> *Bulger v. Ross*, 98 Ala. 267.

gether with other facts, is erroneous, as it gives undue prominence to the injustice of the will.<sup>161</sup>

Further, if the court charges, as it properly may, that a just will is strong evidence of capacity, and an unjust will the reverse, it is error for the court to point out certain natural beneficiaries only to the exclusion of others, as to refer to the brothers and sisters of the testator as the natural objects of his bounty to the exclusion of certain nephews, sons of a deceased brother.<sup>162</sup> And it is error to assume, as a matter of law, that a will which excludes all of testator's relations is a just and natural one.<sup>163</sup>

### §386. Evidence of financial standing of parties.

Since the great weight of authority allows the jury to consider the justice or injustice of the will as bearing on testator's capacity, it would naturally follow that a very free inquiry should be permitted into the history of the financial standing of the parties to the suit, and of their previous relations with testator, in order to determine whether the will was fair and reasonable or not. Accordingly we find that the courts allow inquiry into these facts, yet with more reserve in admitting evidence than would be expected from the broad principle laid down as to the effect of the nature of the will.

Evidence is admissible as to how testator acquired the property disposed of by will,<sup>164</sup> and to show the value of the decedent's estate.<sup>165</sup> Evidence is admissible to show advancements made by testator in his life to the father of his grandchildren, and to show the size of their father's estate as showing that the will was a reasonable one.<sup>166</sup>

<sup>161</sup> *Herbert v. Long*, — Ky. —; 23 S. W. 658; *Zimlich v. Zimlich*, 90 Ky. 657.

Another case where the court erred in giving such prominence to the justice of the will as to lead the jury to pass on its propriety, rather than its validity, is *Couch v. Gentry*, 113 Mo. 248.

<sup>162</sup> *Sturdevant's Appeal*, 71 Conn. 393; 42 Atl. 70.

<sup>163</sup> *Chappell v. Trent*, 90 Va. 849.

<sup>164</sup> *In re Wilson's Estate*, 117 Cal. 262; *Pergason v. Etcherson*, 91 Ga. 785.

<sup>165</sup> *In re Flint's Estate*, 100 Cal. 391.

<sup>166</sup> *Manatt v. Scott*, 106 Io. 203.



Evidence of financial standing of the contestants has been held to be immaterial, where advancements by testator were not involved,<sup>167</sup> and so has evidence of the financial standing of the father of the beneficiaries.<sup>168</sup>

Upon this point the courts are not in accord. In a recent Missouri case it was held that evidence of the financial standing of the parties to the contest was admissible,<sup>169</sup> and the wealth of the contestant seems to have been properly admitted in a Maine case. This latter case is not a precedent, as the only evidence of incapacity was that the testatrix was old, was subject to attacks of faintness and dizziness, and left her property to an adopted child to the exclusion of her own child, who was, however, already comfortably provided for; and this was held not to establish insanity conclusively.<sup>170</sup> But where the method by which testator acquired his property could not affect the testamentary disposition which he would naturally make of it, evidence of such method of acquisition is immaterial.<sup>171</sup>

### §387. Evidence of relations between testator, beneficiaries, and natural objects of bounty.

Evidence of services rendered and favors done by excluded relatives for testator in his lifetime is inadmissible.<sup>172</sup> So is evidence of the extent to which the decedent aided his relatives in his lifetime.<sup>173</sup> And where feeling was shown to exist, caused by quarrels between testator's father and the lat-

<sup>167</sup> Pooler v. Cristman, 145 Ill. 405; Merriman's Appeal, 108 Mich. 454.

<sup>168</sup> Murphree v. Senn, 107 Ala. 424.

<sup>169</sup> McFadin v. Catron, 138 Mo. 197; 120 Mo. 252; Thompson v. Ish, 99 Mo. 160; so Powers v. Powers (Ky.), (1899), 52 S. W. 845.

*Compare* Manatt v. Scott, 106 Io. 203.

<sup>170</sup> Hall v. Perry, 87 Me. 569.

The fact that testatrix in her will

disposed of more than she possessed was held not conclusive as to her lack of testamentary capacity. Hall v. Perry, 87 Me. 569.

<sup>171</sup> Ormsby v. Webb, 134 U. S. 47.

<sup>172</sup> Couch v. Gentry, 113 Mo. 248; Maddox v. Maddox, 114 Mo. 35.

*Contra.* Held admissible. Burkhardt v. Gladish, 123 Ind. 337.

<sup>173</sup> Kelley v. Kelley, 168 Ill. 501; Bush v. Delano, 113 Mich. 321.

ter's wife and brothers, the causes and merits of the original quarrels were held to be immaterial.<sup>174</sup>

The fact that the relations of testator with his family were always pleasant is competent where for no apparent reason certain children were disinherited;<sup>175</sup> so is the fact of a feeling of affection long entertained by testator for a beneficiary,<sup>176</sup> as well as the fact of a long-standing mutual dislike between testator and his brother,<sup>177</sup> and so are the causes which induced testatrix so to dispose of her property.<sup>178</sup> And it is held competent to show where testator, a man of seventy, and a paralytic, was living in illicit relations with a woman who he said was his illegitimate daughter, that this woman had a strong family resemblance to one of testator's daughters, and was in fact an illegitimate child.<sup>179</sup>

Where it was shown that testatrix had always disliked the mother of contestant, and had opposed the marriage of contestant's mother with the son of testatrix, it was held that such evidence was not admissible to show insanity of testatrix.<sup>180</sup>

### §388. Opinion evidence.—Subscribing witnesses.

It is settled by the almost unanimous weight of authority that the subscribing witnesses to a will may give their opinion as to the sanity or insanity of the testator without any reference to their means of determining his mental capacity, or their ability to judge of his capacity with the means at their disposal.<sup>181</sup>

<sup>174</sup> *Turner's Guardian v. King*; — Ky. —; 32 S. W. 941.

<sup>175</sup> *In re Burn's Will*, 121 N. Car. 336.

<sup>176</sup> *Slingloff v. Bruner*, 174 Ill. 561; *Harp v. Parr*, 168 Ill. 459.

<sup>177</sup> *Stevens v. Leonard*, 154 Ind. 67 (1900), 56 N. E. 27. In this case the declarations of the brother showing his hatred of testator were held admissible where the claim of insanity was that testator's hatred for this brother was due to insane delusion.

<sup>178</sup> *Patten v. Cilley*, 67 N. H. 520.

<sup>179</sup> *Johnson v. Armstrong*, 97 Ala. 731.

<sup>180</sup> *Spencer's Estate*, 96 Cal. 448.

<sup>181</sup> "The witnesses are chosen by the testator, and are under the law charged with an important duty in relation to the execution and proof of the will. It may be presumed that in the performance of that duty they will observe carefully the ap-

The subscribing witnesses may give their opinions as to the sanity of testator without first stating the facts upon which they base their opinions,<sup>182</sup> though they may afterwards be examined as to such facts.<sup>183</sup> But where, as in Massachusetts, a non-expert, non-subscribing witness can not give his opinion, a subscribing witness can not be examined as to his opinion of testator's sanity based on facts occurring after the execution of the will.<sup>184</sup>

The subscribing witnesses are allowed to testify directly as to the sanity of the testator, "because that is one of the facts necessary to the validity of the will, which the law places them around the testator to attest and testify to."<sup>185</sup>

The testimony of subscribing witnesses who testify to the mental capacity of testator is not, as a matter of law, to be given greater weight by the jury than the testimony of other witnesses.<sup>186</sup> And where the subscribing witnesses testify adversely to the capacity of testator, they have under oath stated that he was incompetent to make a will, while by their solemn acts in subscribing as witnesses they have in effect formally declared that he was competent. Accordingly, their testimony adverse to the capacity of testator is, under such

pearance of the testator at the time and form an opinion as to his sanity." *Williams v. Spencer*, 150 Mass. 346.

<sup>182</sup> *Ethridge v. Bennett*, 9 Houst. (Del.), 295; *Scott v. McKee*, 105 Ga. 256; 31 S. E. 183; *Robinson v. Adams*, 62 Me. 369; *Williams v. Spencer*, 150 Mass. 346; *Hardy v. Merrill*, 56 N. H. 227; *Holcomb v. Holcomb*, 95 N. Y. 316; *Potter's Will*, 45 N. Y. Supp. 563; *Titlow v. Titlow*, 54 Pa. St. 216; *Kaufman v. Caughman*, 49 S. Car. 159; *Van Huss v. Rainbolt*, 2 Coldw. (Tenn.), 139.

<sup>183</sup> "We have no doubt upon both reason and authority that one who becomes a witness to a will at the testator's request is competent to testify to all facts and circum-

stances attending its execution, and upon them to give an opinion that the testator was mentally competent to execute it." *Denning v. Butcher*, 91 Io. 425, citing *In re Coleman's Will*, 111 N. Y. 220; *Doherty v. O'Callaghan*, 157 Mass. 90; 31 N. E. 726; *Layman's Will*, 40 Minn. 371; 42 N. W. 286; *Scott v. Harris*, 113 Ill. 447; *Blackburn v. Crawford*, 3 Wall. 175; *Fossler v. Schriber*, 38 Ill. 172; *Russell v. Jackson*, 10 Hare, 204; *Graham v. O'Fallon*, 4 Mo. 338; *Pence v. Waugh*, — Ind. —; 34 N. E. 860.

<sup>184</sup> *Williams v. Spencer*, 150 Mass. 346.

<sup>185</sup> *Hastings v. Rider*, 99 Mass. 622.

<sup>186</sup> See Sec. 366.

trying circumstances, of but little value,<sup>187</sup> and it is not error for the court to so instruct the jury.<sup>188</sup>

**§389. Opinion evidence.—Witnesses other than subscribing witnesses.—Experts.**

An expert, in cases involving mental capacity to make a will, is one who from special study and experience is familiar with the symptoms of mental disease.<sup>189</sup>

A physician who has made a specialty in study of mental diseases, and has practiced in treating such diseases, is an expert and may testify as such.<sup>190</sup>

A physician in general practice is regarded in most jurisdictions as an expert upon questions of sanity. While his qualifications have been challenged in some jurisdictions in criminal cases, it has been conceded in the cases involving the validity of wills that he is an expert,<sup>191</sup> though it has been intimated that he should at least be the physician who attended the testator.<sup>192</sup>

By the weight of authority, where a subscribing witness testified that he was a physician and surgeon, had had several years' experience, had attended to testator in his last illness and believed him to have been of sound mind, may be cross-examined as to his qualifications as an expert.<sup>193</sup>

A superintendent of an insane asylum who has made a study of the diseases of those under his charge is an expert, inasmuch as such superintendents are generally and very properly physicians and specialists in mental diseases.<sup>194</sup>

<sup>187</sup> Chappell v. Trent, 90 Va. 849; See Sec. 374.

<sup>188</sup> Stevens v. Leonard, Ind. (1900); 56 N. E. 27.

<sup>189</sup> Crockett v. Davis, 81 Md. 134; Toomes's Estate, 54 Cal. 509.

<sup>190</sup> General Convention, etc., v. Crockett, 7 Ohio C. C. 327.

<sup>191</sup> *In re Mullin's Estate*, 110 Cal. 252; Barber's Appeal, 63 Conn. 393; Potts v. House, 6 Ga. 324; Bever v. Spangler, 93 Io. 576; *In re Fenton's Will*, 97 Ia. 192; Crocker v.

Davis, 81 Md. 134; McHugh v. Fitzgerald, 103 Mich. 21; Pidcock v. Potter, 68 Pa. St. 342; Foster v. Dickerson, 64 Vt. 233.

<sup>192</sup> Hall v. Perry, 87 Me. 569. This restriction is contrary to the great weight of authority as set forth in the cases in the preceding note. Hutchins v. Ford, 82 Me. 363.

<sup>193</sup> Mullin's Estate, 110 Cal. 252.

<sup>194</sup> General Convention, etc., v. Crocker, 7 Ohio C. C. 327; Pren-tis v. Bates, 93 Mich. 234.

A priest who had studied mental diseases and made a regular use of his studies in determining the mental capacity of those who confessed to him and applied for absolution, was held to be an expert.<sup>195</sup> But a chaplain who has regularly visited insane asylums is not necessarily an expert in insanity.<sup>196</sup>

An expert in mental diseases may give his opinion as to the sanity of testator without giving the facts upon which he bases his opinion.<sup>197</sup> This opinion may be based upon facts obtained by the expert in either of two ways:

(a) He may have learned the facts upon which he bases his opinion by personal acquaintance with testator extending over a period of time long enough to enable the expert to form an opinion.<sup>198</sup>

(b) The facts upon which the opinion is based may be communicated to the expert in the form of an hypothetical question, in which the attorney narrates the facts involved, and asks the expert his opinion of the mental capacity of the man described in such question.<sup>199</sup> He may also give his opinion upon an hypothetical question supplemented by facts which he knows personally, and concerning which he has testified fully.<sup>200</sup>

If the expert gives his opinion upon the facts put before him by a hypothetical question the value of such opinion depends upon whether the evidence establishes such facts or not. If the evidence establishes such facts the jury will then give to the opinion such weight as in their judgment it deserves. But if the evidence fails to establish all the facts set forth

In a former decision upon this same case it was held that the superintendent of an insane asylum could not give his opinion as to the condition of a patient whom he had never seen, where such opinion was based upon the absence of certain facts from the records of the asylum. *Prentis v. Bates*, 88 Mich. 567.

<sup>195</sup> *Toomes's Estate*, 54 Cal. 509.

<sup>196</sup> *Ledwith v. Claffey*, 45 N. Y. Supp. 612.

<sup>197</sup> See preceding cases cited under this section.

<sup>198</sup> *Crockett v. Davis*, 81 Md. 134; *McHugh v. Fitzgerald*, 103 Mich. 21.

<sup>199</sup> *Kempsey v. McGinniss*, 21 Mich. 123; *Brown v. Mitchell*, 88 Tex. 350.

<sup>200</sup> *Foster v. Dickerson*, 64 Vt. 233.

in the hypothetical question, the opinion based upon such facts is worthless, for the facts which the jury reject may be the controlling facts on the question of sanity. Accordingly it is error for the court to charge the jury that the value of the opinion of the expert will vary, as the facts set forth in the hypothetical question fail to coincide with the facts as found by the jury.<sup>201</sup>

Sometimes the expert, who is present at the trial, is asked if from the evidence adduced he believes that the testator was sane or insane. Such a question is, at best, very objectionable. The facts should be put in the form of an hypothetical question.

It is possibly not error to permit it, however, where the evidence referred to is consistent, and is adduced by one of the parties to the suit. Even this is objectionable, as the expert might not deduce the same facts from the evidence as the jury might. But where the evidence is conflicting, and is adduced by both parties to the suit, it is error to allow the expert to express his opinion as to the sanity of the testator upon such evidence; for this is allowing the expert to usurp the function of the jury, and decide what evidence should be believed and what should be rejected. The jury, furthermore, if not actually misled by such opinion, can not be aided by it, for they can not tell upon which of the facts in dispute the expert based his opinion.<sup>202</sup>

The value of expert evidence is, at best, doubtful. The witness is often rather the advocate of one side than the unbiassed and impartial scientist, whose opinion impresses the jury as sound and fair. In actual practice his opinions have less weight than would be expected at first thought.

The courts have sharply criticised the character of much expert testimony, in no case perhaps more sharply than in one from Illinois. "Upon the question whether (the insanity) had reached such a stage that the subject of it was incapable of making a contract or irresponsible for his acts, the opinion

<sup>201</sup> General Convention, etc., v. (Mass.) 467; *Kempsey v. McGinniss*, 21 Mich. 123.  
Crocker, 7 Ohio C. C. 327.

<sup>202</sup> *Woodbury v. Obear*, 7 Gray

of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country." <sup>203</sup>

### §390. Opinion evidence.—Non-experts.

A non-expert witness who is not a subscribing witness can not give his opinion of the testator's sanity without first giving the facts upon which he bases his opinion.<sup>204</sup> In some jurisdictions by special statute an exception is made in favor of intimate acquaintances of testator, who may give their opinions as to his sanity without first stating the facts upon which such opinion is based.<sup>205</sup> It rests in a very large measure with the discretion of the trial court as to whether upon the evidence, the witness offered was an "intimate acquaintance" of testator or not.<sup>206</sup>

The general rule is that if a non-expert witness first states the facts upon which he bases his opinion, and shows that he has the means of knowing the condition of testator's mind, he may state his opinion as to testator's sanity.<sup>207</sup> And where such non-expert witness has ample opportunities for knowing testator, and judging of his mental condition, it is held

<sup>203</sup> *Rutherford v. Morris*, 77 Ill. 397. To the same effect are *Carpenter v. Calvert*, 83 Ill. 62; *Rankin v. Rankin*, 61 Mo. 295; *Cox's Estate*, 167 Pa. St. 501; *Camp v. Shaw*, 52 Ill. App. 241.

<sup>204</sup> *Murphree v. Senn*, 107 Ala. 424; *O'Connor v. Madison*, 98 Mich. 183; *Lamb v. Lippincott*, 115 Mich. 611; 73 N. W. 887; *In re Hoopes's Estate*, 174 Pa. St. 373; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Titlow v. Titlow*, 54 Pa. St. 216; *Shaver v. McCarthy*, 110 Pa. St. 339; *Elcessor v. Elcessor*, 146 Pa. St. 359.

<sup>205</sup> *Wax's Estate*, 106 Cal. 343.

<sup>206</sup> *Wax's Estate*, 106 Cal. 343; *Carpenter's Estate*, 94 Cal. 406.

<sup>207</sup> *Bulger v. Ross*, 98 Ala. 267; *Burney v. Torrey*, 100 Ala. 157;

*Brook's Estate*, 54 Cal. 471; *Grant v. Thompson*, 4 Conn. 203; *Turner's Appeal*, 72 Conn. 305; *Ethridge v. Bennett Exrs.* 9 Houst. (Del.), 295; *Potts v. House*, 6 Ga. 324; *Craig v. Southard*, 148 Ill. 37; *Bower v. Bower*, 142 Ind. 194; *Denning v. Butcher*, 91 Io. 425; *In re Goldthorpe's Estate*, 94 Io. 336; *In re Fenton's Will*, 97 Io. 192; *Beaubien v. Cicotte*, 12 Mich. 459; *Prentiss v. Bates*, 93 Mich. 234; *Lamb v. Lippincott*, 115 Mich. 611; 73 N. W. 887; *Hardy v. Merrill*, 56 N. H. 227; *Roush v. Wensel*, 15 Ohio C. C. 133; *Pidcock v. Potter*, 68 Pa. St. 342; *Brown v. Mitchell*, 87 Tex. 140; 75 Tex. 9; *Foster v. Dickerson*, 64 Vt. 233; *Whitelaw v. Sims*, 90 Va. 588; *Young v. Barber*, 27 Gratt. (Va.), 96.

that he may give his opinion as to his sanity, even if he can not give in detail the conversations or specific facts upon which he bases his opinion.<sup>208</sup>

Considerable liberality is shown by the courts in allowing persons who are comparatively slightly acquainted with testator to testify as to their opinion of his sanity. A clergyman who visited testatrix in her last illness was allowed to give his opinion as to her mental condition after stating the facts on which such opinion was based.<sup>209</sup> A stenographer who took the deposition of testatrix for a period of about two hours, and testified that testatrix hesitated and was prompted often, was allowed to give her opinion that testatrix was feeble-minded.<sup>210</sup> And a non-expert witness was allowed to testify to a conversation with testator about four years before the date of his will, and upon that as a basis give an opinion as to his sanity.<sup>211</sup>

In some jurisdictions, if not all, a different rule exists for laying a foundation for an opinion of sanity from that which is required for an opinion of insanity. Any old acquaintance who has had opportunities for knowing testator's mental condition can testify that he believes that testator was sane; but before a non-expert witness, who is not a subscribing witness, can give his opinion that testator was insane, he must give the facts upon which he bases his opinion, which facts must fairly justify the inference of insanity.<sup>212</sup> But if the witness shows

<sup>208</sup> Shanley's Appeal, 62 Conn. 325; Newcomb's Exrs. v. Newcomb, 96 Ky. 120; Prentis v. Bates, 93 Mich. 234; Foster v. Dickerson, 64 Vt. 233.

<sup>209</sup> Ethridge v. Bennett's Executors, 9 Houst. (Del.), 295.

<sup>210</sup> *In re Fenton's Will*, 97 Io. 192.

<sup>211</sup> Bower v. Bower, 142 Ind. 194.

<sup>212</sup> Murphree v. Senn, 107 Ala. 424; Lamb v. Lippencott, 115 Mich. 611; Prentis v. Bates, 93 Mich. 234; Buys v. Buys, 99 Mich. 354; O'Connor v. Madison, 98 Mich. 183.

"Where there has been that long

and intimate acquaintance with another to enable the formation of a correct judgment as to the mental condition of such other person a (non-expert) witness may give his opinion that the person is of *sound mind*. Sanity is the normal condition of mankind. . . .

To authorize a non-expert to give his opinion of the existence of an unsound condition of mind he must not only have had the opportunity to form a judgment, but he must state the facts on which it is based." Burney v. Torrey, 100 Ala. 157.



that he has not the means of forming an opinion he will not be allowed to state his opinion. Thus, a witness who had not communicated with testator for five years out of the last nine of his life was not allowed to give his opinion as to testator's sanity during those nine years.<sup>213</sup>

In Massachusetts it is held that a witness, who is neither an expert nor a subscribing witness, can not give his opinion as to testator's sanity, no matter what his opportunities for observation.<sup>214</sup>

Where the non-expert witness has some means of forming an opinion, the value of his evidence depends on his opportunities for forming an opinion.<sup>215</sup> If the witnesses testify that testator is insane, but give as a basis for such opinion facts which do not justify it, their evidence on this point is worthless, and can not support a verdict in favor of contestants.<sup>216</sup>

### §391. Form of questions not calling for opinion.

In order to direct the mind of a witness who is being examined as to the conduct and behavior of testator, to the particular kind of conduct or behavior to be testified to, it is often necessary to characterize such conduct as 'peculiar,' 'extraordinary' and the like, and ask if such kind of conduct was observed. Such questions, if properly framed, are not

<sup>213</sup> Denning v. Butcher, 91 Io. 425.

<sup>214</sup> Smith v. Smith, 157 Mass. 389. (Where the witness had known testator for twenty years.) See the long line of cases cited upon this point in Massachusetts courts. In this case an earnest but fruitless effort was made to induce the court to overrule its previous decisions and follow the weight of authority.

"They are not facts but opinions of those having no peculiar duty or capacity to form them upon a matter requiring special knowl-

edge and skill to judge intelligently, as to which every unskilled witness has a different standard, and which can be quite as well understood by the court or jury from proof of the details of the acts and conduct of the person whose mental capacity is in question."

Hastings v. Rider, 99 Mass. 622, cited and followed in Smith v. Smith, 157 Mass. 389.

<sup>215</sup> Merriman's Appeal, 108 Mich. 454.

<sup>216</sup> Sanders v. Blakeley, (Ky.) (1900), 55 S. W. 10.

objectionable as calling for an opinion. They are merely questions as to facts observed, and if they were not allowed, it would be practically impossible to get them before the jury without going over each occasion when witness saw testator in his whole life. Accordingly, it is not calling for an opinion to ask a non-expert witness if he noticed any difference in the appearance of testatrix between the first time he saw her and the last, indicating mental strength or weakness.<sup>217</sup> Nor is it calling for an opinion to ask a witness who had testified that testator had been on a particular occasion "making faces and slapping himself and making manœuvres" if he saw "anything strange or unusual in his conduct,"<sup>218</sup> nor to ask if on a certain occasion when testator had transacted business he acted in a rational manner;<sup>219</sup> or if he saw anything to indicate mental unsoundness.<sup>220</sup>

But the question put to witness must not be so expressed as to usurp the functions of the jury. Thus, it is not proper to ask a witness if certain accusations of theft made by testatrix against her neighbors were not understood by witness to be "improbable and impossible."<sup>221</sup>

### §392. Form of questions calling for opinion.

The form of the question which calls for an opinion as to testator's sanity from a witness competent to give an opinion, and the nature of the opinion thus called for, are very important topics in the actual trial of a case. A form not infrequent is something like this: "In your judgment was testator competent to make a will?"

This form finds justification in the language used in many cases where the precise point has not been presented for consideration,<sup>222</sup> but it is inherently vicious, as it presupposes

<sup>217</sup> *Manatt v. Scott*, 106 Io. 203.

<sup>218</sup> *Petefish v. Becker*, 176 Ill. 448.

<sup>219</sup> *In re Wax's Estate*, 106 Cal. 343.

<sup>220</sup> *Kimberly's Appeal*, 68 Conn. 428.

<sup>221</sup> *Titus v. Gage*, 70 Vt. 13.

<sup>222</sup> *Ethridge v. Bennett*, 9 Houst. (Del.), 295. (Where the objection was not to the form of the question but to the admissibility of the opinion and the question 'what was her capacity to make a will' was held to be proper.)

that the witness knows what degree of capacity the law requires in order that testator may make a valid will, and in addition to the opinion of the witness as to testator's sanity, such a question calls for the opinion of the witness as to the law.<sup>223</sup> Accordingly the courts which have considered this exact point have held that such question is improper, and should not be allowed.<sup>224</sup> So the witness can not be asked if testator had "mental capacity to make a will" or any similar form of question which assumes that the witness knows what the legal requirement of testamentary capacity is.<sup>225</sup> Nor is it proper to ask a non-expert witness if, in his opinion, the testator was capable of transacting ordinary business.<sup>226</sup>

Some courts hold that the expert should be asked simply to state his opinion of testator's capacity in his own language.<sup>227</sup> Or he may be asked, "Was the testator, in your opinion, capable of planning and executing such a paper as is here offered as his will?"<sup>228</sup> But it was held that a subscribing witness could not be asked if testatrix had strength of mind sufficient to comprehend a clause creating charitable trusts.<sup>229</sup>

<sup>223</sup> "What degree of mental capacity is necessary to enable testator to make a valid will, to what extent and with what degree of perfection he must understand the will, and the persons and property affected by it, or to what extent his mind must be impaired to render him incapable, is a question of law exclusively for the court, with which witnesses have nothing to do." *Kempsey v. McGinniss*, 21 Mich. 123, cited in *Brown v. Mitchell*, 88 Tex. 350.

<sup>224</sup> *Walker v. Walker*, 34 Ala. 469; *Schneider v. Manning*, 121 Ill. 376; *White v. Bailey*, 10 Mich. 155; *Kempsey v. McGinniss*, 21 Mich. 123; *Buys v. Buys*, 99 Mich. 354; *Farrell v. Brennan*, 32 Mo. 328; *Clapp v. Fullerton*, 34 N. Y. 190; *Hewlett v. Wood*, 55 N. Y. 634; *Runyan v. Price*, 15 O. S. 1; *Gib-*

*son v. Gibson*, 9 Yerg. 329; *Brown v. Mitchell*, 88 Tex. 350; *In re Blood's Will*, 62 Vt. 359; 19 Atl. 770.

<sup>225</sup> *May v. Bradley*, 127 Mass. 414; *Hall v. Perry*, 87 Me. 569; *Kempsey v. McGinniss*, 21 Mich. 123; *Crowell v. Kirk*, 3 Dev. 355; *Fairchild v. Bascomb*, 35 Vt. 398.

<sup>226</sup> *Torrey v. Burney*, 113 Ala. 496.

<sup>227</sup> *Crowell v. Kirk*, 3 Dev. (N. Car.), 355; *Fairchild v. Bascomb*, 35 Vt. 398.

<sup>228</sup> *Beaubien v. Cicotte*, 12 Mich. 459; *Kempsey v. McGinniss*, 21 Mich. 123.

<sup>229</sup> "It involved an opinion on a subject about which jurors and witnesses might have differed, and which would not furnish a safe standard for comparison." *Melaney v. Morrison*, 152 Mass. 473.

Another form that has been approved is: "What would you say as to whether at that time her mind was clear?"<sup>230</sup>

### §393. Time at which opinion must exist.

The subscribing witness should be examined as to his opinion concerning the capacity of testator which he held at the date of the execution of the will.<sup>231</sup> The opposite view is held in Ohio. The witness must there be examined as to the opinion of testator's sanity entertained by him at the date of examination.<sup>232</sup> It has been held that evidence may be introduced to show that prior to testator's death contestant regarded testator as mentally competent to do business.<sup>233</sup>

### §394. Time to which evidence must relate.

The evidence in questions of capacity must be, as in other cases, confined to the point at issue. This point is the condition of the testator at the time that he made the will.<sup>234</sup> This is the ultimate fact to be established. But in order to place the condition of testator's mind clearly before a jury or a court it is necessary to receive evidence of his condition before and after the time of the execution of the will. Any other rule would leave those who were present at the time of the execution as the only witnesses whose evidence would be admissible as to capacity, and would render fraud easy and safe. Accordingly evidence of the mental condition of testator, both before and after the execution of the will, is admissible to show his condition at the moment of making the will.<sup>235</sup> Thus, evidence of the condition of testatrix upon

<sup>230</sup> *McHugh v. Fitzgerald*, 103 Mich. 21.

<sup>231</sup> *Ethridge v. Bennett*, 9 *Houst. (Del.)*, 295; *Gwin v. Gwin (Ida.)*, 48 *Pac.* 295; *In re Will of Ingalls*, 148 *Ill.* 287; *Williams v. Spencer*, 150 *Mass.* 346; citing *Poole v. Richardson*, 3 *Mass.* 330; *Robinson v. Adams*, 62 *Me.* 369.

<sup>232</sup> *Runyan v. Price*, 15 *O. S. 1.*

<sup>233</sup> *Sim v. Russell*, 90 *Io.* 656.

<sup>234</sup> *Smith v. Day (Del.)*, 45 *Atl.* 396; *Harp v. Parr*, 168 *Ill.* 459; *Von de Veld v. Judy*, 143 *Mo.* 348.

<sup>235</sup> *Moore v. Heincke*, 119 *Ala.* 627; 24 *So.* 376; *Moore v. Spier*, 80 *Ala.* 129; *Terry v. Buffington*, 11 *Ga.* 337; *Green v. Green*, 145 *Ill.* 264; *Harp v. Parr*, 168 *Ill.*

the evening of the day that she made her will,<sup>236</sup> and evidence of condition within four days of the execution of the will,<sup>237</sup> or for five months before and eleven months after the execution of the will, has been held admissible.<sup>238</sup> So, where the disease was of long standing and progressive development, evidence of the action and manners of the testator for a period of six years after making the will was admissible.<sup>239</sup>

The courts have gone so far as to intimate that in a proper case the whole life of testator may be gone into, in order to determine his mental condition at the time that he made his will.<sup>240</sup>

The right of one party to go into the history of testator's life for a given period is especially clear where the adversary party has been allowed to go over the same period.<sup>241</sup> And where the court has of its own motion charged as to the effect of testator's conduct prior to the execution of his will upon the validity of such will, it is error for the court to refuse a correct charge as to the effect of testator's conduct subsequent to the execution of said will.<sup>242</sup>

The right to go into the history of testator's life is within the reasonable control of the court, however. It was held not to be error for the trial court to limit evidence of specific acts tending to show unsoundness of mind to a period reaching from eight years before the will to two and one-half years after, even though experts testified that they could give a better estimate of his condition if the time limit were extended.<sup>243</sup>

459; *Moore v. Gubbins*, 54 Ill. App. 163; *Stoser v. Hogan*, 120 Ind. 207; *Bower v. Bower*, 142 Ind. 194; *Bever v. Spangler*, 93 Io. 576; *Von de Veld v. Judy*, 143 Mo. 348; *Hegney v. Head*, 126 Mo. 619; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Messner v. Elliott*, 184 Pa. St. 41; *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Mitchell v. Corpening*, 124 N. Car. 472.

<sup>236</sup> *McHugh v. Fitzgerald*, 103 Mich. 21.

<sup>237</sup> *Moore v. Gubbins*, 54 Ill. App. 163.

<sup>238</sup> *Messner v. Elliott*, 184 Pa. St. 41.

<sup>239</sup> *Bever v. Spangler*, 93 Io. 576.

<sup>240</sup> *Dale's Appeal*, 57 Conn. 127; *Ross v. McQuiston*, 45 Io. 145; *Shailer v. Bumstead*, 99 Mass. 112.

<sup>241</sup> *Petefish v. Becker*, 176 Ill. 448.

<sup>242</sup> *Lamb v. Lynch*, 56 Neb. 135.

<sup>243</sup> *Howes v. Colburn*, 165 Mass. 385.

But where the evidence is not such as to throw light upon the condition of testator at the time of making the will, it is inadmissible. Thus, evidence of an insane delusion is inadmissible to show the condition of testator's mind where the evidence shows that the will was made long before the delusion existed.<sup>244</sup> And the record of the appointment of a guardian two or three years after the execution of the will is inadmissible.<sup>245</sup>

### §395. Evidence of insanity of testator's relatives.

It is proper to admit evidence tending to show that the ancestors of testator suffered from a type of insanity which was hereditary in its character,<sup>246</sup> as it is also to admit evidence of the insanity of the sister and niece of testatrix when such insanity was of a type which might be hereditary.<sup>247</sup>

But unless the evidence tends to show that the insanity of testator's ancestors or relatives was of a type that might be transmissible by inheritance, evidence of such insanity is inadmissible. So evidence that the father of testator had been so given to habits of intoxication that he became insane therefrom is inadmissible to show that testator was insane.<sup>248</sup> And evidence that the father of testatrix was intemperate in his youth was inadmissible where no medical expert evidence was introduced to show that such intemperance might result in hereditary insanity.<sup>249</sup>

### §396. Evidence of *res gestae* of execution.

The facts and circumstances of the execution are admissible in evidence as reflecting upon the capacity of testator. Thus, a conversation at the time of execution between persons

<sup>244</sup> Merriman's Appeal, 108 Mich. 454, distinguishing Haines v. Hayden, 95 Mich. 332.

<sup>245</sup> Entwistle v. Meikle, 180 Ill. 9.

<sup>246</sup> Coughlin v. Poulson, 2 McArthur (D. C.), 308; Snow v. Ben-

ton, 28 Ill. 306; Baxter v. Abbott, 7 Gray (Mass.), 71.

<sup>247</sup> Prentis v. Bates, 93 Mich. 234.

<sup>248</sup> Reichenbach v. Ruddach, 127 Pa. St. 564.

<sup>249</sup> Titus v. Gage, 70 Vt. 13.

there present with reference to the condition of testatrix is admissible as part of the *res gestae*.<sup>250</sup>

### §397. Conduct of testator.

Among the facts of the life of testator which may be inquired into to determine his capacity, his business transactions and dealings are of great importance. Some courts go so far as to say that "it is a rule of law that a person who is capable of transacting ordinary business is capable of making a valid will."<sup>251</sup> And when this statement is made, as in these cases, of a person not suffering under an insane delusion, it is clearly correct. Accordingly evidence of the nature and extent of the business transactions carried on by testator during the period when contestants claim that he was incompetent to make a will is admissible.<sup>252</sup> Thus, a witness may testify to the details of a business transaction, and testify that testator performed this business like a rational man;<sup>253</sup> and it is admissible to show that testator did not make out his own tax lists for two years after he made his will, and introduce the tax lists made out for him;<sup>254</sup> and to show that a person, whose unsecured note testator accepted in place of a mortgage, owned no property except such as was exempt.<sup>255</sup>

A witness may testify to specific acts of testator from which insanity may be inferred without being called on for his opinion of the insanity of testator.<sup>256</sup>

But evidence which fails to tend to show that testator acted in an irrational manner may be excluded if offered by contestants, as it can not aid them to establish the issue on their

<sup>250</sup> *Kosteletzky v. Scherhart*, 99 Io. 120.

<sup>251</sup> *Entwistle v. Meikle*, 180 Ill. 9, quoting and approving *Meeker v. Meeker*, 75 Ill. 260, and citing *Lilly v. Waggoner*, 27 Ill. 395; *Myatt v. Walker*, 44 Ill. 485; *Brown v. Riffin*, 94 Ill. 560; *Campbell v. Campbell*, 130 Ill. 406; *Greene v. Greene*, 145 Ill. 264; also *Harp v. Parr*, 168 Ill. 459.

<sup>252</sup> *Wax's Estate*, 106 Cal. 343; *Morris v. Morton's Exr's*, — Ky. —; 20 S. W. 287; *Bonnemort v. Gill*, 165 Mass. 493; *In re Cox's Estate*, 167 Pa. St. 501; *Messner v. Elliott*, 184 Pa. St. 41.

<sup>253</sup> *Wax's Estate*, 106 Cal. 343.

<sup>254</sup> *Bower v. Bower*, 142 Ind. 194.

<sup>255</sup> *Titus v. Gage*, 70 Vt. 13.

<sup>256</sup> *Bower v. Bower*, 142 Ind. 194.

part to be established. Thus, the fact that testatrix once paid off a claim of a child as heir of her husband's estate rather than have litigation over her husband's will is not admissible.<sup>257</sup> Nor is evidence that testator was absentminded, and was sad and afflicted over the death of his wife sufficient to show a lack of testamentary capacity.<sup>258</sup>

As the law does not in any case require ability to manage complicated business, evidence that testator was not able to manage complicated business is not admissible.<sup>259</sup>

Evidence that persons failed to persuade testatrix to quit the use of opium, and that testatrix talked foolishly on this subject, has been held admissible; while evidence that testatrix gradually came to use more whiskey in the later years of her life is held inadmissible.<sup>260</sup>

In determining testator's capacity to make a will evidence is admissible concerning the weakness of his memory and his other mental traits.<sup>261</sup> In order to show the mental condition of testatrix, it is proper to show how she acted when such mental condition was spoken of.<sup>262</sup>

### §398. Ability to answer questions.

It may be here observed that the ability to answer questions does not of itself show that the testator possesses the mental ability requisite for testamentary capacity.<sup>263</sup>

### §399. Sudden change of feeling.

The fact that testator apparently changed his feelings for a natural object of his bounty in a comparatively short time

<sup>257</sup> Pooler v. Cristman, 145 Ill. 405, affirming 45 Ill. App. 334.

<sup>258</sup> Ouachita Baptist College v. Scott, 64 Ark. 349.

<sup>259</sup> Maddox v. Maddox, 114 Mo. 35.

<sup>260</sup> Messner v. Elliott, 184 Pa. St. 41.

<sup>261</sup> Daly v. Daly, 183 Ill. 269; 55 N. E. 671.

<sup>262</sup> Fenton's Will, 97 Io. 192.

<sup>263</sup> Smith v. Henline, 174 Ill. 184; Mendenhall v. Tungate, 95 Ky. 208 (ability to answer "yes" and "no"); Chappell v. Trent, 90 Va. 849; 19 S. E. 314 (ability to answer ordinary questions); Baker v. Baker, 102 Wis. 226; 78 N. W. 453 (ability to answer "yes" and "no"); Tucker v. Sandidge, 85 Va. 546.



and without any apparently adequate cause, has been held not admissible as tending to show the existence of an insane delusion with reference to such person if unsupported by other evidence of such delusion.<sup>264</sup>

#### §400. Declarations of testator.

Any declarations of testator which tend to show the condition of his mind at the time that he made his will are admissible to determine his mental capacity at that date.<sup>265</sup> So, statements made by testator relative to his intention of disposing of his property are admissible, not for the purpose of contradicting the contents of his written will, but to show his state of mind at the time that he executed such will.<sup>263</sup>

Letters written by testator are admissible, not as evidence of the facts stated therein, but to show the state of mind of testator.<sup>267</sup> So is a sworn answer in a suit against testatrix in which she swore that she was weak and unable to read, write or transact business prior to the date of the will;<sup>268</sup> and so are entries in a diary made by testator.<sup>269</sup>

<sup>264</sup> *Riley v. Sherwood*, 144 Mo. 354; *McGovran's Estate*, 165 Pa. St. 203.

*Contra*, *Manatt v. Scott*, 106 Io. 203.

<sup>265</sup> *Coghill v. Kennedy*, 119 Ala. 641; 24 So. 459; *Ball v. Kane*, 1 Penne. (Del.), 90. ("I did not make it. Jimmie and the old woman made it," was the declaration admitted); *Barbour v. Moore*, 4 App. D. C. 535; *Mallery v. Young*, 94 Ga. 804; *American Bible Society v. Price*, 115 Ill. 623; *Reynolds v. Adams*, 90 Ill. 134; *Hill v. Bahrns*, 158 Ill. 314; *Manatt v. Scott*, 106 Io. 203; *Bever v. Spangler*, 93 Io. 576; *Stephenson v. Stephenson*, 62 Io. 163; *Bates v. Bates*, 27 Io. 110; *Goldthorp's Estate*, 94 Io. 336; *Lane v. Moore*, 151 Mass. 87; *Sheehan v. Kearney* (Miss.), 21 So. 41; *Potter's Will*, 161 N. Y. 84; *Waterman v. Whitney*, 11

N. Y. 157; *Burns's Will*, 121 N. Car. 336; *McTaggart v. Thompson*, 14 Pa. St. 149; *McIntosh v. Moore*, (Tex. Civ. App.) 1899; 53 S. W. 611; *Kirkpatrick v. Jenkins*, 96 Tenn. 85; *Barney's Will*, 71 Vt. 217.

<sup>266</sup> *Seale v. Chambliss*, 35 Ala. 19; *Bundy v. McKnight*, 48 Ind. 502; *Bever v. Spangler*, 93 Io. 576; *Estate of Lefever*, 102 Mich. 568; *Hammond v. Dike*, 42 Minn. 273; *Prather v. McClelland*, 76 Tex. 574.

<sup>267</sup> *Bulger v. Ross*, 98 Ala. 267; *Slingoff v. Bruner*, 178 Ill. 561; *Harp v. Parr*, 168 Ill. 459; *Woodward v. Sullivan*, 152 Mass. 470; *In re Brunor*, 47 N. Y. S. 681; *McNinch v. Charles*, 2 Rich. (S. Car.), 229; *Foster v. Dickerson*, 64 Vt. 233; *Blakeley's Will*, 48 Wis. 294.

<sup>268</sup> *Manatt v. Scott*, 106 Io. 203.

<sup>269</sup> *Barber's Estate*, 63 Conn. 393.

Under this general rule his oral declarations which tend to show his condition or state of mind at the time that he made his will are admissible in evidence. For this purpose it makes no difference whether testator's declarations were made at the time of the execution of the will or at other times before or after, provided that the time was so near to the time of execution that the declarations offered tend to show testator's mental condition at that time.\* The declarations of testator may be made before the execution of the will,<sup>270</sup> or they may be made after the execution of the will in question.<sup>271</sup>

Previous wills executed by testator when sane have been held to be admissible, upon the theory that such will tends to show the fixed and settled purpose of testator, and any sudden change in such purpose without adequate cause may be evidence from which insanity may be inferred; while a persistence in a purpose formed when sane may be evidence that, until the time of the execution of the latest will, testator remained sane.<sup>272</sup>

This theory is ignored in a recent Texas case, where it is said that on an issue solely as to mental capacity it is inadmissible to introduce a previous will unless it was drawn under such circumstances as make it admissible as a declaration.<sup>273</sup>

The declarations of testator as to the conduct of a son, made

\* *Petefish v. Becker*, 176 Ill. 448; *Hill v. Bahrns*, 158 Ill. 314; *Taylor v. Pegram*, 151 Ill. 106; *Craig v. Southard*, 148 Ill. 37.

<sup>270</sup> *Goodbar v. Lidikey*, 136 Ind. 1; *Manatt v. Scott*, 106 Ia. 203; *Estate of Lefever*, 102 Mich. 568; *Sheehan v. Kearney*, — Miss.—; 21 So. 41; *Rambler v. Tryon*, 7 S. & R. (Pa.) 90; *In re Burns's Will*, 121 N. Car. 336; *Chappell v. Trent*, 90 Va. 849.

<sup>271</sup> *Ball v. Kane*, 1 Penne. (Del.), 90; (Del.), 39 Atl. 778; *Dennis v. Weekes*, 51 Ga. 24; *Hill v. Bahrns*, 158 Ill. 314; *Sheehan v. Kearney*, — Miss. —; 21 So. 41; *Pratte v. Coffman*, 33 Mo. 71; *In re Burns's*

*Will*, 121 N. Car. 336; *Kirkpatrick v. Jenkins's Exr's*, 96 Tenn. 85.

<sup>272</sup> *Barlow v. Waters*, — Ky. (1894); 28 S. W. 785, citing and following *Harrison's Will*, 1 B. Mon. (Ky.), 351; *Carrico v. Neal*, 1 Dana (Ky.), 162; to the same effect are *Hughes v. Hughes*, 31 Ala. 519 (overruling *Roberts v. Tra- wick*, 13 Ala. 68); *Love v. Johnson*, 12 Ired. (N. Car.), 355; *Taylor v. Pegram*, 151 Ill. 106; *Nieman v. Schnitker*, 181 Ill. 400; *Hammond v. Dike*, 42 Minn. 273.

<sup>273</sup> *Brown v. Mitchell*, 87 Tex. 140; 88 Tex. 350.

to the attorney who was taking the instructions of testator for drawing up his will, as a reason for disinheriting such son, do not show an insane delusion.<sup>274</sup>

As has been stated, the evidence must tend to show testator's condition at the time that he executed his will.<sup>275</sup> In every case the declarations offered in evidence must be such as, in view of the other evidence in the case, tend to establish the state of mind of testator at the time that he made the will in question. No hard and fast rule can be laid down as to the distance in point of time from the date of the will the declarations may be. In one case declarations made five or six years before the date of the will as to what testator meant to do with his property were held to be too remote.<sup>276</sup> The declaration must, moreover, be of such sort as to tend to show the state of mind of the testator at the time that he made the will. Thus, where testator had once, years before the date of his will, said that the law made a good enough will for him, and no other evidence of his intention appeared, such declaration was held inadmissible.<sup>277</sup> The declarations of testator made at least seventeen years before the execution of his will are inadmissible.<sup>278</sup> And in another case, declarations made three years after the date of the will, which did not concern the mental capacity of testatrix at the date of the will, were held to be inadmissible.<sup>279</sup>

#### §401. Declarations of legatees, devisees, and contestants.

It is so well settled as a principle of evidence that declarations which make for the interest of declarant are not admissible upon the sole ground of their being his declarations, that accordingly, without discussion, it may be assumed that the declarations of a devisee or legatee under a will, which decla-

<sup>274</sup> *Kidney's Will*, 33 N. B. 9.

<sup>275</sup> See Sec. 394.

<sup>276</sup> *Bonnemort v. Gill*, 165 Mass. 493; *Langford's Estate*, 108 Cal. 608 (declarations made seventeen years before held too remote).

<sup>277</sup> *Rutherford v. Morris*, 77 Ill.

397, followed in *Pyle v. Pyle*, 158 Ill. 289; a similar ruling was made in *Hill v. Bahrns*, 158 Ill. 314.

<sup>278</sup> *Langford's Estate*, 108 Cal. 608.

<sup>279</sup> *Crocker v. Chase*, 57 Vt. 413.

rations are to the effect that testator was competent to make a will, are inadmissible.

The question of the admissibility of the declarations of a beneficiary under the will, which declarations are to the effect that testator was insane at the time of making the will, or otherwise was incompetent, is a matter of considerable complexity. It is held that declarations made before any interest arose under the will by one who after the time of such declarations becomes a beneficiary, are inadmissible upon the familiar principle of law that such declarations were not adverse to his interest when they were made.<sup>280</sup> The execution of the will is pointed out as the time when the interest arises. "These declarations may have been made before the execution of the will, and therefore at a time when the legatees whose interests arise out of the will had no interest to be affected by the declarations."<sup>281</sup>

Where declarations adverse to the competency of testator were made by a devisee or legatee after their interest arose, the only objection to their admissibility is that the declarations of one devisee or legatee, even if admissible against himself, should not be admitted against other devisees or legatees whose interests are separate from those of the one who made the admission. Accordingly, where the legatee is the sole beneficiary under the will, his declarations and admissions adverse to the competency of the testator, and made after legatee's interest arose, are held to be admissible.<sup>282</sup> But where there are several devisees or legatees whose interests are several, and not joint, the weight of authority is that the declarations and admissions of one of these devisees and legatees are not admissible, as if admitted they would operate to the prejudice

<sup>280</sup> *In re Ames's Estate*, 51 Io. 596; *Thompson v. Thompson*, 13 O. S. 356; *Burton v. Scott*, 3 Rand. (Va.), 399.

<sup>281</sup> *Thompson v. Thompson*, 13 O. S. 356; *Burton v. Scott*, 3 Rand. (Va.), 399.

<sup>282</sup> *Egbers v. Egbers*, 177 Ill. 82; *Wallis v. Luhling*, 134 Ind. 447; 34 N. E. 231; *Brick v. Brick*, 66 N. Y. 144.

of the other devisees.<sup>283</sup> But in some jurisdictions the declarations of one of several legatees are admissible whenever similar declarations made by a sole legatee would be admissible.<sup>284</sup>

When the feeling of the contestant towards testator is material, the declarations of the contestant expressing such feelings are admissible, even if it is not shown that testator was informed of such declarations.<sup>285</sup>

#### §402. Adjudication of insanity and record of guardianship.

We have already seen that one adjudicated insane and under guardianship may be capable of making a valid will, but that such guardianship is *prima facie* evidence of his incapacity. Accordingly, the record establishing the existence of the guardianship on the ground of insanity, or adjudging testator insane, is admissible in evidence, and makes a *prima facie* case of testator's incompetency from the date of the guardianship and during its continuance.<sup>286</sup> And very clear evidence is required to overthrow the presumption of insanity arising from such an adjudication.<sup>287</sup>

But the record of a guardianship which did not exist for several years after the will is inadmissible to show a want of mental capacity at the date of making the will.<sup>288</sup>

<sup>283</sup> *Blakely v. Blakely*, 33 Ala. 611; *Appeal of Livingstone*, 63 Conn. 68; *Campbell v. Campbell*, 138 Ill. 612; *McMillan v. McDill*, 110 Ill. 47; *Roller v. Kling*, 150 Ind. 159; *Phelps v. Hartwell*, 1 Mass. 71; *Shailer v. Bumstead*, 99 Mass. 112; *Estate of Lefever*, 102 Mich. 568; *Thompson v. Thompson*, 14 O. S. 356; *Roush v. Wensel*, 15 Ohio C. C. 133; *Titlow v. Titlow*, 54 Pa. St. 216; *Fairchild v. Bascomb*, 35 Vt. 398; *Whitelaw v. Whitelaw's Adm'r*, 96 Va. 712; 32 S. E. 458; *In re Goldthorp's Estate*, 94 Io. 336; *Parsons v. Parsons*, 66 Io. 754; *Dye v. Young*, 55 Io. 433; *In re Ames*, 51 Io. 596.

<sup>284</sup> *Williamson v. Nabers*, 14 Ga. 286; *Beall v. Cunningham*, 1 B. Mon. (Ky.), 399; *Peebles v. Stevens*, 8 Rich. (S. Car.), 198.

<sup>285</sup> *Stevens v. Leonard*, 154 Ind. 67; 56 N. E. 27.

<sup>286</sup> *Estate of Johnson*, 57 Cal. 529; *Harrison v. Bishop*, 131 Ind. 161; *In re Fenton's Will*, 97 Io. 192; *Rice v. Rice*, 50 Mich. 448; *Hamilton v. Hamilton*, 10 R. I. 538.

<sup>287</sup> *Stevens v. Stevens*, 127 Ind. 560.

<sup>288</sup> *Entwistle v. Meikle*, 180 Ill. 9.

In some jurisdictions it is held that an adjudication of lunacy is conclusive as to the mental condition of testator at the date of the adjudication, and that only evidence to show a cure after such adjudication is admissible.<sup>289</sup>

The record of discharge from a guardianship of insanity as cured is further only *prima facie* evidence of such cure.<sup>290</sup>

#### §403. Miscellaneous questions of evidence.

Evidence of the opinions of testator's sanity entertained by persons who are not called as witnesses is hearsay and inadmissible.<sup>291</sup> Thus, evidence that the boys on the street made fun of testatrix was held inadmissible.<sup>292</sup>

The photograph of testator is not admissible on the issue of capacity.<sup>293</sup>

Since an insane delusion is not based on evidence, the question of whether a peculiar belief of testator's had any apparent foundation in fact or not is material, and evidence on that point is admissible.<sup>294</sup> Thus, where testator's alleged insane delusion was as to his wife's infidelity, the evidence of the alleged adulterer as to her innocence was admissible.<sup>295</sup>

### IV—EVIDENCE OF UNDUE INFLUENCE.

#### §404. Evidence of undue influence largely circumstantial.

As undue influence is generally employed surreptitiously, the evidence by which it is established is, in a very large degree,

<sup>289</sup> *In re Hoopes's Estate*, 174 Pa. St. 373.

<sup>290</sup> *Fenton's Will*, 97 Ia. 192.

<sup>291</sup> *Townsend v. Peperell*, 99 Mass. 40; *Brinkman v. Rueggessick*, 71 Mo. 553; *Vance v. Upson*, 66 Tex. 476.

<sup>292</sup> *In re Hine*, 68 Conn. 551.

<sup>293</sup> *Varner v. Varner*, 16 Ohio Cir. Ct. 386.

<sup>294</sup> *Titus v. Gage*, 70 Vt. 13; *Burkhart v. Gladish*, 123 Ind. 337.

<sup>295</sup> *Burkhart v. Gladish*, 123 Ind. 337.

circumstantial,<sup>296</sup> and the question of undue influence is especially one for the jury.<sup>297</sup>

#### §405. Burden of proof.

Upon the issue of undue influence the burden of proof, as established by the weight of authority, is upon the party alleging it; that is, upon the contestant. In this sense the burden of proof is the duty of establishing the issue by a preponderance of the evidence.<sup>298</sup>

Undue influence is not presumed in absence of evidence to warrant such presumption.<sup>299</sup> Where the evidence discloses nothing more than a motive to exert undue influence and an

<sup>296</sup> "From the nature of the case, the evidence of undue influence is mainly circumstantial. It is not unusually exercised openly in the presence of others so that it can be directly proven. But the circumstances relied on to show it, must be such as, taken altogether point unmistakably to the fact that the mind of the testator was subjected to that of some other person so that the will is that of the latter and not of the former." *Storer's Will*, 28 Minn. 9, quoted in *Hess's Will*, 48 Minn. 504; *Campbell v. Barrera*, Tex. Civ. App. 32 S. W. 724.

<sup>297</sup> *Caven v. Agnew*, 186 Pa. St. 314.

<sup>298</sup> *Fitch's Estate*, 26 N. S. 195; *Chandler v. Jost*, 96 Ala. 596; *Bulger v. Ross*, 96 Ala. 267; *Livingstone's Appeal*, 63 Conn. 68; *Rockwell's Appeal*, 54 Conn. 119; *Allison's Estate*, 104 Ia. 130; *Webber v. Sullivan*, 58 Ia. 260; *Johnson v. Stevens*, 95 Ky. 128; *Barlow v. Waters*, — Ky. —; 28 S. W. 785; *Sheehan v. Kearney*, — Miss. —; 21 So. 41; 35 L. R. A. 102; *Prentis*

*v. Bates*, 93 Mich. 234; 17 L. R. A. 494; *Gay v. Gillilan*, 92 Mo. 250; *Maddox v. Maddox*, 114 Mo. 35; *Carl v. Gabel*, 120 Mo. 283; *Berberet v. Berberet*, 131 Mo. 399; *Morton v. Heidorn*, 135 Mo. 608; *Doherty v. Gilmore*, 136 Mo. 414; *Gordon v. Burris*, 141 Mo. 602; *Riley v. Sherwood*, 144 Mo. 354; *Tibbe v. Kamp* (Mo.), 54 S. W. 879; 55 S. W. 440; *Stewart v. Stewart*, 56 N. J. Eq. 761; *Salter v. Ely*, 56 N. J. Eq. 357; *Runyan v. Price*, 15 O. S. 1; 86 Am. Dec. 459; *Messner v. Elliott*, 184 Pa. St. 41; *Yorke's Estate*, 185 Pa. St. 61; *McGraw's Will*, 41 N. Y. Supp. 481; *Van Ormen v. Van Ormen*, 58 Hun, 606; *Seebrock v. Fedawa*, 30 Neb. 424; *Chappell v. Trent*, 90 Va. 849; *McMaster v. Scriven*, 85 Wis. 162; *Armstrong v. Armstrong*, 63 Wis. 162.

<sup>299</sup> *Post v. Mason*, 91 N. Y. 539; *Baldwin v. Parker*, 99 Mass. 79; *Kerrigan v. Leonard*, N. J. Eq.; 8 Atl. 503; *Rutherford v. Morris*, 77 Ill. 397; *Carpenter v. Hatch*, 64 N. H. 573; 15 Atl. 219.

opportunity to exert it, there is a failure of proof of undue influence;<sup>300</sup> and so, where the circumstances of execution, though suspicious, were perfectly consistent with a freedom from undue influence.<sup>301</sup>

The doctrine that the burden of proof should rest upon contestant has been sharply criticised by some of our ablest text-books. But, while undue influence in jurisdictions where the only issue is *devisavit vel non* assumes the form of a traverse, in reality it admits the capacity and formal execution and relies upon new matter. In this point it is like a defense of duress in contract law, upon which issue there is no doubt that the burden is upon the party alleging it.

The only consistent theory upon which the doctrine that the burden of proof rests upon the parties alleging it could be criticised is this: The right to make a will depends on statute. The class specified as competent to make a will is that of persons of full age, sound mind and memory and not under restraint. It might be urged that a party offering a will must establish every fact necessary to bring the case within the wills act.

Similar reasoning has been employed to uphold the theory that proponent must establish the sanity of testator, but never, as far as observed, has it been employed in cases of undue influence to place the burden of proof upon proponents.

#### §406. Shifting the burden of proof.

But while the courts are unanimous upon this proposition, as a fundamental rule, it is sometimes said that, when circumstances of suspicion exist, the burden shifts to the beneficiaries under the will to show that there was no undue influence.<sup>302</sup>

<sup>300</sup> *McFadin v. Catron*, 138 Mo. 197; *Doherty v. Gilmore*, 136 Mo. 414; *Maddox v. Maddox*, 114 Mo. 35; *Bedlow's Will*, 67 Hun, 408; *Phalen's Will*, 47 N. Y. S. 44; *McMaster v. Scriven*, 85 Wis. 162; *Trezevant v. Rains*, 85 Tex. 329.

<sup>301</sup> *Howell v. Taylor*, 50 N. J.

Eq. 428; *Fritz v. Turner*, 46 N. J. Eq. 515.

<sup>302</sup> *Tyrrel v. Painton* (1894), Prob. 151; 6 Rep. 540, citing *Barry v. Butlin*, 2 Moore P. C. 480; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Brown v. Fisher*, 63 Law T. (N. S.), 465; *Sheehan v. Kearney*, —



Thus, in a recent Iowa case it was said that the burden of proof does not shift to proponents until evidence is introduced sufficient "to warrant the presumption that the will was not the free act of testator, as in a case like that at bar, that the confidential agent and legatee was actually instrumental in the dictation and procurement of the execution of the will."<sup>302</sup>

Thus, it has been held that where the evidence discloses that a beneficiary under a will to the exclusion of other children of testator was a son who occupied a relation of trust and especial confidence with his father, the testator, a presumption arises that such will was obtained by undue influence.<sup>303</sup> A like presumption arises where the evidence shows that the devise was made entirely on account of the confidential relations between testatrix and devisee.<sup>304</sup>

It is even said that the fact that the beneficiaries procured the will, and were in a position to exercise undue influence, shifts the burden to them to show that there was no undue influence.<sup>305</sup> So, where the beneficiaries take an active part in preparing the will, the burden is said to be shifted upon them to show an absence of undue influence.<sup>306</sup>

But the facts that testatrix was eighty-six years old, and made a will in favor of her niece, whose husband was her confidential adviser, are not enough to shift the burden of proof where the evidence shows affirmatively that testatrix had a clear understanding of the transaction, and the husband of the niece was absent when the will was made.<sup>307</sup>

Where the evidence fails to show the existence of confidential relations between proponents and testator, it is error to charge

Miss—; 21 So. 41; *Hegney v. Head*, 126 Mo. 619; *McFadin v. Catron*, 120 Mo. 252; 138 Mo. 197; *Stewart v. Stewart*, 56 N. J. Eq. 761; *Claffey v. Ledwith*, 56 N. J. Eq. 333; *Dale v. Dale*, 38 N. J. Eq. 274; *Waddington v. Buzby*, 43 N. J. Eq. 154; 45 N. J. Eq. 173; *Miller v. Miller*, 187 Pa. St. 572; *Chappel v. Trent*, 90 Va. 849; *Whitelaws v. Sims*, 90 Va. 588.

\* *Denning v. Butcher*, 91 Io. 425.

<sup>302</sup> *Miller v. Miller*, 187 Pa. St. 572.

<sup>303</sup> *Messner v. Elliott*, 184 Pa. St. 41.

<sup>304</sup> *Wright v. Jewell*, 9 Manitoba, 607.

<sup>305</sup> *Chandler v. Jost*, 96 Ala. 596.

<sup>307</sup> *Yorke's Estate*, 185 Pa. St. 61.

that the burden of proof on the issue of undue influence is on proponents.<sup>308</sup>

The objection to this form of stating the rule is given before.<sup>309</sup> In the technical sense the burden of proof never shifts. The law and the nature of the issue determine upon which party the burden of proof rests at the outset, and this never shifts during the progress of the trial.

What is really meant by this form of statement is this: If the evidence of execution introduced by proponent does not of itself tend to establish undue influence, proponent is not obliged to go further and offer affirmative evidence that there was no undue influence. If, however, proponent's evidence tends directly to show that there was undue influence, or establishes facts from which undue influence may be inferred, proponent must, in order to go before the jury, introduce other and further evidence to disprove the existence of undue influence. If, when he rests, the uncontradicted evidence introduced by proponent establishes undue influence, he may be non-suited, or the jury may be directed to return a verdict against him, in accordance with the method of procedure prevailing in that jurisdiction. If proponent's evidence is conflicting, it may be considered by the jury together with the evidence introduced by contestant, including all presumptions which may be drawn from the evidence introduced. If upon the whole evidence, including such presumptions, the preponderance of evidence is with contestants, they will prevail; otherwise proponents will prevail.

The so-called shifting of the burden of proof is therefore really the raising of presumptions which must be overcome by the proponent in order to prevent contestant from prevailing, by establishing the issue on his part by a preponderance of the evidence. From this standpoint the subject can be best considered under the head of presumptions in the following sections.

<sup>308</sup> *Tibbe v. Kamp*, Mo. (1899),  
54 S. W. 879; (1900), 55 S. W.  
440.

<sup>309</sup> See Sec. 369.

### §407. Extent of burden.

The burden of proof is never greater upon the issue of undue influence than the duty of establishing the issue by a preponderance of the evidence.<sup>310</sup> It is therefore error to charge the jury that in order to avoid the will the circumstances of execution must be inconsistent with any hypothesis except that of undue influence;<sup>311</sup> and after the court has charged the jury that, on proof of due execution and capacity of testator, the will is presumed to be his free and voluntary act, it is error to add that undue influence must be "proven to your satisfaction by a preponderance of evidence," as this doubles the burden upon contestants by giving proponents the benefit of a presumption of fact as a presumption of law.<sup>312</sup>

In some cases the extreme rule is applied that the contestant must adduce such evidence that no hypothesis except that of undue influence will be consistent with the evidence which the jury believes.<sup>313</sup>

### §408. Presumptions.—In general.

Presumptions of undue influence are said to arise out of certain combinations of fact. These presumptions are presumptions of fact merely, and not presumptions of law,<sup>314</sup> and it is error for the court to charge the jury that a certain state of facts creates a presumption of undue influence, and that unless the adversary party rebuts this presumption the jury must find against him.<sup>315</sup>

<sup>310</sup> Gay v. Gillilan, 92 Mo. 250.

<sup>311</sup> Bush v. Delano, 113 Mich. 321.

The earlier case of Maynard v. Vinton, 59 Mich. 139, had followed the language used in the English cases and had held that to establish undue influence the proof must be inconsistent with any other hypothesis.

This case was quoted in Severance v. Severance, 90 Mich. 417, but was specifically overruled in Bush v. Delano, *supra*.

<sup>312</sup> Morton v. Heidorn, 135 Mo. 608.

<sup>313</sup> Adams v. McBeath, 27 Can. S. C. 13.

<sup>314</sup> Morton v. Heidorn, 135 Mo. 608; Patten v. Cilley, 67 N. H. 520; Manley's Ex'r v. Staples, 65 Vt. 370.

<sup>315</sup> See cases cited in preceding note.

A recent Virginia case seems to hold a different opinion, and to regard these presumptions as *prima facie* presumptions of law. The evidence showed that testatrix was eighty-eight years old, and that she had made a will totally different from her previous intentions, and in favor of persons in confidential relation toward her. The trial court refused to charge that if these facts were found to be true they raised a violent presumption of undue influence, to be overcome only by satisfactory "testimony." This refusal was held to be error.<sup>316</sup>

These presumptions are best considered in connection with the relations between the testator and the beneficiaries out of which the presumptions arise, or which constitute part of the combinations of fact out of which the presumptions arise. In order to save repetition, therefore, each class of relations between testator and beneficiaries will be considered first with regard to the presumption, if any, arising out of the relationship itself, and second with regard to the additional facts which may, in connection with such relationship, give rise to a presumption of undue influence, or strengthen a presumption already raised.

#### §409. Parent and child.

The fact that the testator and beneficiary bore the relation of parent and child does not of itself give rise to any presumption of undue influence.<sup>317</sup> This rule applies both to wills made by parents in favor of their children,<sup>318</sup> and to wills made by children in favor of their parents.<sup>319</sup> It also applies to a son-in-law who is a beneficiary under the will of his father-in-

<sup>316</sup> *Whitelaw's Executor v. Sims*, 437; *Foster's Appeal*, 142 Pa. St. 90 Va. 588, citing *Hartman v. Strickler*, 82 Va. 225. \* 62.

<sup>317</sup> *Dale's Appeal*, 57 Conn. 127; *Teegarden v. Lewis*, 145 Ind. 98; *Lamb v. Lippencott*, 115 Mich. 611; *Cash v. Lust*, 142 Mo. 630; *Aylward v. Briggs*, 145 Mo. 604; 47 S. W. 510; *In re Martin*, 98 N. Y. 193; *Coleman's Estate*, 185 Pa. St. 437; *Bundy v. McKnight*, 48 Ind. 502; *Lamb v. Lippencott*, 115 Mich. 611; *Cash v. Lust*, 142 Mo. 630; *White v. Starr*, 47 N. J. Eq. 244.

<sup>318</sup> *In re Andrews*, 33 N. J. Eq. 514; *Coleman's Estate*, 185 Pa. St. 437.

law;<sup>320</sup> and to brothers and sisters who are beneficiaries under the will of each other,<sup>321</sup> and to members of the same household generally.<sup>322</sup>

The fact that the beneficiary in such relationship transacted business for the testator does not raise a presumption of undue influence.<sup>323</sup> So the mere fact that a son lived with his parents, and managed their property for them, does not of itself make out even a *prima facie* case of undue influence.<sup>324</sup> Nor does the fact that one of such parties suggested and urged the testator to make such will, unless such urging amounted to actual undue influence.<sup>325</sup> Nor does the fact that the will did not distribute the property equally among the natural objects of testator's bounty raise a presumption of undue influence in such relations.<sup>326</sup> Indeed, from the adjudicated cases, it may safely be laid down, as a general rule, that in such relations no presumption of undue influence arises, but, on the contrary, the evidence must be even stronger to establish actual undue influence where the beneficiary is so close a relation of testator than where beneficiary is a stranger.<sup>327</sup> But, where a child of testator also is his confidential agent, the rule of presumption as to confidential agents applies, and not the rule as to parent and child,<sup>328</sup> and where a child of testator is guilty of such

<sup>320</sup> *Lamb v. Lippencott*, 115 Mich. 611, citing *Maynard v. Vinton*, 59 Mich. 139; *Severance v. Severance*, 90 Mich. 417.

<sup>321</sup> *In re McDevitt*, 95 Cal. 17.

<sup>322</sup> *Doherty v. Gilmore*, 136 Mo. 414; *McMaster v. Scriven*, 85 Wis. 162.

<sup>323</sup> *Lamb v. Lippencott*, 115 Mich. 611; *Cash v. Lust*, 142 Mo. 630; *Aylward v. Briggs*, 145 Mo. 604; 47 S. W. 510.

<sup>324</sup> *Aylward v. Briggs*, 145 Mo. 604; 47 S. W. 510; *Mears v. Mears*, 15 O. S. 90.

<sup>325</sup> *Harrison's Will*, 1 B. Mon. (Ky.), 351; *Gilreath v. Gilreath*, 4

*Jones Eq. (N. Car.)*, 142; *Coleman's Estate*, 185 Pa. St. 437; *Woodward v. James*, 3 Strobb (S. Car.), 552; *Hartman v. Strickler*, 82 Va. 225.

<sup>326</sup> *McLane's Estate*, 21 D. C. 554; *McFadin v. Catron*, 120 Mo. 252; *Myers v. Hauger*, 98 Mo. 433; *Maddox v. Maddox*, 114 Mo. 35; *Pennyl's Estate*, 157 Pa. St. 465; *Kaughman v. Caughman*, 49 S. Car. 159; *Kerr v. Lunsford*, 31 W. Va. 660; *Mears v. Mears*, 15 O. S. 90.

<sup>327</sup> *Dale's Appeal*, 57 Conn. 127; *Lamb v. Lippencott*, 115 Mich. 611.

<sup>328</sup> *Miller v. Miller*, 187 Pa. St. 572; 41 Atl. 277.

fraud<sup>329</sup> or force and violence<sup>330</sup> as would amount to actual undue influence in a stranger, it is none the less undue influence because of the relationship. And where the evidence tended to show actual undue influence, and further, that the brother of testator, who took under the will, was instrumental in having the will drawn, and was present at its execution, the rules relating to a beneficiary who drafts the will apply, rather than the rules relating to brothers, and a presumption of undue influence arises.<sup>331</sup>

#### §410. Husband and wife.

No presumption of undue influence arises where the beneficiary is either the husband or wife of testator on account of such relationship;<sup>332</sup> nor does the fact that the beneficiary in such relationship urged and solicited testator to make such will create a presumption,<sup>333</sup> even where beneficiary had great and continuous influence over testator.<sup>334</sup>

<sup>329</sup> Jones v. Simpson, 171 Mass. 474; 50 N. E. 940.

<sup>330</sup> Capper v. Capper, 172 Mass. 262; Dale v. Dale, 38 N. J. Eq. 274; Moore v. Blauvelt, 15 N. J. Eq. 367.

<sup>331</sup> Boisaubin v. Boisaubin, 51 N. J. Eq. 252; a similar case is Lyons v. Campbell, 88 Ala. 462.

<sup>332</sup> Bulger v. Ross, 98 Ala. 267; Herwick v. Langford, 108 Cal. 608; Orth v. Orth, 145 Ind. 184; 145 Ind. 206; 32 L. R. A. 298, 308; Gwin v. Gwin, — Ida. —; 48 Pac. 295; Small v. Small, 4 Me. 220; Pierce v. Pierce, 38 Mich. 412; Defoe v. Defoe, 144 Mo. 458; Rankin v. Rankin, 61 Mo. 295; Black v. Foljambe, 39 N. J. Eq. 234.

<sup>333</sup> Herwick v. Langford, 108 Cal. 608; Gwin v. Gwin, — Ida. —; 48 Pac. 295; Black v. Foljambe, 39 N. J. Eq. 234; Hughes v. Murtha, 32 N. J. Eq. 288; Lide v. Lide, 2 Brev. (S. Car.), 403.

<sup>334</sup> Herwick v. Langford, 108 Cal.

608; Meeker v. Meeker, 75 Ill. 260; Small v. Small, 4 Me. 220; Storer's Will, 28 Minn. 9; Peery v. Peery, 94 Tenn. 328; McClure v. McClure, 86 Tenn. 173; Smith v. Harrison, 2 Heis. (Tenn.), 230; Simerly v. Hurley, 9 Lea (Tenn.), 711.

"There is no legal presumption against the validity of any provision which a husband may make in a wife's favor, for she may justly influence the making of her husband's will for her own benefit or that of others, so long as she does not act fraudulently or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent." Latham v. Udell, 38 Mich. 238, cited and followed *In re* Langford, 108 Cal. 608; also citing Hughes v. Murtha, 32 N. J. Eq. 288; Rankin v. Rankin, 61 Mo. 295; Nelson's Will, 39 Minn. 204; and see Richmond's Appeal, 21 Am. St. R. 95.

It is, indeed, not even correct to say that beneficiary must use such a degree of sollicitation as would amount to undue influence if exerted by a stranger, in order to constitute undue influence. The law recognizes the fact that on account of the closeness and intimacy of such relationship, like that of parent and child, the parties thereto should each be allowed great freedom in urging mutual claims upon the consideration of the other. Accordingly the husband is allowed somewhat greater latitude in persuading his wife to make a will in his favor than would be permitted to a stranger,<sup>335</sup> and on account of the supposed difference of natural influence of the two sexes the wife is allowed still greater latitude.<sup>336</sup> When, however, the will of testator is actually overcome, and the will of the beneficiary is substituted for his, undue influence exists.<sup>337</sup>

The distinction in actual practice between the cases of undue influence between husband and wife, or parent and child, on the one hand, and testator and a beneficiary on the other, is that the courts, and still more the juries, recognize that sollicitation and importunity may go to a considerably greater extent in the domestic circle than between persons not so related, before the will of testator is actually broken down.

#### **§411. Wills in favor of those living in improper sexual relations with testator.**

In some of the earlier cases it was held that the mere fact that testator made a will in favor of a woman who was living with him as his mistress raised a presumption of fact of undue influence, and that such state of facts was of itself enough to justify a finding of undue influence.<sup>338</sup> The great weight of modern authority, however, holds that the mere fact that the

<sup>335</sup> *Eulger v. Ross*, 98 Ala. 267; *Armstrong v. Armstrong*, 63 Wis. 162.

<sup>336</sup> *Herwick v. Langford*, 108 Cal. 608; *Storey's Will*, 20 Ill. App. 183; (not affected on this point by the reversal in 120 Ill. 244); *Thompson v. Ish*, 99 Mo. 160; *Mason v. Williams*, 53 Hun, 398; *Lide*

*v. Lide*, 2 Brev. (S. Car.), 403.

<sup>337</sup> *Pierce v. Pierce*, 38 Mich. 412; *Messner v. Elliott*, 184 Pa. St. 41.

<sup>338</sup> *Dean v. Negley*, 41 Pa. St. 312; see *Hess's Will*, 31 Am. St. Rep. 665 for cases that will to a mistress shows *per se* undue influence.

beneficiary holds unlawful sexual relations with testator is, of itself, not sufficient to justify a finding of undue influence, and that upon such facts no presumption arises.<sup>339</sup>

The early cases have not been overruled by the second line of cases, but distinguished. In the earlier line there was in every case enough evidence of actual undue influence to justify the finding of the court.<sup>340</sup>

But while the existence of the unlawful relationship does not amount *per se* to undue influence, it is in many cases of great importance.<sup>341</sup> Accordingly, where there is some evidence tending to show actual undue influence, the fact that testator or testatrix occupied unlawful sexual relations with each other is admissible in evidence.<sup>342</sup>

<sup>339</sup> *Wingrove v. Wingrove*, L. R. 11 P. D. 81; *Moore v. Heineke*, 119 Ala. 627; *Dunlap v. Robinson*, 28 Ala. 100; *Richmond's Appeal*, 59 Conn. 226; *Smith v. Henline*, 174 Ill. 184; *Kessinger v. Kessinger*, 37 Ind. 341; *Porschett v. Porschett*, 82 Ky. 93; *Davis v. Calvert*, 5 Gill. & J. (Md.) 269; *Wallace v. Harris*, 32 Mich. 380; *Hess's Will*, 48 Minn. 504; *Sunderland v. Hood*, 84 Mo. 293; *Arnault v. Arnault*, 52 N. J. Eq. 801; 31 Atl. 606; *Smith v. Smith*, 48 N. J. Eq. 566; *Mondorf's Will*, 110 N. Y. 450; *Monroe v. Barclay*, 17 O. S. 302; *Johnson's Appeal*, 159 Pa. St. 630; *Wainright v. Wainright*, 89 Pa. St. 220; *Rudy v. Ulrich*, 69 Pa. St. 177; *Main v. Ryder*, 84 Pa. St. 217; *Farr v. Thompson*, 1 Claves (S. Car.), 37; *O'Neill v. Farr*, 1 Rich. (S. Car.), 80; *McClure v. McClure*, 86 Tenn. 173.

<sup>340</sup> *Johnson's Appeal*, 159 Pa. St. 630, distinguishing *Dean v. Negley*, 41 Pa. St. 312.

<sup>341</sup> "The existence of an illicit relationship between a deceased testator and his mistress will not give rise to a presumption of undue influence as a matter of law, but un-

due influence is more readily inferred in case of a will made in favor of a mistress than in the case of a will made in favor of a wife. The existence of the relation is a circumstance to be considered by the jury along with other facts in the case." *Smith v. Henline*, 174 Ill. 184.

<sup>342</sup> *In re Ruffino's Estate*, 116 Cal. 304; *Kessinger v. Kessinger*, 37 Ind. 341; *Baldwin v. Robinson*, 93 Mich. 438; (facts in reported case are very meager); *Dean v. Negley*, 41 Pa. St. 312; *Reichenbach v. Ruddach*, 127 Pa. St. 564; *Bryant v. Pierce*, 95 Wis. 331; *McClure v. McClure*, 86 Tenn. 173.

"The jury have a right to consider the fact of the unlawful relationship when there is proof, as there is in the case at bar, tending to show constraint and inference, impaired mental capacity, loss of will power, and sickness or disease at the time of the making of the will."

*Smith v. Henline*, 174 Ill. 184, citing *Monroe v. Barclay*, 17 O. S. 302; *Johnson's Estate*, 159 Pa. St. 630; *McClure v. McClure*, 86 Tenn. 173.



### §412. Subsequent marriage of parties in unlawful sexual relations.

In accordance with these principles, it is not competent to show that testator and his wife had illicit and unlawful sexual relations prior to their marriage,<sup>343</sup> unless the evidence discloses that there was actual undue influence.<sup>344</sup>

### §413. Attorney and client.

The fact that the attorney who is consulted upon the execution of the will suggests the legal phraseology appropriate to carry the wish of testator into effect, or even dictates and revises the will, does not of itself raise a presumption of undue influence.<sup>345</sup> And where the attorney who is employed to draw the will is made the executor of the will by the terms thereof, no presumption of undue influence arises on that ground alone.<sup>346</sup> Where a will leaves property to the attorney of testator, who had nothing to do with the execution of the will, no presumption is said to arise. This point is touched upon in *dicta* far more often than in adjudications, for the question of undue influence of an attorney is rarely raised except where the attorney drew the will. Where the attorney draws the will and receives a beneficial interest thereunder, the case is one of those discussed in the next section, where the beneficiary, who is in confidential relations with testator, draws the will, and the rules there given apply;<sup>347</sup> but where the attorney who draws the will suggests such a change in the phraseology as to change an interest given to him as trustee to an absolute interest, such conduct avoids the will.<sup>348</sup> Where the attorney drafts the

<sup>343</sup> *In re Flint's Estate*, 100 Cal. 391; *In re Langford*, 108 Cal. 608; *Maynard v. Tyler*, 168 Mass. 107.

<sup>344</sup> *Maynard v. Tyler*, 168 Mass. 107; *Baldwin v. Robinson*, 93 Mich. 438; *Reichenbach v. Ruddach*, 127 Pa. St. 564.

<sup>345</sup> *Hennessey's Heirs v. Woulfe*, 49 La. Ann. 1376; *King v. Holmes*, 84 Me. 219.

<sup>346</sup> *Livingstone's Appeal*, 63 Conn. 68; *Richmond's Appeal*, 59 Conn. 226; *Dale's Appeal*, 57 Conn. 127; *St. Leger's Appeal*, 34 Conn. 434; *Berberet v. Berberet*, 131 Mo. 399; *Edson's Will*, 70 Hun, 122.

<sup>347</sup> *Bennett v. Bennett*, 50 N. J. Eq. 439.

<sup>348</sup> *Jones v. Simpson*, 171 Mass. 474; *Lyon v. Dada*, 111 Mich. 340.

will in which he is named a beneficiary the ordinary rules apply which control a will drawn by a beneficiary.<sup>349</sup>

#### §414. Effect of beneficiary's drawing will.

At Roman Law, if a person wrote a will in his own favor such will was void.<sup>350</sup>

At our law the rule is by no means as strict as at Roman law. The rule established by the weight of authority is that where the will is drawn by beneficiary, who was also in confidential relations with testator, a presumption of undue influence arises.<sup>351</sup> This rule is not limited to those related by blood, but

<sup>349</sup> See Sec. 414.

<sup>350</sup> Dig. Lib. 48 Tit. 10 §15; *Paske v. Ollat*, 2 Phil. Ecc. Cas. 323; *Barney's Will*, 70 Vt. 352; *Bennett v. Bennett*, 50 N. J. Eq. 439.

<sup>351</sup> *Coghill v. Kennedy*, 119 Ala. 641; 24 So. 459; *Garrett v. Heflin*, 98 Ala. 615; *Henry v. Hall*, 106 Ala. 84; *Higginbotham v. Higginbotham*, 106 Ala. 314; *Silvany's Estate*, 127 Cal. 226, 59 Pac. 571; *Drake's Appeal*, 45 Conn. 9; *Hughes v. Meredith*, 24 Ga. 325; *Adair v. Adair*, 30 Ga. 102; *Gerrish v. Nason*, 22 Me. 438; *Bush v. Delano*, 113 Mich. 321; *Brown v. Bell*, 58 Mich. 58; *Farnum v. Boyd*, 56 N. J. Eq. 766; *DeLafield v. Parish*, 25 N. Y. 9; *Yardley v. Cuthbertson*, 108 Pa. St. 395; *Scattergood v. Kirk*, 192 Pa. St. 195; *Cuthbertson's Appeal*, 97 Pa. St. 163; *Blume v. Hartman*, 115 Pa. St. 32; *Hoope's Estate*, 174 Pa. St. 373; *Tomkins v. Tomkins*, 1 Bail. (S. Car.), 92; *Smith's Exr's v. Smith*, 67 Vt. 443; *Barney's Will*, 70 Vt. 352; *Montague v. Allan's Exr's*, 78 Va. 592; *Armor's Estate*, 154 Pa. St. 517; *Wilson's Appeal*, 99 Pa. St. 545.

"In all cases the burden is on

the proponent to establish that the instrument is the will of the testator. *Williams v. Robinson*, 42 Vt. 658; *Roberts v. Welch*, 46 Vt. 164. In general the law presumes this vital fact from the proven facts that the instrument was executed by the testator with the formalities required by law, and that he was of testamentary capacity so that affirmative proof that the will was not procured by the undue influence of others is not required. But where the relations between the testator and the proponent were confidential and the proponent drew the will taking the entire estate or a large bequest and would have taken nothing as heir, while near, needy and deserving relations take nothing, then the law not only regards the transaction with suspicion, but the burden should be cast upon the proponent to show that he did not, nor did anyone in his behalf, unduly influence the testator, and that the instrument propounded is the testator's will and not the will of another person." *Barney's Will*, 70 Vt. 352, citing *Paske v. Ollat*, 2 Phillim. Ecc. R. 323; *Barry v. Butlin*, 1 Curt. Ecc. 637; 2 Moore P. C. 480;

applies to any confidential relations.<sup>352</sup> A similar presumption arises when the will is drawn by a husband of the beneficiary.<sup>353</sup> But where the will was drawn by an attorney who held a share in a cemetery association, and was a director in such association, and by the will a legacy was given to such association, no presumption of undue influence arises.<sup>354</sup>

But this presumption is neither a conclusive presumption, nor even a presumption of law, but merely a presumption of fact. "There is a 'long stride' between any inference that can be drawn from the evidence offered at the trial and the established fact of undue influence upon the testator."<sup>355</sup> And, as has been said, these are facts, "in no case amounting to more than a circumstance of suspicion."<sup>356</sup> So, while the jury may find undue influence as a fact from the fact that a beneficiary in confidential relations with testator drew the will, the court must not charge the jury as a matter of law so to find.<sup>357</sup> Accordingly the circumstances as introduced in evidence may rebut the presumption of fact of undue influence in these cases, and the jury may find that no undue influence existed without bringing in a verdict contrary to

*Durling v. Loveland*, 2 Curt. 225; *Tyrrell v. Painton* (1894), P. 151; *Higginbotham v. Higginbotham*, 106 Ala. 314; *Moore v. Spier*, 80 Ala. 129; *Lyons v. Campbell*, 88 Ala. 462; *Bancroft v. Otis*, 91 Ala. 279; *Eastis v. Montgomery*, 95 Ala. 486; *Richmond's Appeal*, 59 Conn. 226; *Hughes v. Meredith*, 24 Ga. 325; *Hess's Will*, 48 Minn. 504; 31 Am. St. Rep. 665; *Maddox v. Maddox*, 114 Mo. 35; *Carroll v. House*, 48 N. J. Eq. 269; *Dale v. Dale*, 38 N. J. Eq. 274; *Post v. Mason*, 91 N. Y. 539; *In re Smith*, 95 N. Y. 517; *Tyler v. Gardiner*, 35 N. Y. 559; on the same point are *Blewitt v. Blewitt*, 4 Hagg. Ecc. R. 463; *Smith v. Henline*, 174 Ill. 184; *Wood v. Devers* (Ky.), 19 S.

W. 1; *Tyler v. Gardiner*, 35 N. Y. 559; *Delafield v. Parish*, 25 N. Y. 9; *Greenwood v. Cline*, 7 Ore. 17; *Swails v. White*, 149 Pa. St. 261.

<sup>352</sup> *Scattergood v. Kirk*, 192 Pa. St. 263; *Darlington's Estate*, 147 Pa. St. 624.

<sup>353</sup> *Bromley's Estate*, 113 Mich. 53.

<sup>354</sup> *Barkley v. Cemetery Association* (Mo.) (1899), 54 S. W. 482.

<sup>355</sup> *King v. Holmes*, 84 Me. 219; *Logan's Estate*, 195 Pa. St. 282.

<sup>356</sup> *Bennett v. Bennett*, 50 N. J. Eq. 439.

<sup>357</sup> *Stirling v. Stirling*, 64 Md. 138; *Griffith v. Diffendoffer*, 50 Md. 466.

the law and the evidence.<sup>358</sup> Thus, where the evidence shows an absence of actual undue influence, and, further, that testatrix kept the will a year after execution, the jury may find that no undue influence existed though the residuary legatee, an old friend, drew the will;<sup>359</sup> and so, where an attorney, who was also a legatee, drew the will, but the clause giving him the legacy was inserted by testatrix in her own handwriting after she took independent legal advice.<sup>360</sup>

Where the will was drawn, at request of testatrix, by a person who had no confidential relations with her, and who was the father of a beneficiary under the will, it was held that no presumption of undue influence arose;<sup>361</sup> and where the attorney who drew the will was a beneficiary thereunder, and was also guardian of testator, these facts did not constitute undue influence where such attorney had always been regarded by testator as his father.<sup>362</sup> And the facts that a legacy was given to the attorney who drew the will, and who was also named as executor, and was trustee of three corporations to which bequests were given, were held not to constitute undue influence where testatrix retained possession of the will thereafter, and no direct evidence of fraud or undue influence appeared.<sup>363</sup> And where the evidence discloses that the proponent was active in causing the will to be executed by reason entirely of his desire to aid testatrix and carry out her wishes, no presumption of undue influence arises.<sup>364</sup> So, where the beneficiary, who was a son of testatrix, furnished the data for the will to the scrivener, whom he had called in to draw the will, it was held that

<sup>358</sup> *Henry v. Hall*, 106 Ala. 84; *Lyons v. Campbell*, 88 Ala. 462; *Garrett v. Heflin*, 98 Ala. 615; *Daniel v. Hill*, 52 Ala. 430; *White v. Cole*, — Ky.—; 47 S. W. 759; *King v. Holmes*, 84 Me. 219; *Stirling v. Stirling*, 64 Md. 138; *Bromley's Estate*, 113 Mich. 53; *Carpenter v. Hatch*, 64 N. H. 573; *Bennett v. Bennett*, 50 N. J. Eq. 439; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Waddington v. Buzby* 45 N. J. Eq. 173; *Post v. Mason*, 91

N. Y. 539; *Logan's Estate*, 195 Pa. St. 282.

<sup>359</sup> *Garrett v. Heflin*, 98 Ala. 615.

<sup>360</sup> *Bromley's Estate*, 113 Mich. 53.

<sup>361</sup> *Henry v. Hall*, 106 Ala. 84.

<sup>362</sup> *White v. Cole* (Ky.), 47 S. W. 759.

<sup>363</sup> *Farnum v. Boyd*, 56 N. J. Eq. 766.

<sup>364</sup> *Eastis v. Montgomery*, 95 Ala. 486; 11 So. 204.

such conduct did not establish undue influence where testatrix had the will read over to her before execution in the absence of the beneficiary.<sup>365</sup> But in some extreme cases it is said that only the clearest evidence can rebut the presumption of undue influence. Thus, where testator was advanced in years, and of very doubtful capacity, and the attorney who prepared the will wrote himself as executor and chief beneficiary, it was said that in order to rebut the presumption of undue influence he must offer evidence of the clearest and most convincing character; and his claim that this legacy was in compensation for legal services, which were worth far less than the legacy, was not sufficient to rebut such presumption.<sup>366</sup>

#### §415. Effect of presence of legatees at execution.

The mere fact that legatees were present when the will was made, without any evidence that they induced or procured the execution of the will, does not raise any presumption of undue influence.<sup>367</sup> And even though beneficiaries were present at the execution of the will, and employed the attorney who drew the will, no presumption of undue influence arises where the evidence does not disclose that they even knew the provisions of the will.<sup>368</sup>

#### §416. Effect of business relations between testator and beneficiaries.

The fact that the devisee under a will had been for a long time the partner of the testator does not raise a presumption of undue influence;<sup>369</sup> nor does the fact that devisee was the

<sup>365</sup> Logan's Estate, 195 Pa. St. 282. Similar facts were presented in Scattergood v. Kirk, 195 Pa. St. 195.

<sup>366</sup> Hoopes's Estate, 174 Pa. St. 373.

<sup>367</sup> Henry v. Hall, 106 Ala. 84; Ethridge v. Bennett's Executors, 9 Houst. (Del.), 295; Wilcoxon v.

Wilcoxon, 165 Ill. 454; Dieffenbach v. Grece, 56 N. J. Eq. 365; Delgado v. Gonzales, (Tex. Civ. App.), 28 S. W. 459.

<sup>368</sup> McMaster v. Scriven, 85 Wis. 162. (See cases in preceding note.)

<sup>369</sup> Goodbar v. Lidikay, 136 Ind. 1.

business manager of testator,<sup>370</sup> or his confidential agent,<sup>371</sup> or employee.<sup>372</sup>

In a recent New Jersey case where the partner of a testator who was an habitual drunkard drew the will, in which he was named as executor though not a beneficiary, and the beneficiary, testator's son, was ordered to continue the partnership with executor and not to sell his interest without his permission, it was held that such facts do not constitute undue influence.<sup>373</sup>

The nature and extent of the dealings between testator and beneficiary may show that they did not occupy ordinary business relations toward each other, but that the relations were those of especial trust and confidence.<sup>374</sup> Where the beneficiary occupies relations of trust and confidence with testator it is said that the burden is cast upon beneficiary to prove that there was no undue influence.<sup>375</sup> Thus, where a stranger acquired absolute control over testatrix, and thus obtained a will in his favor, it was held void for undue influence.<sup>376</sup>

#### §417. Effect of intimacy.

The fact that beneficiary was an old friend of testator's does not of itself raise a presumption of undue influence.<sup>377</sup> Indeed,

<sup>370</sup> Denning v. Butcher, 91 Io. 425.

"Nor will the mere fact that the testator gave a legacy to one not of his blood and who had been his confidential business agent, cast upon such legatee the burden of showing that the will was not made by his influence or procurement." Denning v. Butcher, 91 Io. 425, citing Webber v. Sullivan, 58 Io. 260; McIntire v. McConn, 28 Io. 480; Smith v. James, 72 Io. 519; Blake v. Rourke, 74 Io. 519.

"The rule as to the burden of proof in cases relating to gifts *inter vivos*, where a confidential relation exists between the parties, has often been held inapplicable to cases touching wills." Denning

v. Butcher, 91 Ia. 425; Bancroft v. Otis, 91 Ala. 279; 8 So. 286; Loder v. Whelpley, 111 N. Y. 239; Mondorf's Will, 110 N. Y. 450.

<sup>371</sup> Patten v. Cilley, 67 N. H. 520.

<sup>372</sup> Douglass's Estate, 162 Pa. St. 567.

<sup>373</sup> Koegel v. Egner, 54 N. J. Eq. 623.

<sup>374</sup> Manatt v. Scott, 106 Io. 203.

<sup>375</sup> Bancroft v. Otis, 91 Ala. 279.

<sup>376</sup> Grove v. Spiker, 72 Md. 300.

<sup>377</sup> Garrett v. Heflin, 98 Ala. 615; Harp v. Parr, 168 Ill. 459; Goodbar v. Lidikay, 136 Ind. 1; Lamb v. Lippincott, 115 Mich. 611; Messner v. Elliott, 184 Pa. St. 41; Green's Appeal, 140 Pa. St. 137.

it is said rather to show absence of undue influence, since such a will would be just and natural.<sup>378</sup>

#### §418. Physician, nurse, etc.

The physician and nurse of testator stand in a relation of peculiar trust and confidence to the testator, especially when the will is made in his last sickness. Accordingly, devises and bequests in favor of a physician or nurse have been held by the courts to be subject to suspicion, and it has even been said that a presumption of fact arises of undue influence.<sup>379</sup> But this presumption is, of course, rebuttable by showing that testator did in fact make his will in favor of his nurse at a time when he was entirely free from influence.<sup>380</sup>

Even if this presumption may arise, it must be shown that the will was made during testator's sickness, while under medical care of the persons who were claimed to have exercised such undue influence.<sup>381</sup>

Undue influence can not be presumed from the mere fact that the physician informed testator that his condition was dangerous, and urged him to arrange his business affairs.<sup>382</sup>

#### §419. Religious adviser.

The fact that the beneficiary under a will is the religious adviser of testator is said to raise a presumption of undue influence. This presumption is like other presumptions in undue influence, a presumption of fact, not law.<sup>383</sup>

<sup>378</sup> Harp v. Parr, 168 Ill. 459.

<sup>379</sup> Pike's Will, 83 Hun. 327; Chappell v. Trent, 90 Va. 849.

<sup>380</sup> Bush v. Lisle, — Ky. —; 12 S. W. 762.

<sup>381</sup> Bidwell's Succession, 52 La. Ann. 744.

<sup>382</sup> Folks v. Folks (Ky.) (1900), 54 S. W. 837.

<sup>383</sup> Zerega v. Percival, 46 La. Ann. 590; Hegney v. Head, 126 Mo. 619; Muller v. St. Louis Hospital Association, 5 Mo. App. 390;

affirmed on grounds stated in opinion below in 73 Mo. 242; Marx v. McGlynn, 88 N. Y. 357.

In the cases cited in the notes sustaining this proposition, the point in question is found chiefly in obiters. In Marx v. McClynn the whole evidence showed no undue influence; in Zerega v. Perceval the ground of attack was barred by the efflux of time, and further the religious adviser was also the husband of testatrix; and in the Mis-

A spiritual adviser is ordinarily in a relation of peculiar confidence toward his congregation or parishioners. Accordingly, as in other cases of those in confidential relations, undue influence may be inferred as a presumption of fact from the additional circumstances that such adviser drew the will or procured it to be drawn.<sup>384</sup> And suggestions from a spiritual adviser may amount to undue influence, when similar suggestions from a stranger would not.<sup>385</sup>

#### §420. Spiritualistic adviser.

The doctrine applying to priests and clergymen is applicable to spiritualistic advisers and mediums. A will bequeathing property to a spiritualistic adviser is not on that ground alone presumed to be caused by undue influence. And a reasonable will has been held valid, even where testator believed that he was advised to make it by spirits.<sup>386</sup> But evidence of fraud and deceit, together with using testator's belief in spiritualism as a means of inducing him to make such will, is undue influence.<sup>387</sup>

In a recent Illinois case testatrix was induced by an alleged medium to believe that he had a mission from the dead to reform the world, and that in order for him to do this it

souri cases there were complicating facts. The legatees were spiritual advisers or else institutions with which they were connected, and these spiritual advisers drew the will. These cases might well be decided on the theory that the legatee drew the will. In a later case, where the pastor of testator's church refused to draw a will for testator, leaving a large part of his property to the church, but was present when it was executed, it was held not sufficient to justify submitting the question of undue influence to the jury. *Tibbe v. Kamp*, 55 S. W. 440; 54 S. W. 879; (Mo.) (1900).

<sup>384</sup> *Lyons v. Campbell*, 88 Ala. 462; *Drake's Appeal*, 45 Conn. 9; *Hegney v. Head*, 126 Mo. 619; *Miller v. St. Louis Hospital Association*, 5 Mo. App. 390; 73 Mo. 242.

<sup>385</sup> *Carroll v. Hause*, 48 N. J. E. 269.

<sup>386</sup> *Storey's Will*, 20 Ill. App. 183, also in 120 Ill. 244. In this case the advice seems to have been the very general and safe advice to provide for those that he loved best.

<sup>387</sup> *Thompson v. Hawks*, 14 Fed. 902; *Greenwood v. Cline*, 7 Ore. 17.



was necessary that he be provided with funds to enable him to print and publish a book. He thereby induced her to make a will in his favor.<sup>388</sup> This case, while a very interesting one, is so affected by the fraud of the beneficiary, and the insane delusion of testatrix, as not to be a precedent on undue influence alone.

#### §421. General rules of presumption.

As a general deduction from the specific instances of presumptions, it may be said that a presumption does not arise from the mere fact that the beneficiary takes under the will, even if his share is much greater than he would receive had testator died intestate,<sup>389</sup> nor is a presumption created by the facts that beneficiaries had an opportunity to exert undue influence, and that the will actually made discriminates in their favor.<sup>390</sup>

#### §422. Former intention of testator.

A testator has full power of revoking former wills, and, by a new will, disposing of his property in a manner entirely different from his previous intentions. At the same time it is proper for the jury to consider whether the will offered for probate, and alleged to be caused by undue influence, is consistent with the previous intentions of the testator or not.<sup>391</sup>

<sup>388</sup> In discussing this case the court said: "It is not every influence exercised over a testator by the beneficiary under a will which will justify a decree setting it aside; but when the relative positions of the parties are considered, she being an aged and feeble woman, laboring under the influences of an insane delusion brought upon her through his machinations, the rule can have no proper application." *Orchardson v. Cofield*, 171 Ill. 14.

<sup>389</sup> *Denning v. Butcher*, 91 Io. 425; *Blake v. Rourke*, 74 Io. 519; *Maddox v. Maddox*, 114 Mo. 35.

<sup>390</sup> *In re Langford*, 108 Cal. 608; *Maddox v. Maddox*, 114 Mo. 35; *Berberet v. Berberet*, 131 Mo. 399; *McFadin v. Catron*, 138 Mo. 197; *Turnure v. Turnure*, 35 N. J. Eq. 437; *McMaster v. Scriven*, 85 Wis. 162.

<sup>391</sup> *Higginbotham v. Higginbotham*, 106 Ala. 314; *Bulger v. Ross*, 98 Ala. 267; *Kaenders v. Montague*, 180 Ill. 300; *Pen. Trust Co. v. Barker*, 116 Mich. 333; 74 N. W. 508; *Horn v. Pullman*, 72 N. Y. 269; *Varner v. Varner*, 16 Ohio, C. C. 386; *Whitelaws v. Sims*, 90 Va. 588.

The fact that testator's intentions, as expressed in the will, had existed for years prior to any claim of undue influence, is ordinarily sufficient to show that there was no undue influence;<sup>392</sup> and where testatrix had brought up a child and always had expressed her intention of providing for it by will, and then married again and left her property by will to her second husband, it was competent on the question of undue influence to show that testatrix, when married the first time, had made a will in favor of her first husband.<sup>393</sup> So it is proper to show that the disposition of property made by testatrix was in accordance with the understanding which had existed for years between herself and her husband, as to the disposition of their property to be made by the survivor of them, and entries in a bank book made years before by testatrix are admissible to prove and corroborate evidence of such understanding.<sup>394</sup>

#### §423. Declarations of testator.

The declarations of testator are generally objectionable as being mere hearsay. Where these declarations are narrations by testator of past events they are not competent for this reason, even where the events narrated constitute the acts of undue influence.<sup>395</sup>

But testator's declarations may be admissible on one of two grounds:

First. The declarations may be made at the very time of the execution of the will, so that in order to understand what was done at the execution it is necessary to hear evidence of

<sup>392</sup> Pen. Trust Co. v. Barker, 116 Mich. 333; 74 N. W. 508.

<sup>393</sup> Bulger v. Ross, 98 Ala. 267.

<sup>394</sup> Perry v. Moore, 66 Vt. 519.

<sup>395</sup> Calkins v. Calkins, 112 Cal. 296; Comstock v. Society, 8 Conn. 254; Jones v. Grogan, 98 Ga. 552; Mallery v. Young, 94 Ga. 804; Gwin v. Gwin, Ida. 48 Pac. 295; Stephenson v. Stephenson, 62 Io.

163; Bevelot v. Lestrade, 153 Ill. 625; Griffith v. Diffenderffer, 50 Md. 566; Shailer v. Bumstead, 99 Mass. 112; McFadin v. Catron, 138 Mo. 197; 120 Mo. 252; Doherty v. Gilmore, 136 Mo. 414; Middleditch v. Williams, 45 N. J. Eq. 726; Waterman v. Whitney, 11 N. Y. 157; Herster v. Herster, 122 Pa. St. 239; Kirkpatrick v. Jenkins, 96 Tenn. 85.

what the testator said. In such case these declarations are admissible under the theory of *res gestae*.

Second. The declarations of testator may be admissible as being in their very nature the best evidence by which that particular fact can be proved.

On this principle the testator's declarations, as to how he means to dispose of his property, are admissible.<sup>396</sup>

In some states a declaration by testator, after the execution of his will, that he had disposed of or meant to dispose of his property in a given manner is held admissible when the scheme of disposition stated by testator coincides with his will; but inadmissible when different.<sup>397</sup> This ruling is on the theory that declarations for the will tend to show the absence of undue influence, as testator is still satisfied with it when under no restraint, while, if his subsequent declarations are antagonistic to the will, it may be a willfully false statement of testator meant to mislead the heirs. So it is held that testator's declarations to the effect that he is not satisfied with the will as made, and intends to change it, are not admissible.<sup>398</sup>

Testator's declarations are also admissible to show the state and condition of his mind and feelings,<sup>399</sup> and the motives which actuate him in his disposition of his property.<sup>400</sup> Thus,

<sup>396</sup> *Harp v. Parr*, 168 Ill. 459; *In re Goldthorp's Estate*, 94 Io. 336; *McHugh v. Fitzgerald*, 103 Mich. 21; *Neel v. Potter*, 40 Pa. St. 483; *Kaufman v. Caughman*, 49 S. Car. 159; *Patterson v. Lamb*, 21 Tex. Cir. App. 512.

<sup>397</sup> *Kaufman's Estate*, 117 Cal. 288; *Calkin's Estate*, 112 Cal. 296; *Jones v. Grogan*, 98 Ga. 552; *Mallery v. Young*, 94 Ga. 804; *Muir v. Miller*, 72 Io. 585; *Goodbar v. Lidikey*, 136 Ind. 1.

<sup>398</sup> *Calkins v. Calkins*, 112 Cal. 296; *Manogue v. Herrell*, 13 App. D. C. 455; *Jones v. Grogan*, 98 Ga. 552; *Gwin v. Gwin*, — Ida. —; 48 Pac. 295; *Bevelot v. Lestrade*, 153 Ill. 625; *Dickie v. Carter*, 42 Ill. 376.

<sup>399</sup> *Coghill v. Kennedy*, 119 Ala. 641; *Canada's Appeal*, 47 Conn. 450; *Ball v. Kane*, 1 Penn. (Del.) 90; *Goldthorp's Estate*, 94 Ia. 336; *May v. Bradlee*, 127 Mass. 414; *Bush v. Delano*, 113 Mich. 321; *Seymour's Estate*, 111 Mich. 203; 69 N. W. 494; *Bush v. Bush*, 87 Mo. 480; *Waterman v. Whitney*, 11 N. Y. 157; *Robinson v. Hutchinson*, 26 Vt. 38; *Bryant v. Pierce*, 95 Wis. 331; *Campbell v. Barrera*, Tex. Cir. App. 32 S. W. 724.

<sup>400</sup> *Manatt v. Scott*, 106 Io. 203; *Lane v. Moore*, 151 Mass. 87; *King v. Holmes*, 84 Me. 219; *Hess's Will*, 48 Minn. 504; *Gordon v. Burris*, 141 Mo. 602; *Waterman v. Whitney*, 11 N. Y. 157; *Hindman v. Van Dyke*, 153 Pa. St. 243.

testator's declaration to the effect that he had already given his son as much as the rest would get serves to show that his leaving such son only ten dollars was not due to false accusation against his honesty made by his sisters to testator,<sup>401</sup> and testator's declarations are admissible to rebut evidence that he was happy and contented during the year before his death.<sup>402</sup>

In some cases the declarations of testator include both a statement of the acts of others and of his own feelings, so closely connected that it is impossible to separate them. In such case they are held admissible as far as they tend to show testator's motives and feelings and the like.<sup>403</sup>

A statement that "the clique made me get mad at you, and made me do what I did not intend to," was admitted.<sup>404</sup> So, where testator said: "I don't know anything about it; they got around me and confuddled me. It is to be done over again,"<sup>405</sup> or, "I have not made my will as I wanted to; I know I did wrong, but I could not help it."<sup>406</sup> But in such cases these declarations have no weight as evidence of the acts of undue influence, and the jury should be so instructed.<sup>407</sup>

The declarations of testator made at a considerable distance in time from the execution of the will, both before and after, are admissible in evidence as long as there is room for fair inference that they indicate testator's feelings, motives, and the like, at the time of making the will.<sup>408</sup>

<sup>401</sup> Cahill's Estate, 180 Pa. St. 131.

<sup>402</sup> Barney's Will, 71 Vt. 217.

<sup>403</sup> Hollingsworth's Will, 58 Io. 526; Hess's Will, 48 Minn. 504; Doherty v. Gilmore, 136 Mo. 414; Evan's Will, 123 N. Car. 113; 31 S. E. 267; Ray v. Ray, 98 N. Car. 566.

<sup>404</sup> Doherty v. Gilmore, 136 Mo. 414.

<sup>405</sup> Stephenson v. Stephenson, 62 Io. 163.

<sup>406</sup> Dennis v. Weeks, 51 Ga. 24.

<sup>407</sup> Doherty v. Gilmore, 136 Mo.

414; Herster v. Herster, 122 Pa. St. 239; Evan's Will, 123 N. Car. 113; 31 S. E. 267; Kaufman v. Caughman, 49 S. Car. 159; Peery v. Peery, 94 Tenn. 328, citing Beadles v. Alexander, 9 Bax. (Tenn.) 604; Lynch v. Lynch, 1 Lea. (Tenn.) 526; Maxwell v. Hill, 89 Tenn. 584.

<sup>408</sup> Moore v. Gubbins, 54 Ill. App. 163; Dye v. Young, 55 Io. 433; Parsons v. Parsons, 66 Io. 754; Sheehan v. Kearney, — Miss. —; 21 So. 41; Peery v. Peery, 94 Tenn. 328; Campbell v. Barrera, Tex. Cir. App.; 32 S. W. 724.

While the declarations of testator are, in the cases already given, admissible, it must be remembered that "such declarations have no weight unless introduced in connection with evidence tending to prove undue influence, mental incompetency or fraud at the time of the testamentary act."<sup>409</sup>

Whenever declarations of testator are put in evidence, without objection, the adversary party may introduce evidence of other declarations of testator to rebut those put in evidence,<sup>410</sup> and even if such declarations are resisted when offered in evidence, they may be opposed by contrary declarations of testator made before the execution of the will.<sup>411</sup> But a letter alleged to have been written by testator must first be shown to be such before it can be used in evidence as a written declaration.<sup>412</sup>

Declarations made at a time so remote from the date of the will as to throw no light upon the condition of testator at the time of the execution of the will are inadmissible.<sup>413</sup>

#### §424. Declarations of beneficiaries.

Declarations made by beneficiaries under the will are, as a general rule, inadmissible.

There are two classes of exceptions to this rule:

First. When the declarations of a beneficiary are so connected with the facts of the execution of the will or with other facts admissible in evidence, as to be part of the *res gestae*, or when such declarations are designed to influence the testator, and the fact of making them is itself a material fact, such declarations are admissible.<sup>414</sup> When the declara-

<sup>409</sup> *In re Langford*, 108 Cal. 608; citing *In re McDevitt*, 95 Cal. 17; *Waterman v. Whitney*, 11 N. Y. 157. (See *Hess's Will*, 31 Am. St. R. 665.)

<sup>410</sup> *Perry v. Moore*, 66 Vt. 519.

<sup>411</sup> *Kaenders v. Montague*, 180 Ill. 300.

<sup>412</sup> *Clements v. McGinn*, — Cal. (1893); 33 Pac. 920.

<sup>413</sup> *Garland v. Smith*, 127 Mo. 583. To the same point are *Doherty v. Gilmore*, 136 Mo. 414; *Cud-*

*ney v. Cudney*, 68 N. Y. 148; *Evan's Will*, 123 N. Car. 113; 31 S. E. 267; *Tallman's Estate*, 148 Pa. St. 286; *Tawney v. Long*, 76 Pa. St. 106; *Hoshauer v. Hoshauer*, 26 Pa. St. 404.

<sup>414</sup> *Higginbotham v. Higginbotham*, 106 Ala. 314; *Smith v. Henline*, 174 Ill. 184; *Wallis v. Luhring*, 134 Ind. 447; 34 N. E. 231; *Potter's Will*, 161 N. Y. 84; *Perret v. Perret*, 184 Pa. St. 131.

tions of legatee, offered in evidence, are claimed to have been made by him in a conversation with testator, it is error to exclude what testator said in such conversation.<sup>415</sup>

Second. Declarations of a beneficiary may be admitted on the theory that they are declarations against interest. In order to be admissible on this ground, such declarations must have been made after the interest arose, that is, after the execution of the will,<sup>416</sup> except where the declaration is in the nature of a threat to influence testator's action, when, of course, it is made before the will is executed.

If the declarations offered are admissible, as being against interest, the further question is presented as to their admissibility as affecting the validity of the will.

If the declaration offered in evidence was made by the only beneficiary under the will it is, of course, admissible, as the interest of declarant is the only interest that can be affected thereby.<sup>417</sup>

So statements by one joint devisee are admissible in evidence to affect the interest of his co-devisee where such interest is a joint one.<sup>418</sup>

Where beneficiaries under a will have several interests, the question of the admissibility of the declarations of one devisee presents some difficulty. On principle his declarations may be used against himself, but not against other devisees whose interest are diverse from his.

In some jurisdictions, as we have seen, a part of a will may be declared void on the ground of undue influence, leaving the rest in force. In such jurisdictions the declarations of a devisee may be admitted as affecting his interests alone.<sup>419</sup>

<sup>415</sup> *Potter's Will*, 161 N. Y. 84.

<sup>416</sup> *Ames's Will*, 51 Io. 596; *Garland v. Smith*, 127 Mo. 583.

<sup>417</sup> *Higginbotham v. Higginbotham*, 106 Ala. 314; *King v. Holmes*, 84 Me. 219; *Capper v. Capper*, 172 Mass. 262; 52 N. E. 98; *Garland v. Smith*, 127 Mo. 583; *Miller's Estate*, 179 Pa. St. 645; *Perret v. Perret*, 184 Pa. St. 131.

<sup>418</sup> *Smith v. Henline*, 174 Ill. 184.

(This declaration was made in the presence of the other devisee, and was a message to testator of the wishes of the two devisees, before a codicil was added.)

<sup>419</sup> Thus in a Georgia case the view was taken that the declaration of one legatee might be admitted against himself, but not against the other legatees. "The jury upon sufficient proof may strike out his leg-

In jurisdictions where the will is treated as a unit, as far as undue influence is concerned, the declarations of a devisee are not admissible where there are several whose interests are separate.<sup>420</sup>

Declarations, where admissible on the grounds already stated, must be considered further as to their nature. A declaration of a fact material or relevant to the issue is admissible. So is a declaration in the nature of a threat to exercise undue influence where the will was actually made of the sort threatened.<sup>421</sup> Thus, where the chief beneficiary

acy and establish the balance of the will, so that the will may be good as to one party and not good as to another." *Morris v. Stokes*, 21 Ga. 552. This statement was an obiter, as the evidence had been introduced so as to affect the interests of all. See Sec. 131.

<sup>420</sup> *Livingstone's Appeal*, 63 Conn. 68; *Hayes v. Burkram*, 67 Ind. 359; *McMillan v. McDill*, 110 Ill. 47; *Rogers v. Rogers*, 2 B. Mon. (Ky.) 324; *Phelps v. Hartwell*, 1 Mass. 71; *Shailer v. Bumstead*, 99 Mass. 112; *Thompson v. Thompson*, 13 O. S. 356; *Nussear v. Arnold*, 13 Serg. & R. (Pa.) 323; *Clark v. Morrison*, 25 Pa. St. 453; *Irwin v. West*, 81\* Pa. St. 157; *Forney v. Ferrell*, 4 W. Va. 729.

"If our mode of procedure in the settlement of the estates of deceased persons had permitted the appellant to take three appeals, one as against each legatee, and try each alone, or had permitted each legatee to have a separate trial of the issues raised by the appellant, then upon the trial of (C's) appeal it would have been quite permissible to the appellant to prove that, although (C) was claiming in the Superior Court his rights under the will as legatee, he yet had insisted before the probate court that his

mother was without capacity to make a will. In such case his contradictory declarations would have affected the only person whom he represented or for whom he was authorized to speak, namely, himself. But inasmuch as the law has compelled (A) and (F) to submit their several and individual rights of property in this estate to the issue of a proceeding which also determines those of (C), it in avoidance of great injustice, has suspended in their favor the operation of the rule that a party to a proceeding may prove the admissions of his adversary. Of necessity the use of C's admission against him would be to use it against all the other legatees." *Dale's Appeal*, 57 Conn. 127, followed in *Livingston's Appeal*, 63 Conn. 68, and distinguishing *Saunders's Appeal*, 54 Conn. 108, as a case in which the declarations admitted appeared on the record as an impeachment of his evidence already given that he never had exercised any influence over testator.

*Apparently contra*, *Gordon v. Burris*, 141 Mo. 602.

<sup>421</sup> *Higginbotham v. Higginbotham*, 106 Ala. 314; *Smith v. Henline*, 174 Ill. 184; *Miller's Estate*, 179 Pa. St. 645; *Perret v. Perret*, 184 Pa. St. 131.

under the will had said before its execution: "Mother's got to make a will some of these days. She is not going to live very long, and I am going to have all the property or raise hell," such declaration was admissible in evidence.<sup>422</sup>

Such a threat is not conclusive evidence of undue influence, and where the facts of execution show that the testator's act was free and voluntary, the will must be held to be valid.<sup>423</sup>

Where the threat to use influence may have referred to influence to do other things than make a will, it is not admissible.<sup>424</sup> And declarations of intention to injure contestant, which threats were never known to testatrix, are inadmissible.<sup>425</sup>

Declarations of a legatee, which merely express her opinion, that under other circumstances testatrix would have made a different will, are not admissible, or where admitted have no weight.<sup>426</sup>

#### §425. Miscellaneous declarations.

It has been held that the declarations of testator, which are merely a narrative of past conduct of others and past conversations between testator and others, are inadmissible as hearsay, although testator's evidence would be admissible if it were not impossible to obtain it.\*

Declarations made by those not legatees may be admissible as being part of the *res gestae*. Thus the declarations of a nurse that she would put certain relatives of testator out of the sickroom are admissible as tending to show a plan to control him absolutely, in order to induce him to make a will.<sup>427</sup>

Otherwise such declarations are mere hearsay, and not admissible. Thus, a letter written by testator's wife, whom he survived, to defendant, reflecting upon the character of defendant, and possibly on that of plaintiff, is inadmissible;

<sup>422</sup> Wallis v. Luhring, 134 Ind. 447; 34 N. E. 231.

<sup>423</sup> Peery v. Peery, 94 Tenn. 328.

<sup>424</sup> King v. Holmes, 84 Me. 219.

<sup>425</sup> Garland v. Smith, 127 Mo. 583.

<sup>426</sup> McHugh v. Fitzgerald, 103 Mich. 21; Renaud v. Pageot, 102 Mich. 568.

\* Gordon v. Burris, 141 Mo. 602.

<sup>427</sup> Coghill v. Kennedy, 119 Ala. 641; 24 So. 459.



so is a letter from a stranger to testator concerning the habits of his son-in-law.<sup>428</sup> And statements made by one not a beneficiary under a will, as to the intention of beneficiaries to exclude contestants from testator's presence, are inadmissible since they are hearsay.<sup>429</sup> The declarations of a subscribing witness, since deceased, concerning the sanity of testator is, of course, mere hearsay and inadmissible.<sup>430</sup>

#### §426. Nature of will and conduct of beneficiaries.

While an unjust will does not of itself raise a presumption of undue influence, the nature of the will may be considered by the jury upon the issue of undue influence as a circumstance.<sup>431</sup> Thus, the fact that a wife who was claimed to have procured a will by undue influence took less under the will than she would have had by law had testator died intestate, is of great weight in disproving undue influence.<sup>432</sup>

The will, however, can not show on its face whether it is fair or not. First, in order to determine the question of its justice or injustice it is necessary to know the relationship by consanguinity or affinity between beneficiaries, heirs and testator. Second, it is not a rule of law that a will which disinherits the relatives of testator in favor of strangers to his blood is an unnatural or unjust will.<sup>433</sup>

The question whether a will is natural and fair or unnatural and unjust, is a question of fact for the jury upon all

<sup>428</sup> *Miller v. Miller*, 187 Pa. St. 572; 41 Atl. 277.

<sup>429</sup> *Hurton v. Hurton*, 113 Mich. 634.

<sup>430</sup> *Cronshaw v. Johnson*, 120 N. Car. 270.

*Contra*, that it may be put in evidence where such witness has since died, to contradict his former testimony at probate. *Abraham v. Wilkins*, 17 Ark. 292.

<sup>431</sup> *Crandall's Appeal*, 63 Conn. 365; *McCommon v. McCommon*, 151 Ill. 428; 31 N. E. 491; *Pooler v. Christman*, 145 Ill. 405, overruling

*Rutherford v. Morris*, 77 Ill. 397; *Kaenders v. Montague*, 180 Ill. 300; *Hollenbeck v. Cook*, 180 Ill. 65; *White v. Cole*, — Ky. —; 47 S. W. 759; *Mitchell's Estate*, 43 Minn. 73.

<sup>432</sup> *Maynard v. Tyler*, 168 Mass. 107.

<sup>433</sup> *Denning v. Butcher*, 91 Io. 425; *Smith v. James*, 72 Io. 515; *Merriman's Appeal*, 108 Mich. 454; *Webber v. Sullivan*, 58 Io. 260; *McIntire v. McConn*, 28 Io. 480; *Smith v. James*, 72 Io. 515; *Blake v. Rourke*, 74 Io. 519.

the evidence in the case.<sup>434</sup> Accordingly evidence is admissible to show the actual conduct of beneficiaries and heirs respectively toward testator, and of his actual feelings towards them.<sup>435</sup> Thus, the fact that beneficiaries had advanced money to testator to aid him in emergencies is admissible;<sup>436</sup> and it is admissible, as tending to show undue influence, to introduce in evidence the fact that proponents had managed the property of testatrix for years; and further, the report made by testatrix as executrix of her husband's estate, which report was prepared by proponents, is admissible in evidence to show by the omission of some of said husband's property, which was in custody of proponents, that testatrix was not aware of her estate, and that proponent had concealed it from her.<sup>437</sup> But where such evidence is introduced, proponent may go further and explain the entire transaction. Thus, where the evidence showed that proponent had managed the estate of deceased for a long time, and in his dual capacity of such agent and of administrator of another estate, had compromised a note due deceased at twenty-five cents on the dollar, it was admissible for proponent to show that in this transaction he had acted under legal advice.<sup>438</sup>

The fact that two of the sons of testatrix tried to have her declared a lunatic and placed under guardianship is important as explaining their exclusion under the will.<sup>439</sup>

Where the facts of the dealings between the parties relate to a time so remote from the date of execution of the will that it can not be inferred that such dealings could or would affect the will, such facts are not admissible. Thus, evidence

<sup>434</sup> *Henry v. Hall*, 106 Ala. 84; *Burney v. Torrey*, 100 Ala. 157; *Eastis v. Montgomery*, 95 Ala. 486.

<sup>435</sup> *Higginbotham v. Higginbotham*, 106 Ala. 314; *Burney v. Torrey*, 100 Ala. 157; *Kaufman's Estate*, 117 Cal. 288; *Manatt v. Scott*, 106 Io. 203; *Denning v. Butcher*, 91 Ia. 425; *King v. Holmes*, 84 Me. 219; *McHugh v. Fitzgerald*, 103 Mich.

21; *Merriman's Appeal*, 108 Mich. 454; *Stewart v. Jordan*, 50 N. J. Eq. 733; *Hindman v. Van Dyke*, 153 Pa. St. 243; *Barney's Will*, 70 Vt. 352; *Slinger's Will*, 72 Wis. 22; *Bryant v. Pierce*, 95 Wis. 331.

<sup>436</sup> *Chandler v. Jost*, 96 Ala. 596.

<sup>437</sup> *Manatt v. Scott*, 106 Io. 203.

<sup>438</sup> *In re Hine*, 68 Conn. 551.

<sup>439</sup> *Pensyl's Will*, 157 Pa. St. 465.

that twenty-five years before the execution of the will contestants had worked for testator as farm hands is inadmissible.<sup>440</sup> So evidence of a contract between testator and proponent—testator's widow—entered into some time before their marriage was contemplated, by the terms of which she was to receive three dollars a week, her mother and brother were to live with them, and she was to receive the further sum of fifteen hundred dollars if she served him till his death, was inadmissible, no evidence being offered to show any connection between such contract and the will of testator made after his marriage,<sup>441</sup> and the fact that the beneficiary under a will drew out all the money of testator on deposit in the bank, on checks given him by testator, does not show undue influence.<sup>442</sup>

Evidence concerning the conduct and character of the beneficiaries is inadmissible where it does not tend to show the fact of undue influence or its absence. Thus, evidence that the person who was claimed to have exerted undue influence was stingy and miserly does not so tend to show that she influenced testator to make a will in favor of her son as to be admissible.<sup>443</sup> So, evidence that the chief legatee speculated on 'change is inadmissible.<sup>444</sup>

### §427. Facts explanatory of the nature of the will.

As the nature of the will may be considered by the jury on the issue of undue influence, facts and circumstances which tend to show that the will was either just or unjust are admissible. Evidence is admissible to explain the actual relations existing between testator and the legatees under the will, and the relations between testator and the natural objects

<sup>440</sup> *Maddox v. Maddox*, 114 Mo. 35.

<sup>441</sup> *Smith v. Smith*, 168 Ill. 488.

<sup>442</sup> *Doherty v. Gilmore*, 136 Mo. 414.

<sup>443</sup> *Calkins v. Calkins*, 112 Cal. 296; 44 Pac. 577.

<sup>444</sup> *Garland v. Smith*, 127 Mo. 583.

of his bounty.<sup>445</sup> Thus, it is proper to show where the next of kin were excluded in favor of strangers to the blood, that these "strangers" had been brought up from extreme youth by testator as a member of his household.<sup>446</sup> Thus, in order to show the reason for the hostile feeling of testator toward a grandchild it was proper to show that testator and the parents of this grandchild had engaged in litigation,<sup>447</sup> and similar facts may be introduced to show testator's feeling towards a legatee.<sup>448</sup>

Where contestant claimed that he had been falsely accused of bigamy to testator, it was competent to show that such charge was true.<sup>449</sup> But where testator and his daughter had quarreled just before the will was made, it was held immaterial what the ground of the quarrel was, it not appearing that the quarrel was incited by beneficiary.<sup>450</sup>

In some cases it is held proper to show the financial standing of children of testator on other natural objects of testator's bounty.<sup>451</sup> In other cases such evidence is held to be immaterial and inadmissible,<sup>452</sup> and the fact that the beneficiaries under a will who were not the relatives of testatrix were supported by her in her lifetime was held inadmissible as tending to show undue influence.<sup>453</sup>

In order to show that the will was either just or unjust, it is proper to show how testator obtained the property of

<sup>445</sup> *Clough v. Clough*, 10 Colo. App. 433; *Henry v. Hall*, 106 Ala. 84; *Staser v. Hogan*, 120 Ind. 216; *Denning v. Butcher*, 91 Io. 425; *Allison's Estate*, 104 Io. 130; *Marx v. McGlynn*, 88 N. Y. 357; *Miller v. Miller*, 187 Pa. St. 572; *Slinger's Will*, 72 Wis. 22; *Bryant v. Pierce*, 95 Wis. 331.

<sup>446</sup> *Henry v. Hall*, 106 Ala. 84.

<sup>447</sup> *Estes v. Bridgeforth*, 114 Ala. 221.

<sup>448</sup> *Canada's Appeal*, 47 Conn. 450.

<sup>449</sup> *Torrey v. Burney*, 100 Ala. 157.

<sup>450</sup> *Kaufman's Estate*, 117 Cal. 288.

<sup>451</sup> *Barbour v. Moore*, 10 App. D. C. 30; *Gurley v. Park*, 135 Ind. 440; *Manatt v. Scott*, 106 Io. 203.

<sup>452</sup> *Kaufman's Estate*, 117 Cal. 288.

<sup>453</sup> *Messner v. Elliott*, 184 Pa. St. 41; *Henry v. Hall*, 106 Ala. 84, can be distinguished from *Messner v. Elliott* as a case in which testator not only supported the beneficiary, but occupied a quasi-parental relation to him.

which he is making disposition by will.<sup>454</sup> Thus, it is proper to show that testator obtained his property from his wife and her sister by deed, and that at the time they deeded it to him they expressed a desire that he should leave it to the persons to whom he actually did devise it.<sup>455</sup>

But evidence of this nature is, of course, not conclusive, as the mere fact that the will is unjust is not of itself evidence of undue influence.<sup>456</sup>

### §428. Condition of testator.

As the question on the issue of undue influence is not whether the influence exerted would have overpowered the will of the average man, but whether it did actually overpower the will of the testator, evidence of testator's age, health and physical condition is admissible,<sup>457</sup> and so is evidence of his strength of mind and memory,<sup>458</sup> and of the fact that testator has been under guardianship,<sup>459</sup> and of testator's extreme cruelty, disgusting eccentricities and the like.<sup>460</sup>

It is admissible to show that testator was intoxicated when he made his will, even if the intoxication was not such as to incapacitate him, as it would affect his susceptibility to the influence of others.<sup>461</sup>

Evidence that testator ceased taking care of his property as he had been doing is admissible as tending to show greater susceptibility to the undue influence of others,<sup>462</sup> and it may

<sup>454</sup> *Gunn's Appeal*, 63 Conn. 254; *Ruffino's Estate*, 116 Cal. 304; *Glover v. Hayden*, 4 Cush. (Mass.) 580; *Belknap v. Robinson*, 67 N. H. 194; 29 Atl. 450.

<sup>455</sup> *Gunn's Appeal*, 63 Conn. 254.

<sup>456</sup> *Ruffino's Estate*, 116 Cal. 304.

<sup>457</sup> *Olmstead v. Webb*, 5 App. D. C. 38; *Pooler v. Christman*, 145 Ill. 405, affirming 45 Ill. App. 334; *Sullivan v. Foley*, 112 Mich. 1; *Hess's Will*, 48 Minn. 504; *Gordon v. Burris*, 141 Mo. 602; *Perret v. Perret*, 184 Pa. St. 131; *Peery v. Peery*, 94 Tenn. 328; *McClure v. McClure*, 86 Tenn. 173.

<sup>458</sup> *Messner v. Elliott*, 184 Pa. St. 41; *Tallman's Estate*, 148 Pa. St. 286; *Patten v. Cilley*, 67 N. H. 520; *Foster v. Dickinson*, 64 Vt. 233.

<sup>459</sup> *Lamb v. Lippincott*, 115 Mich. 611.

<sup>460</sup> *Rivard v. Rivard*, 108 Mich. 98; *Bittner v. Bittner*, 65 Pa. St. 347.

<sup>461</sup> *Smith's Executor v. Smith*, 67 Vt. 443.

<sup>462</sup> *Bryant v. Pierce*, 95 Wis. 331.

be shown that after the execution of the will testator was ignorant of its contents.<sup>463</sup>

On the other hand, evidence that testator acquiesced in his will after its execution, when free from undue influence, and capable of revoking, is admissible, not as showing a ratification, for this could be done only by republication, but as showing that the will was made without undue influence in the first instance.<sup>464</sup> Of course if the will were executed under undue influence the act of retaining in testator's possession would not give it validity. Republication would be necessary.<sup>465</sup>

Where the fact that testator did not destroy his will after the alleged undue influence ceased is used to disprove undue influence, it is competent to show that testator, by reason of his physical condition, defective memory, and the like, was unable to revoke it.<sup>466</sup> As tending to show that the will was not in the custody of testator, and that he could not revoke it, evidence that the envelope in which it was placed was endorsed in the handwriting of a beneficiary, who was also the husband of the principal legatee, is admissible.<sup>467</sup>

#### §429. Circumstances of execution.

As the circumstances attending the execution of a will are especially valuable in determining whether undue influence

<sup>463</sup> "There was evidence tending to show that after its execution he was not aware of its contents. This was competent." *Barney's Will*, 70 Vt. 352, citing *Shaler v. Bumstead*, 99 Mass. 112.

<sup>464</sup> *In re Coleman's Estate*, 185 Pa. St. 437; *Deck v. Deck* (Wis.) (1900), 82 N. W. 293. To the same effect are *Garrett v. Heflin*, 98 Ala. 615; *Tallman's Estate*, 148 Pa. St. 286; *Hoshauer v. Hoshauer*, 26 Pa. St. 404; *Kaul v. Brown*, 17 R. I.

14; *Peery v. Peery*, 94 Tenn. 328, citing *Floyd v. Floyd*, 49 Am. Dec. 626; *Irish v. Smith*, 11 Am. Dec. 648.

<sup>465</sup> *Chaddick v. Haley*, 81 Tex. 617.

<sup>466</sup> *Barbour v. Moore*, 10 App. D. C. 30 (where will was in custody of husband of beneficiary); *Haines v. Hayden*, 95 Mich. 332; *Porter v. Throop*, 47 Mich. 313.

<sup>467</sup> *Barbour v. Moore*, 10 App. D. C. 30.

existed then or not, such circumstances are admissible in evidence.<sup>468</sup>

The fact that at the time of the execution of the will testator was under the actual physical control of beneficiaries, and that the natural objects of testator's bounty were excluded from testator's presence, is admissible and usually of great weight.<sup>469</sup> Evidence of such conduct is said by some courts to raise a presumption of undue influence.<sup>470</sup>

Such evidence may, of course, be contradicted or explained away by proponent. Thus, where contestants introduced evidence to show that contestant, who was testator's father, was not sent for during testator's sickness, when the will was made, because proponent, testator's wife, did not want him there, it was held competent for the wife to show that she invited him to be present and that he refused to come, as he was too old, and so asked another person to go in his place.<sup>471</sup>

The subscribing witness may testify that at the execution of the will, he saw no sign of undue influence.<sup>472</sup>

However, the mere fact that the will was executed secretly does not create a presumption of undue influence.<sup>473</sup> But while direct evidence, as to the facts and circumstances of execution, the exclusion of friends and relatives from testator, and the like, is admissible, hearsay evidence of such facts is, of course, incompetent.<sup>474</sup>

<sup>468</sup> *Wilcoxon v. Wilcoxon*, 165 Ill. 454; *King v. Holmes*, 84 Me. 219; *In re Bromley's Estate*, 113 Mich. 53; 71 N.W. 323; *Sullivan v. Foley*, 112 Mich. 1; *Bennett v. Bennett*, 50 N. J. Eq. 439.

<sup>469</sup> *Coghill v. Kennedy*, 119 Ala. 641; 24 So. 459; *Frye v. Jones*, — Ky. —; 24 S. W. 5; *Green's Will*, 67 Hun, 527; *Seymour's Estate*, 111 Mich. 203; 69 N. W. 494; *Claffey v. Ledwith*, 56 N. J. Eq. 333; *Chappell v. Trent*, 90 Va. 849; *Smith v. Smith*, 67 Vt. 443; 32

Atl. 255; *Boisaubin v. Boisaubin*, 51 N. J. Eq. 252.

<sup>470</sup> *Chappell v. Trent*, 90 Va. 849.

<sup>471</sup> *Allison's Estate*, 104 Io. 130.

<sup>472</sup> *Taylor v. Pegram*, 151 Ill. 106; 37 N. E. 837.

<sup>473</sup> *Tibbe v. Kamp* (Mo.) (1900), 55 S. W. 440; 54 S. W. 879; *Fox v. Martin*, 104 Wis. 581; 80 N. W. 921; *Logan's Estate*, 195 Pa. St. 282.

<sup>474</sup> *Hurton v. Hurton*, 113 Mich. 634; 71 N. W. 1078.

### §430. Opinion evidence.

If the witness first details the facts upon which he bases his opinion he may be asked his opinion whether the testator was under restraint when he made his will.<sup>475</sup> A beneficiary, however, can not be asked his opinion as to the injustice of the will, for this is peculiarly a question for the jury.<sup>476</sup>

Evidence that "something in the manner or conduct" of third persons made witness believe that testator was under their control was inadmissible where the evidence did not show that testator was present, nor what this "manner or conduct" was,<sup>477</sup> and evidence that the person who was claimed to exert undue influence "always looked shy, and was generally confused," and looked as if he wanted to do something that he was ashamed to do, was inadmissible where not part of the *res gestae*.<sup>478</sup>

## V—EVIDENCE OF ALTERATION AND PARTIAL SPOILIATION.

### §431. Burden of proof.

Where a will is offered for probate, with alterations apparent upon its face, it is often said that the burden of proof is upon the parties offering it for probate, to show that the alterations were made before execution.<sup>479</sup> This proposition means first, that in every will the burden of proof is upon proponents to establish the execution in the form in which it is offered for probate;<sup>480</sup> and second, that in cases of certain alterations the presumption arises that they were made after execution.

<sup>475</sup> Jones v. Grogan, 98 Ga. 552; McLean v. Clark, 47 Ga. 24; Howell v. Howell, 59 Ga. 145; Rollwagen v. Rollwagen, 63 N. Y. 504.

<sup>476</sup> Aylward v. Briggs, 145 Mo. 604; 47 S. W. 510.

<sup>477</sup> Jones v. Grogan, 98 Ga. 552.

<sup>478</sup> *In re Merriman's Appeal*, 103 Mich. 454; 66 N. W. 372.

<sup>479</sup> Cooper v. Bockett, 4 Moore. P. C. C. 419; 10 Jur. 931; Lushington v. Onslow, 6 Not. Cas. 183; Doe v. Palmer, 15 Jur. 836; *In re Lawson*, 25 Nova Scotia, 454; Camp v. Shaw, 52 Ill. App. 241, also 163 Ill. 144; *In re Wilson*, 8 Wis. 171.

<sup>480</sup> Holman v. Riddle, 8 O. S. 384.



## §432. Presumptions.

An alteration in a will is, as a general rule, presumed, in the absence of evidence, to have been made by the testator after the execution of the will.<sup>481</sup> This rule is different from that often said to obtain in the case of other written instruments for this reason: In the case of other instruments it is a civil wrong, if not a crime, to alter a written instrument. In case of wills the testator may alter the will as much as he pleases, without wronging anyone. "There is no crime in a testator choosing to make alterations in his will, but he can not reserve to himself a power of making future testamentary gifts by unattested instruments."<sup>482</sup>

This presumption obtains where the will is in the custody of testator and subject to his control.<sup>483</sup> But where the evidence shows that the will was in the custody of those who were interested in suppressing it, alterations apparent on the will are not ordinarily presumed to have been made by testator.<sup>484</sup>

At least one important qualification must be made to this general rule of presumption. If the words, claimed to be an alteration, are necessary to the sense of the will, the law will presume that they were accidentally omitted in drafting the will, and were inserted before execution.<sup>485</sup>

The New York courts seem to entertain a contrary view, and to hold that an interlineation in the handwriting of testator, reasonable and fair, and without anything suspicious about it, except that it is an interlineation, is not presumed to have been made after execution. "Where an interlineation on a will is fair upon its face, and it is entirely unexplained,

<sup>481</sup> *Cooper v. Bockett*, 4 Moore, P. C. C. 419; *Goods of Sykes*, L. R. 3 P. 26; *Burgoyne v. Shawler*, 1 Rob. 5; *In re Lawson*, 25 N. S. 454; *Camp v. Shaw*, 52 Ill. App. 241; *Toebe v. Williams*, 80 Ky. 661; *Baptist Church v. Robbarts*, 2 Pa. St. 110.

<sup>482</sup> *Williams v. Ashton*, 1 Johns & H. 115.

<sup>483</sup> See cases cited in last two notes.

<sup>484</sup> *Miles's Appeal*, 68 Conn. 237; *Bennett v. Sherrod*, 3 Ired. (N. Car.) 303.

<sup>485</sup> *Goods of Cadge*, L. R. 1 P. & D. 543; *Goods of Bist*, L. R. 2 P. 214; *Goods of Adams*, L. R. 2 P. 367; *Martin v. King*, 72 Ala. 354.

there being no circumstances whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution.”<sup>486</sup>

### §433. Evidence contradicting or supporting presumption.

These presumptions, in cases where they obtain, are *prima facie* only, and may be rebutted. A certificate in the attestation clause that the alterations were made before execution is admissible to prove such fact, and, if genuine, is conclusive.<sup>487</sup>

Extrinsic evidence from those who saw the will at the time of execution is admissible to show whether the alterations were made before execution or not.<sup>488</sup>

According to the English authorities declarations of testator before or at the time of the execution of the will are admissible to show whether the alterations then existed;<sup>489</sup> but his declarations after the execution of his will as to the time when the alterations were made is inadmissible.<sup>490</sup>

Expert evidence based on the appearance of the will, the color of the ink, the handwriting, and the like, is admissible to show whether the alteration was made before or after execution.

## VI—EVIDENCE OF LOST AND SPOLIATED WILLS.

### §434. Degree of proof necessary.—Burden of proof.

The statutes upon the subject of lost wills are generally framed upon the theory that within limits of safety the spoliator of a will should be prevented from gaining anything by

<sup>486</sup> Grossman v. Crossman, 95 N. Y. 145.

<sup>487</sup> Lurie v. Radnitzer, 166 Ill. 609; Crossman v. Crossman, 95 N. Y. 145.

<sup>488</sup> Goods of Hindmarch, L. R. 1 P. 307; Wright v. Wright, 5 Ind. 389.

<sup>489</sup> Doe v. Palmer, 16 Q. B. 747; Goods of Sykes, L. R. 3 P. 23.

<sup>490</sup> Goods of Adamson, L. R. 3 P. 253.

*Contra*, Ravenscroft v. Hunter, 2 Hagg, 65.

his wrongful act, and these statutes are construed by the courts as being *in odium spoliatoris*.<sup>491</sup>

It is not necessary to prove the contents of the lost will literally, but a substantial proof of such contents is all that is required,<sup>492</sup> and if only a part of the lost will can be proved such part may be admitted to probate.<sup>493</sup>

It is clearly settled that the burden of proof in probate of lost wills is upon the parties offering such lost will for probate.<sup>494</sup> To what degree this burden of proof extends is not so well settled. The courts exact a greater amount of evidence than a preponderance. In some cases it is said that the evidence must be "clear";<sup>495</sup> in others it is said that the evidence must be "full and satisfactory";<sup>496</sup> in still other cases it is put in the superlative degree, and it is said that the proof must be "very clear"; or the "clearest, most conclusive and satisfactory."<sup>497</sup> In other cases it is said that the proof must be "beyond all reasonable doubt."<sup>498</sup> This degree has been held too high in Alabama.<sup>499</sup> In other cases it is said that it should be "free from all doubt."<sup>500</sup> But while exacting a high degree of proof the courts hold that upon the facts of the destruction, circumstantial evidence alone may be sufficient to justify a finding for the will.<sup>501</sup>

<sup>491</sup> *Anderson v. Irwin*, 101 Ill. 411; *Pomery v. Benton*, 77 Mo. 64; *Lambie's Estate*, 97 Mich. 49; *Banning v. Banning*, 12 O. S. 437; *Brown v. Brown*, 10 Yerg. (Tenn.) 84.

<sup>492</sup> *Jones v. Casler*, 139 Ind. 382; *Banning v. Banning*, 12 O. S. 437.

<sup>493</sup> *Jones v. Casler*, 139 Ind. 382; *Cahill v. Owens*, 2 Gaz. (Ohio), 89.

<sup>494</sup> *Newell v. Homer*, 120 Mass. 277; *Graham v. O'Fallon*, 3 Mo. 507; *Coddington v. Jenner*, 57 N. J. Eq. 528; 41 Atl. 874; affirmed, 45 Atl. 1090.

<sup>495</sup> *Coddington v. Jenner*, 57 N. J. Eq. 528; 41 Atl. 874; affirmed, 45 Atl. 1090.

<sup>496</sup> *Morris v. Swaney*, 7 Heisk (Tenn.), 591; *Dudley v. Wardner*,

41 Vt. 59; *McNeely v. Pearson* (Tenn. Ch. App.), 42 S. W. 165, "clear and satisfactory."

<sup>497</sup> *Kitchens v. Kitchens*, 39 Ga. 168; *Vining v. Hall*, 40 Miss. 83; *Buchanan v. Matlock*, 8 Hump. (Tenn.) 390.

<sup>498</sup> *Woodward v. Goulstone*, 11 App. Cas. 469.

<sup>499</sup> *Sleggs v. Horton*, 82 Ala. 352; *Apperson v. Cottrell*, 3 Porter (Ala.), 51.

<sup>500</sup> *Johnson's Will*, 40 Conn. 587; *Davis v. Sigourney*, 8 Met. (Mass.), 487.

<sup>501</sup> *Schultz v. Schultz*, 35 N. Y. 653; *Harris v. Harris*, 10 Wash. 555.

**§435. Witnesses.**

In some jurisdictions it is required that the contents of a lost will must be proved by the testimony of two credible witnesses, as a condition precedent to its admission to probate.<sup>502</sup> Where such a rule is in force, and the beneficiaries under a will are held to be incompetent witnesses at probate, the contents of a lost will can not be proved by the sole beneficiary and by a disinterested party.<sup>503</sup> Nor can the declarations of testator be offered as a substitute for one witness.<sup>504</sup>

**§436. Evidence of existence of will.**

In order to establish a lost will the evidence must first disclose the fact that such will was once in existence. Direct evidence of those who saw the will before its loss or destruction is of course desirable.<sup>505</sup>

**§437. Declarations of testator as to existence of will.**

In the absence of such evidence, however, proponents are not precluded from establishing the will, but may introduce other evidence. The weight of authority is that the declarations of testator are admissible as tending to prove the existence of the will.<sup>506</sup>

<sup>502</sup> Jones v. Casler, 139 Ind. 382; Keesy v. Dimon, 91 Hun. 642; Harris v. Harris, 10 Wash. 555.

<sup>503</sup> Keesy v. Dinion, 91 Hun. 642.

<sup>504</sup> Clark v. Turner, 50 Neb. 290; Harris v. Harris, 10 Wash. 555.

<sup>505</sup> Kotz v. Belz, 178 Ill. 434.

<sup>506</sup> Sugden v. St. Leonards, 1 Prob. Div. 154; Keen v. Keen, L. R. 3 Prob. & Div. 105; Woodward v. Goulstone, 11 App. Cas. 469; Harris v. Knight, 15 Prob. Div. 170; Goods of Ball, 25 L. R. Ir. 556; Boudinot v. Bradford, 2 Dall. 266; Southworth v. Adams, 11 Biss. 256; Weeks v. McBeth, 14 Ala. 474; Johnson's Will, 40 Conn. 587; Dawson v. Smith, 3 Houst. (Del.), 335; Paterson v. Hickey, 32 Ga. 156; *In re*

Page, 118 Ill. 576; Steele v. Price, 5 B. Mon. (Ky.), 58; Collagan v. Burns, 57 Me. 449; Pickens v. Davis, 134 Mass. 252; Commonwealth v. Trefethen, 157 Mass. 180; Williams v. Williams, 142 Mass. 515; Lane v. Moore, 151 Mass. 87; Lawyer v. Smith, 8 Mich. 412; Lambie's Estate, 97 Mich. 49; Harring v. Allen, 25 Mich. 505; Collyer v. Collyer, 110 N. Y. 481; Knapp v. Knapp, 10 N. Y. 276; Behrens v. Behrens, 47 O. S. 323; Youndt v. Youndt, 3 Grant's Cas. (Pa.), 140; Foster's Appeal, 87 Pa. St. 67; Durant v. Ashmore, 2 Rich. Law (S. Car.), 184; Minkler v. Minkler, 14 Vt. 125; Valentine's Will, 93 Wis. 45.

### §438. Proof of execution.

The execution of a will must, as a rule, be proved with the same strictness with which the execution of an ordinary will must be proved,<sup>507</sup> except that from the necessities of the case such proof of handwriting as is admissible in probate of ordinary wills is of course impossible.<sup>508</sup>

Generally, the execution should be proven by the subscribing witnesses if accessible; if not, some one who saw the will executed, other than a subscribing witness may testify.<sup>509</sup> The declarations of testator can not be admitted in evidence to show execution in the manner prescribed by law.<sup>510</sup>

### §439. When presumption of execution arises.

But where the evidence discloses that the will was in the possession of a party interested in suppressing the will, it is held that a presumption arises that the will which such interested party has suppressed was executed in the form prescribed by law.<sup>511</sup>

Where the will was admitted to probate before it was lost, evidence of that fact dispenses with proof of execution, as the presumption of due execution is then conclusive,<sup>512</sup> and the fact of admission to probate is sufficiently established by the testimony of an abstracter of title that the will was filed and recorded in the probate court.<sup>513</sup>

### §440. Evidence of contents.

After the existence and execution of the lost will have been proved, evidence of the contents is admissible. While this is

<sup>507</sup> *Lasance's Estate*, 7 Ohio Dec. 246; 5 Ohio, N. P. 20.

<sup>508</sup> *In re Page*, 118 Ill. 576; *Harris v. Harris*, 10 Wash. 555.

<sup>509</sup> *Lasance's Estate*, 7 Ohio Dec. 246; 5 Ohio, N. P. 20.

<sup>510</sup> *McDonald v. McDonald*, 142 Ind. 55; *Mercer v. Mackin*, 14 Bush. (Ky.) 434; *Cheever v. North*, 106 Mich. 390.

<sup>511</sup> *Anderson v. Irvin*, 101 Ill.

411; *Lambie's Estate*, 97 Mich. 49.

<sup>512</sup> *Kotz v. Belz*, 178 Ill. 434 (a will burned in the Chicago fire); *Marshall v. Marshall*, 42 S. Car. 436 (a will destroyed during the Civil War); *Counts v. Wilson*, 45 S. Car. 571; *McNeely v. Pearson* (Tenn. Ch. App.), affirmed Sup. Ct. 42 S. W. 165.

<sup>513</sup> *Kotz v. Belz*, 178 Ill. 434.

the logical order of evidence, it is not, however, necessary that it follow this order in actual time of introduction. It is sufficient if all the necessary evidence is introduced before the case is submitted to the jury.\*

After the loss of the original has been proved, secondary evidence may be introduced to show its contents. The weight of authority in America is that there are degrees in secondary evidence, and that secondary evidence of the highest degree should either be offered, or its absence accounted for before evidence of a lower degree is offered. Thus, if a copy of the will is in existence, and it can be identified as a copy by one who has compared it with the original, such copy should be introduced in evidence to prove the contents of the original will.<sup>514</sup> So, where the will was recorded for probate purposes, during the life of testator, such record is admissible in evidence, though the clerk who made the record and compared his copy with the original is dead.<sup>515</sup>

It was held, however, where the will was recorded, in a suit for its construction, merely as a matter of formal certification of evidence in that suit that such record was not of itself admissible to establish the existence and contents of the will.<sup>516</sup>

The testimony of one who read over the will is admissible to show its contents, and such witness may use a certified copy of the will to refresh his memory, where the will was lost after probate, and, therefore, such certified copy could be had.<sup>517</sup> But the evidence of a witness who saw the will, but did not read it, is, of course, of no effect whatever as to its contents.<sup>518</sup> And a witness to whom testator read over the will can not testify to its contents, as his testimony would be either hear-

\* *Marshall v. Marshall*, 42 S. Car. 436, 20 S. E. 298.

<sup>514</sup> *Coddington v. Jenner*, 57 N. J. Eq. 528; 41 Atl. 874; affirmed, 45 Atl. 1090; *Lasance's Estate*, 5 Ohio, N. P. 20; 7 Ohio Dec. 246.

<sup>515</sup> *Harris v. Harris*, 10 Wash. 555. In this case the deputy clerk who recorded the will was also one of the subscribing witnesses thereto,

and testator had spoken of this record of his will in his lifetime.

<sup>516</sup> *McNeely v. Pearson* (Tenn. Ch. App.), 42 S. W. 165, affirmed by Sup. Ct.

<sup>517</sup> *McNeely v. Pearson* (Tenn. Ch. App.), 42 S. W. 165.

<sup>518</sup> *Harris v. Harris*, 10 Wash. 555.

say, or else evidence of the declarations of testator concerning the contents of his will, unless the circumstances are such as to make testator's declarations admissible.<sup>519</sup>

#### §441. Declarations of testator as to contents.

The rule in force in most jurisdictions is that the declarations of testator are admissible to establish the contents of the lost will in whole or in part.<sup>520</sup>

In some states it is required by statute that the contents of a lost will shall be established by the testimony of at least two witnesses before it can be admitted to probate.<sup>521</sup> Where such rule is in force the declarations of testator are held inadmissible to establish the contents of the written will, at least where the direct evidence of two witnesses who saw the will is not offered.<sup>522</sup>

In the cases cited but little attention was given to the question whether the declarations of testator are sufficient to establish the contents of the will, when such declarations are the sole evidence upon the subject. It seems to be settled that such declarations are admissible to corroborate other evidence of the contents.<sup>523</sup> But where this question has been passed upon specifically by the courts, it has been held that the declarations of testator taken alone are not sufficient to establish the contents of the lost will, at least where there is no evidence to show that the will was fraudulently suppressed.<sup>524</sup>

<sup>519</sup> Clark v. Turner, 50 Neb. 290.

<sup>520</sup> McDonald v. McDonald, 142 Ind. 55; Schnee v. Schnee, 61 Kan. 643; 60 Pac. 738; Cheever v. North, 106 Mich. 390; Lambie's Estate, 97 Mich. 49; Lautenschlager v. Lautenschlager, 80 Mich. 285; Penny v. Croul, 87 Mich. 15; Brown v. Bell, 58 Mich. 58; Schofield v. Walker, 58 Mich. 96; Hope's Appeal, 48 Mich. 518; Lane v. Hill, 68 N. H. 275, 398; Valentine's Will, 93 Wis. 45.

<sup>521</sup> Jones v. Casler, 139 Ind. 382; Harris v. Harris, 10 Wash. 555. See Sec. 435.

<sup>522</sup> Clark v. Turner, 50 Neb. 290; Harris v. Harris, 10 Wash. 555.

<sup>523</sup> Sugden v. St. Leonard's, L. R. 1, P. 154; Southworth v. Adams, 11 Biss. (U. S.), 256; *In re* Page, 118 Ill. 576; Hope's Appeal, 48 Mich. 518; Lambie's Estate, 97 Mich. 49.

<sup>524</sup> Quick v. Quick, 3 Sw. & T. 442; Woodward v. Goulstone, 11 App. Cas. 469; Chisholm v. Ben. 7 B. Mon. (Ky.), 408; Mercer v. Mackin, 14 Bush. (Ky.), 434; Clark v. Turner, 50 Neb. 290; Clark v. Morton, 5 Rawle (Pa.), 235.

While the question of the sufficiency of the unsupported declarations of testator to establish the contents of a lost will has not been adjudicated it has been discussed by the courts to some extent.<sup>525</sup>

#### §442. Evidence of circumstances of destruction.

In the absence of any evidence, as to the circumstances of destruction, a presumption arises that a will which was in the custody of testator, and which can not be found at his death, was destroyed by him with intention of revoking it.<sup>526</sup> But where the will was not in the custody of testator, the fact that it can not be found at his death does not raise the presumption that he destroyed it with the intention of revoking it, and, accordingly, evidence of the custody of the will is always admissible.<sup>527</sup>

But where the will was kept in the custody of the drafts-

<sup>525</sup> In *Clark v. Turner*, 50 Neb. 290, the court said:

"*Chisholm v. Ben* [7 B. Mon. (Ky.) 408] intimated that on adequate proof that the will had been fraudulently suppressed by the heirs, the evidence referred to might be sufficient by virtue of the maxim, '*omnia praesumuntur contra spoliatores*.' This maxim is not easy to apply. It has sometimes been held to justify the production of slighter proof than would otherwise be required. Its most frequent application is for the purpose of allowing secondary evidence. It would certainly be very dangerous to extend it so far as to relieve a party charged with proving the contents of a written instrument from all obligation to produce some evidence of a competent character; but this phase of the case was not submitted to the jury by any instruction given or asked, at least so far as the contents of the will are concerned. The general verdict for the contest-

ants precludes us from examining the evidence on this point on the theory that spoliation by the contestant was established. The policy of the statute of wills, like the statute of frauds, is that it is better that occasional injustice should be done in exceptional cases upon failure of legal proof, than that transactions within the statute should in all cases be left to the uncertainties of parol evidence. So the courts in giving effect to the statutes should pursue the same policy and should avoid meeting hard cases by adopting rules which generally applied would defeat the objects of the legislature."

<sup>526</sup> *Gardner v. Gardner*, 177 Pa. St. 218; *Harris v. Harris*, 10 Wash. 555; *Steinke's Will*, 95 Wis. 121.

<sup>527</sup> *Coddington v. Jenner*, 57 N. J. E. 528; 41 Atl. 874, affirmed 45 Atl. 1090; *Gardner's Estate*, 164 Pa. St. 420; *Harris v. Harris*, 10 Wash. 555; *Steinke's Will*, 95 Wis. 121.



man in his safe, to which testator had access, and which he had frequent opportunities to destroy, it was held that this was insufficient to overcome the presumption of destruction by testator, arising from its non-production.<sup>528</sup>

#### §443. Declarations of testator as to circumstances of destruction.

The declarations of testator are held to be admissible in evidence, both to rebut the presumption of revocation which arises from the disappearance of a will which was in testator's custody, and to strengthen such presumption.<sup>529</sup> Thus, the declarations of testatrix made within three days of her death, that her will was still in existence, and that the notary with whom she had originally left it, still had it, were held sufficient to rebut any presumption of revocation arising from the fact that the will could not be found, and that the notary testified that he did not have the will, and believed that testatrix had it last.<sup>530</sup>

<sup>528</sup> Keesy v. Dimon, 91 Hun, 642. (The court was further strengthened in this conclusion by the fact that testator had subsequently made and revoked another will.)

<sup>529</sup> Lambie's Estate, 97 Mich. 49; Behrens v. Behrens, 47 O. S. 323; Gardner's Estate, 164 Pa. St. 420; Harris v. Harris, 10 Wash. 555; Steinke's Will, 95 Wis. 121.

"Where, as here, it is established that the testatrix properly executed a valid will, and the same was last known to be in her possession, but can not be found on her death, there is a *prima facie* presumption that she destroyed it with the intention of revoking it, but such presumption may be overcome by competent evidence. . . Of course, if such subsequent declarations are admissible in evidence to overcome

such presumption they are also admissible to support such presumption. True, upon the principles already stated in respect to admitting such declarations on the question of undue influence, her subsequent declarations to the effect that she had destroyed her will by burning the same or by any other of the prescribed methods, would not be evidence of the fact so declared, much less that such destruction was with the intent to revoke, but they would tend to prove that she died in the belief that she had left no will, and thus support the presumption of revocation arising from the fact that it was last known to be in her possession, but could not be found upon her death." Valentine's Will, 93 Wis. 45.

<sup>530</sup> Steinke's Will, 95 Wis. 121.

#### §444. Admissions against interest.

The admissions of parties interested made against their interest are said to be admissible in questions of revocation and spoliation.<sup>531</sup>

#### §445. Evidence of character and motives of testator and alleged spoliator.

Evidence of testator's character is admissible, in so far as it shows his tenacity of purpose, and thereby the probability of his revoking his will.<sup>532</sup> So, in evidence of testator's feeling towards those who would take if he were to die intestate.<sup>533</sup> So evidence of the conduct, character, and interest of those who were about testator, and had opportunity to destroy his will, is admissible as bearing upon the question whether testator destroyed his will or someone else.<sup>534</sup>

### VII—EVIDENCE IN CASES OF HOLOGRAPHIC AND NUNCUPATIVE WILLS.

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#### §446. Holographic wills.

The only evidence which is ordinarily necessary or admissible at the probate of a holographic will is evidence of testator's handwriting. This may be proved by any competent witness who has such knowledge of testator's handwriting that he can testify thereto. Under most modern statutes the beneficiaries under the will are competent witnesses.<sup>535</sup> However, it has been said that in case of doubt, as to whether the writing

<sup>531</sup> *Sugden v. St. Leonard's*, 1 P. D. 154; *Lambie's Estate*, 97 Mich. 49; *Nelson v. Whitfield*, 82 N. Car. 46.

<sup>532</sup> *Gardner's Estate*, 164 Pa. St. 420; *Gardner v. Gardner*, 177 Pa. St. 218.

<sup>533</sup> *Brown v. Brown*, 10 Yerg. (Tenn.), 84. [Where evidence was received as to testator's hatred for

the person who would be benefited by the revocation.]

<sup>534</sup> *Gardner v. Gardner*, 177 Pa. St. 218.

<sup>535</sup> *Morvant's Succession*, 45 La. Ann. 207; *Martin v. McAdams*, 87 Tex. 225; 27 S. W. 255, distinguishing *Lewis v. Aylott*, 45 Tex. 190 (attesting witnesses to a nuncupative will).

was meant as a will, declarations of testator to the effect that he would not make a will are admissible.<sup>536</sup>

The burden of proof is upon the propounder of a holographic will.<sup>537</sup> Where a holographic instrument is treated as a will, only when found among testator's valuable papers, the fact that testator had such an instrument in his possession before his death, and that it was found among his valuable papers on the day after his death, makes out a *prima facie* case that it is his will.\*

It is said that a holographic will should not be held a forgery, except on clear evidence, where the handwriting is positively identified. "The weight of the testimony to justify a judgment annulling a will should make it appear with some certainty that the will is a forged paper."<sup>538</sup>

#### §447. Nuncupative wills.

The rules applicable to the execution of ordinary written wills apply for the most part to nuncupative wills. Owing to the fact that the nuncupative will is oral, some differences must necessarily exist. Some courts have apparently held that the burden of proof in nuncupative wills is greater than in ordinary wills. Thus it has been said that evidence of nuncupative wills must be of "the clearest and most convincing character."<sup>539</sup>

The requisite number of witnesses must state under oath the existence of all facts necessary to its validity, including the *rogatio testium*.<sup>540</sup> Since the statutes controlling nuncupative wills usually provide that the witnesses must be disinterested, the beneficiaries are not competent.<sup>541</sup>

<sup>536</sup> Crutcher v. Crutcher, 11 Hump. (Tenn.), 377.

<sup>537</sup> Gaincs's Succession, 38 La. Ann. 123; Collins v. Collins (N. Car.), 1899, 34 S. E. 195.

<sup>538</sup> Barlaw v. Harrison, 51 La. Ann. 875; 25 So. 378.

<sup>539</sup> Lewis v. Aylott, 45 Tex. 190; Mitchell v. Vickers, 20 Tex. 377.

<sup>540</sup> Bundrick v. Haygood, 106 N. Car. 468.

<sup>541</sup> Vrooman v. Powers, 47 O. S. 191; Lewis v. Aylott, 45 Tex. 190. See Sec. 238.

## VIII—EVIDENCE OF REVOCATION.

## §448. Burden of proof.

Upon the issue of revocation the burden of proof is always upon the party alleging such revocation,<sup>542</sup> and in the absence of any evidence of the existence of a later will it is error to charge that it is for proponents to show that the will had not been revoked or cancelled.<sup>543</sup>

This statement, of course, assumes that evidence of execution and the like has been offered, tending to establish the facts necessary to the validity of the will.

## §449. Presumptions where will is missing.

If a will or codicil, known to have been in existence during testator's lifetime, and in his custody, can not be found at his death, a presumption arises that such will was destroyed by testator in his lifetime with the intention of revoking, and in the absence of rebutting evidence this presumption is sufficient to justify a finding that the will was revoked.<sup>544</sup> The reason underlying this rule was given by Chancellor Walworth in *Betts v. Jackson*.<sup>545</sup>

"Legal presumptions are founded upon the experience

<sup>542</sup> *Olmstead's Estate*, 122 Cal. 224; 54 Pac. 745; *Behrens v. Behrens*, 47 O. S. 323 (modified by peculiarity of practice in Ohio); *Blume v. Hartman*, 115 Pa. St. 32; *Padelford's Estate*, 190 Pa. St. 35.

<sup>543</sup> *Brown v. Walker*, — Miss. —; 11 So. 724.

<sup>544</sup> *Wargent v. Hollings*, 5 Hagg. Ecc. 245; *Lillie v. Lillie*, 3 Hagg. Ecc. 184; *Jacques v. Horton*, 76 Ala. 238; *Johnson's Will*, 40 Conn. 587; *Boyle v. Boyle*, 158 Ill. 228; *Mercer v. Mackin*, 14 Bush (Ky.), 434; *Minor v. Guthrie*, — Ky. —; 4 S. W. 179; *Davis v. Sigourney*, 8 Met. (Mass.), 487; *Howell v. Hor-*

*ner*, 120 Mass. 277; *Stevens v. Hope*, 52 Mich. 65; 17 N. W. 698; *Cheever v. North*, 106 Mich. 390; *Behrens v. Behrens*, 47 O. S. 323; *Wiswell's Will*, *Goebel* (Ohio), 19; *Blymeyer's Will*, *Goebel* (Ohio), 14; *Foster's Appeal*, 87 Pa. St. 67; *Stewart's Will*, 149 Pa. St. 111; *Gardner v. Gardner*, 177 Pa. St. 218; *Durants v. Ashmore*, 2 Rich. (S. Car.), 184; *Minkler v. Minkler*, 14 Vt. 125; *Appling v. Eades*, 1 Gratt. (Va.), 286; *McIntosh v. Moore* (Tex. Cir. App.) (1899), 53 S. W. 611.

<sup>545</sup> 6 Wend. 173.

and observation of distinguished jurists as to what is usually found to be the fact resulting from any given circumstances, and the result being thus ascertained, whenever such circumstances occur they are *prima facie* evidence of the fact presumed; and I have no doubt that five wills, made with all due formality, have been destroyed by the testators either in secret or when no one was present to be a witness to prove the fact, to where there has been one destroyed or suppressed by fraud, or lost by time or accident before the death of the testator.”<sup>546</sup>

For the same reason the finding among the papers of testator, apparently in his custody during his lifetime, of a will torn, cancelled and the like, raises a presumption that such act, manifest upon the will, was done by testator in his lifetime with intent to revoke the will.<sup>547</sup>

This presumption is not conclusive. At the utmost it is a *prima facie* presumption of law, and may be rebutted by showing either that the act was not done by testator or was not done *animo revocandi*.<sup>548</sup>

Where the will is destroyed the burden of proof is upon the party alleging that it was not destroyed by testator, or was destroyed by him while incompetent to revoke his will.<sup>549</sup>

Whether any presumption arises where a will was executed in duplicate, and one of the originals can not be found, was

<sup>546</sup> Quoted and approved in *Behrens v. Behrens*, 47 O. S. 323.

<sup>547</sup> *Christmas v. Whinyates*, 3 Sw. & Tr. 81; 32 L. J. P. 73; 9 Jur. (N. S.), 283; 8 L. T. 801; 11 W. R. 371; *Davies v. Davies*, 1 Lee, 444; *Lambell v. Lambell*, 3 Hagg. 568; *Baptist Church v. Robbarts*, 2 Barr 110; *King v. Ponton*, 82 Cal. 420; *Olmstead's Estate*, 122 Cal. 224; *Woodfill v. Patton*, 76 Ind. 575; *Steele v. Price*, 5 B. Mon. (Ky.), 58; *Townshend v. Howard*, 86 Me. 285; *Bennett v. Sherrod*, 3 Ired. 303; *White's Will*, 25 N. J.

Eq. 501; *Smock v. Smock*, 3 Stock-et, 156; *Tomlinson's Estate*, 133 Pa. St. 245.

<sup>548</sup> *Whitely v. King*, 17 C. B. N. S. 756; *Johnson's Will*, 40 Conn. 587; *Smiley v. Gambill*, 2 Head. (Tenn.), 164; *McIntosh v. Moore* (Tex. Civ. App.), 1899; 53 S. W. 611; *Valentine's Will*, 93 Wis. 45; *Steinke's Will*, 95 Wis. 121; *Shacklett v. Roller* (Va.) (1899); 34 S. E. 492.

<sup>549</sup> *McIntosh v. Moore* (Tex. Cir. App. 1899); *Shacklett v. Roller* (Va.) (1899); 34 S. E. 492.

discussed in a recent Michigan case, but as the record did not present the question properly it was not decided.<sup>550</sup>

#### §450. Declarations of testator.

The declarations of testator, by the weight of authority, are admissible to show his intention to revoke or not to revoke, where such intention is material, whether such declarations strengthen or rebut any presumption raised from the established facts;<sup>551</sup> even where such declarations are made subsequent to the time of the alleged revocation.<sup>552</sup>

Thus, where a will could not be found at the death of testatrix a presumption arose that testatrix had destroyed it, since the notary who drew it testified that he thought that testatrix had it; but her declarations were admissible to rebut this presumption; and such declarations made within three days of her death to the effect that the will was in existence and unrevoked, and that it was in the notary's custody, were sufficient to justify a finding that the will was not revoked.<sup>553</sup>

Where a will could not be found at testator's death, the declarations of testator to the effect that he had destroyed it were admissible to strengthen the presumption of revocation.<sup>554</sup> Testator's declarations tending to show that an act of destruction was committed while he was insane are admis-

<sup>550</sup> Hurton v. Hurton, 113 Mich. 634. See Sec. 253.

<sup>551</sup> Keen v. Keene, 42 L. J. P. 61; L. R. 3 P. 105; 29 L. T. 247; Johnson's Will, 40 Conn. 587; Chisholm v. Ben, 7 B. Mon. (Ky.), 408; Collogan v. Burns, 57 Me. 449; Townsend v. Howard, 86 Me. 285; Pickens v. Davis, 134 Mass. 252; Gage v. Gage, 12 N. H. 371; Smock v. Smock, 11 N. J. Eq. 156; Behrens v. Behrens, 47 O. S. 323; Smiley v. Gambill, 2 Head (Tenn.), 164; Valentine's Will, 93 Wis. 45; Steinke's Will, 95 Wis. 121.

<sup>552</sup> Boyle v. Boyle, 158 Ill. 228; Behrens v. Behrens, 47 O. S. 323;

Youndt v. Youndt, 3 Gr. (Pa.), 140; Steinke's Will, 95 Wis. 121.

*Contra*, Caeman v. Van Harke, 33 Kan. 333, holding that such declarations are admissible only when part of the *res gestae*, citing Hayes v. West, 37 Ind. 21; Mooney v. Olsen, 22 Kan. 69; Waterman v. Whitney, 11 N. Y. 157.

<sup>553</sup> Steinke's Will, 95 Wis. 121. So Blymeyer's Will, Goebel (Ohio), 14; Wiswell's Will, Goebel (Ohio), 19.

<sup>554</sup> Behrens v. Behrens, 47 O. S. 323; Shacklett v. Roller (Va. 1899); 34 S. E. 492.

sible.<sup>555</sup> So are his declarations made before he became insane, tending to show that he had revoked the will before that time.<sup>556</sup>

Where a will had been torn and then pasted together, the declarations and acts of testator while collecting the pieces of the will and pasting them together were admissible to show that no revocation was intended.<sup>557</sup>

A memorandum made by testatrix on the will was admissible to show that the act of revocation was done by her and with intention to revoke the will.<sup>558</sup>

But the declarations of testator are not admissible to establish the fact of the revocatory act,<sup>559</sup> and his declarations are not admissible to establish the existence of a later will revoking the one offered for probate;<sup>560</sup> nor are declarations of the testator that he had made his will in duplicate and had destroyed one of the originals in order to revoke both, admissible.<sup>561</sup> And where the will is in fact cancelled, the declarations of testator, while admitted in evidence without criticism from the reviewing court, were held not conclusive as to the fact of revocation.<sup>562</sup>

Where the will is in fact cancelled, declarations of testator tending to show his dissatisfaction with the old will and his intention to make a new will are admissible.<sup>563</sup>

Where no fact of revocation is shown, the declarations of testator that he intended to revoke his will are inadmissible.<sup>564</sup>

<sup>555</sup> Johnson's Will, 40 Conn. 587.

<sup>556</sup> Shacklett v. Roller, (Va. 1899); 34 S. E. 492.

<sup>557</sup> Collagan v. Burns, 57 Me. 449.

<sup>558</sup> Kirkpatrick's Will, 7 C. E. Gr. (N. J.), 463.

<sup>559</sup> Slaughter v. Stevens, 81 Ala. 418; Toebbe v. Williams, 80 Ky. 661; Lewis v. Lewis, 2 W. & S. (Pa.), 455.

<sup>560</sup> White's Will, 25 N. J. Eq. 501; Noyes's Will, 61 Vt. 14.

<sup>561</sup> Atkinson v. Morris (1897), Prob. 40.

<sup>562</sup> Olmstead's Estate, 122 Cal. 224.

<sup>563</sup> Townsend v. Howard, 86 Me. 285; Semmes v. Semmes, 7 Harr. & J. (Md.), 388; Johnson v. Brailsford, 2 Nott. & McC. 272; Hairston v. Hairston, 30 Miss. 276.

<sup>564</sup> Barnewall v. Murrell, 108 Ala. 366; Taylor v. Cox, 153 Ill. 220.

**§451. Declarations of legatees.**

The declarations of a legatee or devisee under a will, as to the fact of revocation of such will, are admissible in evidence if made after the interest of such beneficiary arose, and if they do not affect the interests of other beneficiaries.<sup>565</sup>

**§452. Declarations of others.**

The declarations of others than testator or legatees are almost always inadmissible as being hearsay evidence.

Thus, declarations made by testator's sister to the effect that she had destroyed his will without his knowledge or consent are inadmissible to rebut the presumption of revocation which arises from the fact that the will which was in testator's custody can not be found at his death.<sup>566</sup>

**§453. Revocation by lost will.—Burden of proof.**

When a lost or missing will is sought to be established as a means of effecting a revocation of the will offered for probate, the burden of proof is upon those alleging it to show that it was properly executed,<sup>567</sup> and also that its contents were such as to revoke the former will, by revocation clause or inconsistency with such will.<sup>568</sup>

**§454. Presumptions.**

However, where beneficiaries under an earlier will suppress a later one, the presumption arises that the later will was duly and legally drawn and executed.<sup>569</sup>

In many jurisdictions, as we have seen, the revocation of a later revoking will can not revive an earlier will at all where

<sup>565</sup> *Lambie's Estate*, 97 Mich. 49.

<sup>566</sup> *Boyle v. Boyle*, 158 Ill. 228.

<sup>567</sup> *West v. West*, 144 Mo. 119; 46 S. W. 139; *McKenna v. McMichael*, 189 Pa. St. 440.

<sup>568</sup> *McIntire v. McIntire*, 162 U. S. 383; *Knox v. Knox*, 95 Ala. 495; *Armstrong v. Chapman*, 65 Cal. 73;

*Johnson's Will*, 40 Conn. 587; *Sternberg's Estate*, 94 Io. 305; *Davis v. Sigourney*, 8 Met. (Mass.), 487; *Cheever v. North*, 106 Mich. 390; *Day v. Day* (N. J. Eq.); 2 Gr. Ch. 549; *Knapp v. Knapp*, 10 N. Y. 276.

<sup>569</sup> *Lambie's Estate*, 97 Mich. 49.



the later will contained a clause of express revocation, unless the earlier will is republished.<sup>570</sup>

In such jurisdictions as permit the revocation of a later will to revive the earlier one without formal republication, there is considerable diversity as to the presumptions arising upon the revocation of the later will.

In one class of jurisdictions, by force of the statute, the intention to revive the earlier will must appear expressly from the terms of such revocation, there being no presumption of an intention to revive the earlier will from the revocation of the earlier will alone.<sup>571</sup>

As we have seen, parol evidence is sufficient in some jurisdictions to show testator's intention to revive the earlier will.<sup>572</sup> But such evidence must clearly show his intention to revive his earlier will when he revoked his later one.

Thus, where testator had made three wills at different times, the two later ones containing clauses of express revocation, and had at different times said that he would keep them all till he decided which one he wanted, the fact that only the second will could be found at his death was not, together with his declarations, sufficient to establish the fact that he had revoked the third will with the intention of reviving the second.\*

Under statutes which require that the evidence of the intention to revive the earlier will by revoking the later be in writing, parol evidence is, of course, inadmissible.<sup>573</sup>

It is said by some courts that, since every person is presumed to know the law, a testator who marries while domiciled in a jurisdiction where marriage alone operated as a revocation of a will, must be conclusively presumed to know that such act on his part revokes the will.<sup>574</sup> But this same result may be reached better from the theory that the mar-

<sup>570</sup> See Secs. 271-274.

<sup>571</sup> See Sec. 274.

<sup>572</sup> *Pickens v. Davis*, 134 Mass. 252. See Secs. 273, 274.

\* *Williams v. Williams*, 142 Mass.

515.

<sup>573</sup> *In re Lones*, 108 Cal. 688; *Stickney's Will*, 161 N. Y. 42.

<sup>574</sup> *Sloniger v. Sloniger*, 161 Ill. 270.

riage acts as a revocation of the will independent of testator's intention.

The fact that testator drew an ink line through a legacy creates a presumption that he intended the natural consequence of his act, where by the local law this act effects a partial revocation.<sup>575</sup>

**§455. Proof of revoking deed.**

If the ground for claiming a revocation is that the will has been revoked by alteration of testator's estate, as by a deed conveying all the property disposed of by will, the deed must be proved and offered in evidence in order to establish the fact of revocation.<sup>576</sup>

<sup>575</sup> Batchelor's Succession, 48 La. Ann. 278.

<sup>576</sup> Gable v. Rauch, 50 S. Car. 95.

## CHAPTER XX.

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### CONSTRUCTION.

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#### GENERAL PRINCIPLES UNDERLYING CONSTRUCTION.

##### §456. General scope of construction.

Upon the death of a testator the practical question which the law is called upon to answer is, What disposition shall be made of his property? With but few exceptions no appeal is ever made to the courts, except to settle disputed property rights.

The question when a decedent can properly be said to be a testator has been discussed in the preceding chapters. This implies that he is, at the time of making the will, of full age, of sound mind and memory and under no restraint; that his will was executed with the formalities prescribed by law; that it was not subsequently revoked, and that it has been properly admitted to probate. The instrument thus established as the last will and testament of the decedent is recognized by the law as a guide to the disposition of testator's estate in determining to whom testator's property is to pass.

The question which is, under these circumstances, presented for judicial decision is, What does the will mean? This topic is generally comprehended under the name of "Construction."

### §457. Definition.

Construction in the law of wills is the ascertaining and determining of testator's intention as expressed in his will, and its application to existing facts and circumstances with which such intention deals.<sup>1</sup>

### §458. Discussion of distinctions and classifications of construction.

In the most technically accurate use of language Construction should probably be distinguished from Definition on the one hand and Interpretation on the other.

*Definition* refers solely to determining the meaning of a word or phrase used in the will, either taken by itself in its primary meaning, or as modified and affected by the context and surrounding circumstances.

*Interpretation* is defined by one of our most profound writers as the ascertaining "of the true sense of the special form of words used."<sup>2</sup>

*Construction* is "the drawing of conclusions respecting subjects which lie beyond the direct expression of the text—conclusions which are within the spirit but not the letter of the text."<sup>3</sup>

These distinctions have been suggested by the highest authorities on the philosophical side of jurisprudence. Acting upon these suggestions, occasionally writers and courts have attempted to rewrite the Law of Construction of Wills upon this classification. While the work that has been done upon these bases is profound and philosophical, the fundamental arrangement is subject to at least two serious objections. The first is that the attempt to treat Construction in the narrower meaning of the term as distinct from Definition and Interpretation results in either confusion or repetition.

No clear and accurate presentation of any topic under the

<sup>1</sup> Phayer v. Kennedy, 169 Ill. 360; Garth v. Garth, 139 Mo. 456; Hadley v. Hadley, 100 Tenn. 446; Pack v. Shanklin, 43 W. Va. 304.

<sup>2</sup> Leiber on Political Hermeneutics.

<sup>3</sup> Leiber on Political Hermeneutics.

head of Construction in the broad and general sense can be given without a careful consideration of each of these three subdivisions. It is, therefore, necessary either to repeat what has already been given under one heading after each of the other two, or to treat a given topic in detail under one heading and refer back and forth to the other two as incidental to the topic selected as the main one.

A second serious objection to this arrangement is that it cuts sharply across the distinctions and classifications which have in the past in actual practice been observed by courts in deciding adjudicated cases. While the influence of philosophical jurisprudence upon the current of judicial decision is deservedly great, the mass of precedent that has already accumulated upon the subject of construction is so enormous that it is impossible to induce the courts to rearrange and reclassify these precedents upon bases which were not present in the minds of the judges who decided these cases.

For these reasons, after careful consideration, it has been thought best to present the law on Construction on the bases of classification and general outlines of distinction which the courts today recognize in adjudicating cases.

#### §459. Value of precedents.

In determining testator's intention as expressed in his will, courts are often asked to decide the case in dispute in the same way as some previous case in which somewhat similar expressions were employed in the will there construed. In most cases courts are unwilling to construe a will in a certain manner merely because in a previous case they have construed a will containing similar expressions in the same manner.

While such a method of construction is, at first glance, very tempting, it is radically at variance with what we shall see is the fundamental rule of construction, namely, that the intention of the testator is to be ascertained, and is to be ascertained from the language used in the entire will. An attempt, therefore, to construe the separate phrases and clauses of the will in accordance with precedents is likely to lead at once to a total dis-

regard of testator's intention, unless it happens that in the two wills taken each as a whole testator's intention is substantially the same, and to be carried out in the same way. Such a coincidence rarely happens except in the introductory clause and attestation clause of a will.

Wills are almost never drawn in any set form. In this respect they are strikingly different from instruments like deeds, leases, mortgages and certain types of business contracts, like insurance policies, bills of lading, etc. Instruments of each of these different classes are drawn each substantially alike. A precedent for construing a phrase in a deed, therefore, is likely to be a most valuable precedent for construing the same phrase in another deed, since the effective parts of the two instruments are likely to be almost identical.

On the other hand, the construction of a phrase in a will is likely to give but little help in construing a similar phrase in another will, since the remaining effective parts of the two instruments are likely to be widely dissimilar. While precedents are of great weight in aiding construction, they have not the controlling force that they have in most branches of law.

These views have been expressed with substantial unanimity by the courts for many years.<sup>4</sup>

<sup>4</sup> Thus in a recent Maine case of *Wentworth v. Fernald*, 92 Me. 282, the court said:

"As is usual in this class of cases, many respectable authorities have been cited and many rules of construction invoked by the learned counsel in support of their respective contentions. With reference to this perplexing branch of the law, Judge Story made the following observation a half-century ago in *Sisson v. Seabury*, 1 Summ. 235: 'The cases almost overwhelm us at every step of our progress, and any attempt even to classify them, much less to harmonize them, is full of the most perilous labor. To lay down any positive and definite rules

of universal application in the interpretation of wills must continue to be, as it has been, a task, if not utterly hopeless, at least of extraordinarily difficulty.' The analogies afforded by precedents are helpful servants but dangerous masters. The same clause or phrase may appear to demand the same construction in the principal case as in the one cited, but a more discriminating inspection may disclose an important difference in the leading purpose of the testator or in the modifying effect of another clause, and thus the force of the precedent be effectually destroyed. To a very great extent the decisions necessarily re-

In certain classes of cases, however, precedents are followed almost as rigidly in what is called construction as it is in almost any other branch of the law. This exception exists where, by long usage and judicial recognition, certain words and phrases have come to have definite and recognized meanings so firmly established that their meaning really ceases to be a question of construction, and becomes rather a rule of property. In cases like this the courts generally continue to speak of the question as one of construction. At the same time they make it clear that they are not really endeavoring to ascertain testator's intention, but rather to establish uniformity in the law of property by constantly adhering to established rules.<sup>5</sup>

solve themselves into the judgment of the court upon the circumstances of each particular case."

A similar view was expressed in somewhat different language in *Jones v. Hunt*, 96 Tenn. 369, in which the court said:

"We have instituted no comparison, in this opinion, between the language of the will under consideration and that of any one of the wills construed in our numerous adjudged cases, because there is in no instance sufficient similarity to render such comparison of any advantage in ascertaining the intention of the present testatrix."

And in the recent English Case, *In re Morgan* (1893), 3 Ch. 222, quoted subsequently in the case *In re Bawden* (1894), 1 Ch. 693, lays especial stress upon the danger of overlooking precedents blindly, in this language:

"Many years ago the court slid into the bad habit of deciding one will by previous decisions upon other wills. Of course there are principles of law which are to be applied to all wills; but if you once get a man's intention and there is no law

to prevent you from giving it effect, effect ought to be given to it."

In *Thurber v. Battey*, 105 Mich. 718, it was said that cases are of little value as precedents "unless they substantially agree in their facts with the case under consideration—a circumstance of rare occurrence."

Similar views are expressed in *Grey v. Pearson*, 6 H. L. C. 61; *Littig v. Hance*, 81 Md. 416; *Williams v. Veach*, 17 Ohio, 171; *Brashers v. Marsh*, 15 O. S. 103.

<sup>5</sup> "Many of the rules which courts have adopted as guides in ascertaining the intention of testators, assume an intention from words and phrases where often it is very doubtful whether they were used with any intelligent appreciation of the legal meaning given them. But these rules have become in many cases rules of property, and work out perhaps in the majority of cases as nearly just as may be. It is better to adhere to them in their integrity than to permit exceptions upon slight grounds." *Lamb v. Lamb*, 131 N. Y. 227.

### §460. Intention to be deduced from words employed by testator.

As the courts are careful to discover and enforce testator's intention, but not to make a new will for testator, it follows that they constantly refuse to ascertain testator's intention except from the words which he used in his will, together with such extrinsic evidence as is admissible. The question always before the mind of the court is not what should testator have meant to do or what words did he mean to use, but what did he mean by words which he has actually used.<sup>6</sup>

### §461. Importance of ascertaining testator's intention.

The sole object and intention of the rules upon the subject of construction is to ascertain the intention of the testator. As was said by Chief Justice Marshall: "The intent of the testator is the cardinal rule in the construction of wills, and, if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail."<sup>7</sup>

The purpose of the court in construing a will is solely to ascertain the intention of the testator as the same appears from a full and complete consideration of the entire will.<sup>8</sup>

The intention of testator is said, in a recent Virginia case, to be the "life and soul of a will," and if this intention is clear, and is not in violation of any rule of law, it must govern with absolute sway.<sup>9</sup>

In construing a will the court has no intention to make a will for the testator or to attempt to improve upon the will

<sup>6</sup> *Sturgis v. Work*, 122 Ind. 134; *Eckford v. Eckford*, 91 Io. 54; *Pack v. Shanklin*, 43 W. Va. 304. "The intention of testator is always to be deduced from words actually written in the will." *Sturgis v. Work*, 122 Ind. 134.

"The language which he has used has been interpreted by judicial decisions, and the testator must be assumed to have used the language which he uses with reference to those judicial decisions and as

meaning what they say it does mean." *In re Bawden* (1894), 1 Ch. 693.

<sup>7</sup> *Finlay v. King*, 3 Pet. (U. S.), 346, quoted in *Whitecomb v. Rodman*, 156 Ill. 116.

<sup>8</sup> *Phayer v. Kennedy*, 169 Ill. 360; *Allen v. White*, 97 Mass. 504; *Stevenson v. Evans*, 10 O. S. 307; *Christy v. Christy*, 162 Pa. St. 485.

<sup>9</sup> *McCamant v. Nuckolls*, 85 Va. 331.



which testator actually made. Assuming, as we must in the case of construction, that the testator had testamentary capacity at the time of making the will, that he was under no restraint, and the will as made is in full compliance with the rules of law on the subject, the sole question for the consideration of a court of construction is what testator meant by the provisions of the will which he has seen fit to make. This proposition has been put by the courts in such a variety of forms, and with such uniformity of view, that it is hackneyed. A few out of an enormous number of cases on this subject are cited in the note below.<sup>10</sup>

- <sup>10</sup> Colton v. Colton, 127 U. S. 309; Thrasher v. Ingram, 32 Ala. 645; Finlay v. King, 3 Pet. 346; Doughten v. Vandever, 5 Del. Ch. 51; Pritchard v. Walker, 22 Ill. App. 286; Blanchard v. Chapman, 22 Ill. App. 341; *Re* Cashman's Estate, 28 Ill. App. 346, affirmed in 24 N. E. 963; Crerar v. Williams, 145 Ill. 625, affirming 44 Ill. App. 497; Whitcomb v. Rodman, 156 Ill. 116; 28 L. R. A. 149; Davenport v. Kirkland, 156 Ill. 169; Phayer v. Kennedy, 169 Ill. 360; Gaffield v. Plumber, 175 Ill. 521; Sheets v. Wetsel, 39 Ill. App. 600; Moran v. Moran, 104 Io. 216; 39 L. R. A. 204; Brown v. Brown, 1 Dana (Ky.), 39; New Orleans v. Hardie, 43 La. Ann. 251; Wentworth v. Fernald, 92 Me. 282; Elder v. Elder, 50 Me. 535; Reilly v. Union Protestant Infirmary, 87 Md. 664; Holmes v. Mitchell, 4 Md. Ch. 162; Smith v. Donnell, 9 Gill. 84; Stewart v. Pattison, 8 Gill. 46; Eliot v. Carter, 12 Pick. (Mass.), 435; Dowey v. Morgan, 18 Pick. 295; Sawyer v. Baldwin, 20 Pick. 378; Garth v. Garth, 139 Mo. 456; Ford v. Ford, 80 Mich. 42; 44 N. W. 1057; Eyer v. Beck, 70 Mich. 179; Hibler v. Hibler, 104 Mich. 274; Thurber v. Battey, 105 Mich. 718; Sorsby v. Vance, 36 Miss. 564; Wetmore v. St. Luke's Hospital, 9 N. Y. S. 753; Hall v. Chaffee, 14 N. H. 215; Cody v. Bunn, 46 N. J. Eq. (1 Dick), 131; Sims v. Sims, 10 N. J. Eq. 158; Brearley v. Brearley, 9 N. J. Eq. 21; Decker v. Decker, 3 Ohio, 157; Brasher v. Marsh, 15 O. S. 103; Townsend v. Townsend, 25 O. S. 477; Linton v. Laycock, 33 O. S. 128; Shadden v. Hembree, 17 Or. 14; Jasper v. Jasper, 17 Or. 590; Christy v. Christy, 162 Pa. St. 485; Belshoover v. Brandt, 18 Pa. St. 473; *Re* Knauss' Estate, 9 Pa. Co. Ct. 621; Guery v. Vernon, 1 Nott. & Mc. C. 69; Heyward v. Brailsford, 2 Bay, 255; Ellis v. Woods, 9 Rich. Eq. 19; Hadley v. Hadley, 100 Tenn. 446; Evans v. Opperman, 76 Tex. 293; Philo v. Holliday, 24 Tex. 38; McCamant v. Nuckolls, 85 Va. 331; Reno v. Davis, 4 Hen. & M. (Va.), 283; Wooton v. Redd, 12 Gratt. 106; Cresap v. Cresap, 34 W. Va. 310.

When testator's intention is clear, every rule of construction yields to such intention.<sup>11</sup>

As was said in a recent Maine case: "There is, however, one fundamental rule or consideration which is paramount to all others and which should never be overlooked, and that is that the intention of the testator, as declared by the will itself, shall be allowed to prevail, unless some principle of sound policy is thereby violated."<sup>12</sup>

#### §462. Intention to be deduced from whole will.

The intention of the testator, which, as we have seen, the courts endeavor to ascertain and enforce, except where forbidden by positive rules of law, is to be ascertained from a consideration of the will of testator as a whole, and not from its disjointed fragments. The courts will approach the problem of construing a will with a *prima facie* assumption that the testator, in drawing and executing his will, had a purpose which was clear, definite and thoroughly consistent. As was said in a recent case already quoted from: "This intention must be collected from the language of the whole will, interpreted with reference to the obvious or manifest object of the testator; and all parts of the instrument must be construed in relation to each other so as to give meaning and effect to every clause and phrase, and, if possible, form one consistent whole, every word receiving its natural and appropriate meaning."<sup>13</sup> This proposition, like the preceding one, is established by an enormous number of cases, a few of which are cited in the note below.<sup>14</sup>

<sup>11</sup> Cox v. Handy, 78 Md. 108; Brasher v. Marsh, 15 O. S. 103; Wentworth v. Fernald, 92 Me. 282; Still v. Spear, 45 Pa. St. 168.

Thus the court spoke in Cox v. Handy, 78 Md. 108 (petition for rehearing 78 Md. 126), of "general rules of construction which are frequently of great use in ascertaining the meaning of a testator

when it is doubtful, but are never to be applied so as to defeat his intention when it is clear."

<sup>12</sup> Wentworth v. Fernald, 92 Me. 282.

<sup>13</sup> Wentworth v. Fernald, 92 Me. 282.

<sup>14</sup> Healy v. Healy, 70 Conn. 467; Bivins v. Crawford, 26 Ga. 225; Coleman v. Camp, 36 Ala. 159;

Thus, as a particular application of this general principle, if two constructions are possible to a clause of a will, one of which is in harmony with the provisions of the remainder of the will, and the other of which is at variance with them, the court will assume that the correct construction is the one which will harmonize this clause with the rest of the will.<sup>15</sup>

A further application of this principle is presented in the familiar rule elsewhere discussed,<sup>16</sup> that where a codicil is appended to a will and does not contain any clause of revocation, the provisions of the will are to be disturbed only as far as are absolutely necessary to give effect to the provisions of the codicil; and in other respects such a will and codicil are to be construed together.<sup>17</sup> Thus, where the will is ambiguous, as to whether a life estate or a fee were granted, a provision

*Strong v. Cumnum*, 2 Burr. 767; *Davenport v. Kirkland*, 156 Ill. 169; *Pritchard v. Walker*, 22 Ill. App. 286; *Cashman's Estate*, 28 Ill. App. 346, affirmed in 24 N. E. 963; *Young v. Harkleroad*, 166 Ill. 318; *Baker v. Riley*, 16 Ind. 479; *Kilgore v. Kilgore*, 127 Ind. 276; *Jackson v. Hoover*, 26 Ind. 511; *Sturgis v. Work*, 122 Ind. 134; *Wing v. Mix*, 17 Ind. 344; *Imas v. Neidt*, 101 Io. 348; *Lebeau v. Trudeau*, 10 La. Ann. 164; *Orr v. Moses*, 52 Me. 287; *Quincy v. Attorney General*, 160 Mass. 431; *Cook v. Holmes*, 11 Mass. 528; *Rogers v. Rogers*, 49 N. J. Eq. 98; *Pennington v. Van Houten*, 8 N. J. Eq. 272; *Turner v. Patterson*, 5 Dana (Ky.), 292; *Mitchener v. Atkinson*, 63 N. Car. 585; *Decker v. Decker*, 3 Ohio, 157; *Edwards v. Ranier*, 17 O. S. 597; *Carter v. Reddish*, 32 O. S. 1; *Brasher v. Marsh*, 15 O. S. 103; *Hard v. Ashley*, 117 N. Y. 606; *Starling v. Price*, 16 O. S. 29; *Mutter's Estate*, 38 Pa. St. 314; *Grove's Estate*, 58 Pa. St. 429; *Shreiner's Appeal*,

53 Pa. St. 106; *Rivers v. Rivers*, 36 S. C. 302; 15 S. E. 137; *Hadley v. Hadley*, 100 Tenn. 446; *Cheshire v. Purcell*, 11 Gratt. (Va.), 771.

<sup>15</sup> *Roe v. Vingut*, 117 N. Y. 204; *Ernst v. Foster*, — Kan. —; 49 Pac. 527; *Hopkins v. Grimes*, 14 Io. 73; *Smithers v. Jackson*, 23 Md. 273; *Prosser v. Hardesty*, 101 Mo. 593; *Coakley v. Daniel*, 4 Jones' Eq. 89; *Brasher v. Marsh*, 15 O. S. 103.

<sup>16</sup> See Sec. 269.

<sup>17</sup> *Morley v. Rennoldson* (C. A.), (1895), 1 Ch. 449; 64 L. J. Ch. (N. S.), 485; *Pellizzaro v. Reppert*, 83 Io. 497; *Bedford v. Bedford*, — Ky. —; 35 S. W. 926; *Thomas v. Levering*, 73 Md. 451; *Richardson v. Willis*, 163 Mass. 130; *Gray v. Sherman*, 5 All. 198; *Robeson v. Shotwell*, 55 N. J. Eq. 318; *Hard v. Ashley*, 117 N. Y. 606; *Starling v. Price*, 16 O. S. 29; *Collier v. Collier*, 3 O. S. 369; *Negley v. Gard*, 20 Ohio, 310; *Ward v. Saunders*, 2 Swan (Tenn.), 174.

in the codicil, that the devisee should have power to dispose of a certain part of such property by will, shows that testator did not intend to give this power by the will;<sup>18</sup> while a provision in the codicil expressly restricting the estate in part of the property to a life interest shows that testator intended a fee to pass by will.<sup>19</sup>

So a provision in a will providing for proportional division among the beneficiaries of either excess or deficiency, and a provision in a codicil giving a certain amount to certain omitted grandchildren, are to be construed together as one instrument.<sup>20</sup>

### §463. General and particular intent.

We have seen that, if possible, the will of testator is to be construed as an entirety, and that all provisions therein are to be rendered consistent with each other.

It not infrequently happens, however, that the general intent of testator, as deduced from the consideration of the will as a whole, is at variance with a particular direction of some clause. This conflict of intention usually arises where the testator has not carefully thought out the application of the provisions of his will to all possible states of fact, and has not, therefore, foreseen the actual contingency which has caused the inconsistency. In such a case, the court, while avoiding making a will for a man who did not succeed in making one for himself, will, nevertheless, if the general intention of the testator is clear, give effect to such intention, disregarding the particular intent of the particular clause.<sup>21</sup>

<sup>18</sup> Robeson v. Shotwell, 55 N. J. Eq. 318.

<sup>19</sup> Pellizzaro v. Reppert, 83 Ia. 497.

<sup>20</sup> Negley v. Gard, 20 Ohio, 310.

<sup>21</sup> Pinney v. Newton, 66 Conn. 141; Alsop v. Russell, 38 Conn. 99; Goodrich v. Lambert, 10 Conn. 448; Warner v. Williard, 54 Conn. 470; Chase v. Lockerman, 11 Gill & J. (Md.), 185; Huffman v. Young, 170

Ill. 290; Butler v. Butler, — Ky. —, 1895; 30 S. W. 4; Ernst v. Foster, — Kan. —, 49 Pac. 527; Boston Safe Deposit & Trust Co. v. Coffin, 152 Mass. 95; 8 L. R. A. 740; Watson v. Blackwood, 50 Miss. 15; Baldwin v. Taylor, 37 N. J. Eq. 78; Roe v. Vingut, 117 N. Y. 204; Crozier v. Bray, 120 N. Y. 366; Jasper v. Jasper, 17 Or. 590; Shreiner's Appeal, 53 Pa. St. 106;

"An obvious general intent to be gathered from the whole will is rarely to be defeated by an inaccuracy or inconsistency in the expression of a particular intent."<sup>22</sup>

#### §464. Unjust or absurd intention.

Since the courts give effect to the intention as expressed in a will, if not in conflict with any positive rule of law, it follows that where the intention of testator to make an unjust, unfair or absurd disposition of his property is clear, then the court has no choice but to give effect to such disposition of

Ulrich's Appeal, 86 Pa. St. 386; Marshall's Appeal, 138 Pa. State, 260, 285; 21 Atl. 75; McMurry v. Stanley, 69 Tex. 227; Hurt v. Brooks, 89 Va. 496; 16 S. E. 358; Price v. Cole, 83 Va. 343; Houser v. Ruffner, 18 W. Va. 244.

<sup>22</sup> Pinney v. Newton, 66 Conn. 141.

Thus in a recent Massachusetts case a testator had executed a will, the general purpose of which was, evidently, a division of his property after making deduction for advances equally among the different branches of his family. A particular clause apparently inconsistent with this general intent was disposed of by the court in the following language:

"The literal meaning of the words is that when a child of the testator shall die leaving children, the latter shall receive the principal sum of which their parent had received the income, and thereupon their interest in the joint fund shall cease, although the result of such cessation is that they may happen to lose the secondary and accidental advantage of sharing in the division of some other child's share, if another child of testator should chance

to die later and leave no children of his own. *In re Homer's Estate*, 19 Ch. D. 186; *In re Benn*, 29 Ch. 839. On the other hand there is the same unlikelihood that the testator intended an aleatory gift which has led to the construction against joint legacies. Probably the testator did not have it in mind to deprive any set of grandchildren of this secondary advantage because of the previous death of their parent. If that is the result of the words used, it is an accidental result, not the object of his disposition."

Balch v. Pickering, 154 Mass. 363; 14 L. R. A. 125 (a different view of what testator's predominant intent was, upon similar facts, was taken in *Sternmetz's Estate*, 194 Pa. St. 611). So in *South Mahoning Township v. Marshall*, 138 Pa. St. 570, the court said:

"This case belongs to that very difficult class in which a situation has arisen never contemplated by the testator and which renders the execution of all his directions impossible. We are obliged, therefore, to separate them and preserve the principal intent even at the sacrifice of the subordinate."

his property, however unfair the injustice of such will may impress the members of the court in their private capacity.<sup>23</sup>

Thus, in a recent Illinois case, testator in his will provided that whatever part of his estate his executor named in the will should take, or should claim as due to him from the testator, should be considered as due him without proof of any kind. The will being valid and the testator's intention being unmistakable, it was held that no one claiming under testator, under the will or by descent, could assert an antagonistic claim to executor, no matter what advantage the executor might take of such provision.<sup>24</sup>

**§465. Testamentary intention presumed to be in accordance with law.**

It will ordinarily be presumed in construing a will that the testator is acquainted with the rules of law, and that he intended to comply with them accordingly. If two constructions of a will or a part thereof are possible, and one of these constructions is consistent with the law, and the other is inconsistent, the presumption that the testator intended to comply with the law will compel that construction which is consistent with the law to be adopted.<sup>25</sup>

Testator will be presumed to know the limits imposed by law upon his testamentary power, and to strive to comply with those limits. Thus, if one construction of the will will cause it to violate the rule against perpetuities, and another construction will make it comply with this rule, the construction which makes it comply with this rule will be preferred.<sup>26</sup>

<sup>23</sup> Maurer v. Bowman, 169 Ill. 586, affirming 65 Ill. App. 261; Marshall v. Hadley, 50 N. J. Eq. 547; 25 Atl. 325; Salter v. Ely, 56 N. J. Eq. 357; Moore v. Powell, 95 Va. 258.

<sup>24</sup> Maurer v. Bowman, 169 Ill. 586, affirming 65 Ill. App. 261.

<sup>25</sup> Quincy v. Attorney General, 160 Mass. 431; Thompson v. Newlin, 8 Ired. Eq. 32; Crozier v. Bray, 120 N. Y. 366; Bonnell v. Bonnell,

47 N. J. Eq. 540; Griggs v. Veghte, 47 N. J. Eq. 179; 19 Atl. 867; James v. Pruden, 14 O. S. 251; McBride's Estate, 152 Pa. St. 192; Armstrong v. Douglass, 89 Tenn. 219; 10 L. R. A. 85; Roe v. Vingut, 117 N. Y. 204; Moore v. Powell, 95 Va. 258.

<sup>26</sup> Ingraham v. Ingraham, 169 Ill. 432; 169 Ill. 472; Roe v. Vingut, 117 N. Y. 204; McBride's Estate, 152 Pa. St. 192; Armstrong v. Douglass, 89 Tenn. 219; 10 L. R. A. 85.

Where a will may be so construed as to operate upon the property belonging to testator, as well as to operate upon the property which did not belong to him, and over which he had no control, the will will be so construed as to apply to testator's property only.<sup>27</sup>

Under this doctrine the testator is also presumed to know the rules of law which control the construction of his will. The ordinary rules of construction will, therefore, be applied, unless it clearly appears from the will itself that the testator had a different intention from that which is presumed by the ordinary rules of construction.<sup>28</sup>

#### §466. Presumption against partial intestacy.

Under ordinary circumstances a man makes a will to dispose of his entire estate, or, at least, of his estate as it exists at the time he makes his will. If, therefore, a will is susceptible of two constructions, by one of which testator disposes of the whole of his estate, and by the other of which he disposes of a part of his estate only, and dies intestate as to the remainder, the courts will prefer the construction by which the whole of testator's estate is disposed of, if this construction is reasonable and consistent with the general scope and provisions of the will.<sup>29</sup>

The court is very keen sighted to discover a construction which will not violate this rule. *Ingraham v. Ingraham*, 169 Ill. 432; 169 Ill. 472.

<sup>27</sup> *Moore v. Powell*, 95 Va. 285.

<sup>28</sup> *Bonnell v. Bonnell*, 47 N. J. Eq. 540; *Griggs v. Veghte*, 47 N. J. Eq. 179; 19 Atl. 867.

<sup>29</sup> *Leake v. Robinson*, 2 Mer. 203; *Lett v. Randall*, 10 Sim. 112; also 16 Eng. Chancery Rep'ts, 112; *Pinney v. Newton*, 66 Conn. 141; *Schofield v. Ocott*, 120 Ill. 362; *Taubenhan v. Dunz*, 20 Ill. App. 262, aff'd in 125 Ill. 524; *Whitcomb v. Rodman*, 156 Ill. 116; 28 L. R. A. 149; *Winkler v. Simons*, 172 Ill. 323, rev'g 71 Ill. App. 422; *Hayward v.*

*Loper*, 147 Ill. 41, affirming 49 Ill. App. 53; *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95; 25 N. E. 30; 8 L. R. A. 740; *Johnson v. Brasington*, 156 N. Y. 181; rev. 86 Hun, 106; *Collier v. Collier*, 3 O. S. 369; *Gilpin v. Williams*, 17 O. S. 396; *Davis v. Corwine*, 25 O. S. 668; *Dull's Estate*, 137 Pa. St. 112; *Cox's Estate*, 180 Pa. St. 139; *Oldham v. York* (Tenn. Sup.), 41 S. W. 333; *Deadrick v. Armour* (Tenn.), 10 Humph. 588; *Gourley v. Thompson*, 2 Sneed (Tenn.), 387; *Jarnagin v. Conway* (Tenn.), 2 Humph. 50; *Saxton v. Webber*, 83 Wis. 617; 20 L. R. A. 509; *Carney v. Kain*, 40 W. Va. 758.

"It will be presumed that a person when he makes and publishes a will intends to dispose of his whole estate, unless the presumption is rebutted by its provisions or evidence to the contrary."<sup>30</sup>

Where testator provided that if his son survives his wife, the whole net income should go to his son, while "in case my son should die leaving my wife surviving, then during the life of my said wife, the widow of my son is to receive one-third of my son's share of said income and the issue of my son two-thirds, and upon the decease of my wife, then the widow of my said son is to receive one-third of the principal of the trust fund, and the issue two-thirds," it was held that testator did not die intestate where his wife survived him, but died before the son, and the son then died; but that the fund passed to the widow and children of such son.<sup>31</sup>

But where testator has not disposed of his property by will, the courts can not, under guise of construction, make a new or corrected will for him to pass such property.<sup>32</sup>

<sup>30</sup> Whitcomb v. Rodman, 156 Ill. 116; 28 L. R. A. 149, citing Higgins v. Dwen, 100 Ill. 554; so Woman's Union Missionary Society v. Mead, 131 Ill. 338; Kennard v. Kennard, 63 N. H. 303; Hoitt v. Hoitt, 63 N. H. 475; 56 Am. Rep. 530; Weatherhead v. Stoddard, 58 Vt. 623.

<sup>31</sup> Cox's Estate, 180 Pa. St. 139.

<sup>32</sup> "It is true that courts have always leaned to constructions which will avoid intestacy, and their swift willingness in this regard has passed into a rule of construction, but there are well-defined limits, beyond which the courts have not gone, and beyond which they could not go without subverting all rules and leaving the interpretation of every will to the mere caprice and whim of the chancellor. One of these rules, firmly established and never departed from or even criticised, is that the expressed intent will not be varied under the guise of cor-

rection, because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that intent. The inquiry will not go to the secret workings of the mind of the testator. It is not, what did he mean? but it is, what do his words mean? In Bingel v. Volz, 142 Ill. 214; 34 Am. St. Rep. 64, it is well said: "The purpose of construction as applied to wills is unquestionably to arrive if possible at the intention of the testator, but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will." Estate of Young, 123 Cal. 337, citing and following Abercrombie v. Abercrombie, 27 Ala. 489; Arthur v. Arthur, 10 Barb. 9; Caldwell v. Caldwell, 7 Bush. 515; Stur-



Where testator attempts to dispose of his property by a gift which is void at law, and there is no residuary clause, such property descends as intestate.<sup>33</sup>

Income to be accumulated in excess of the period allowed by statute descends as intestate property, where the gift of the accumulated fund is contingent, and the beneficiaries can not be ascertained until the end of the accumulation period.<sup>34</sup>

So where the persons to whom certain stock is bequeathed can not be ascertained, the dividends are intestate property.<sup>35</sup>

But where the legacy was lawful on its face, and failed only because the evidence showed it was held on an unlawful parol trust, it was held on a resulting trust for testator's heirs and next of kin, but was not intestate property.<sup>36</sup>

So where the residuary clause merely attempts to pass any property "not hereinbefore disposed of," a void devise does not pass under such clause, but passes as intestate property.<sup>37</sup>

So, in the absence of a residuary clause, a lapsed devise or legacy descends as intestate property,<sup>38</sup> unless testator has specifically provided for its disposition in case of such lapse. Such provision of testator must, of course, be followed.<sup>39</sup>

Where testator intends to make a disposition of his property, but fails to do so by reason of an ambiguity in the dispositive clauses,<sup>40</sup> or where testator, in providing for his prop-

gis v. Cargill, 1 Sand. Ch. 318; Rosborough v. Hemphill, 5 Rich. Eq. 95. To the same effect are, Given v. Hilton, 95 U. S. 591; Cleghorn v. Scott, 86 Ga. 496; Collins v. Collins, 126 Ind. 559; Daman v. Bibber, 135 Mass. 458; State v. Holmes, 115 Mich. 456; Leigh v. Savidge, 14 N. J. Eq. 124; Booth v. Baptist Church, 126 N. Y. 215; Smith v. Jones, 4 Ohio, 115; Gilpin v. Williams, 17 O. S. 396; Colston v. Bishop, 1 Ohio C. C. 460; Alexander v. Mendenhall, 32 Weekly Law Bull. 173; Martin's Estate, 185 Pa. St. 51; Gourley v. Thompson, 2 Sneed. 387.

<sup>33</sup> State v. Holmes, 115 Mich. 456; Booth v. Baptist Church, 126 N. Y. 215; Martin's Estate, 185 Pa. St. 51.

<sup>34</sup> Martin's Estate, 185 Pa. St. 51.

<sup>35</sup> Cleghorn v. Scott, 86 Ga. 496.

<sup>36</sup> Fairchild v. Edson, 154 N. Y. 199, affirming 77 Hun. 298.

<sup>37</sup> Kelly v. Nichols, 17 R. I. 306; 19 L. R. A. 413.

<sup>38</sup> Collins v. Collins, 126 Ind. 559; see Sec. 744.

<sup>39</sup> Smith v. Secor, 157 N. Y. 402.

<sup>40</sup> Lippincott v. Davis, — N. J. — (1894); 28 Atl. 587.

erty under various contingencies, omits to make provisions for the contingency which actually arises,<sup>41</sup> such property descends as intestate.

Where testator devised to his widow his entire residuary estate in fee, and provided that if she remarried she should have one-third of such residue, it was held that on her remarriage two-thirds of the residue was unprovided for and was intestate property.<sup>42</sup>

So where testator grants a life estate to one with a contingent remainder to unborn children, the fee subject to the first taker descends to testator's heirs as intestate property, subject to be divested by the subsequent birth of the children to whom the remainder was given.<sup>43</sup>

So where testator devised a life estate to one with power to dispose of the remainder by will, such remainder descends as intestate property, subject to be divested by the execution of the power to convey.<sup>44</sup>

So where testator devised property to his daughter for life, with power to devise this property by will, and such daughter was his only heir at law, it was held that she took a fee by descent, although testator clearly intended that she should take only a life estate.<sup>45</sup>

Where a devise is revoked by codicil, and no disposition is made of it, it descends as intestate property.<sup>46</sup>

#### §467. Presumptions as to disinheritance.

The presumptions on the subject of disinheritance must, in construing a will, be carefully balanced against those upon

<sup>41</sup> *Bennett v. Packer*, 70 Conn. 357; *De Silver's Estate*, 142 Pa. St. 74; *Nebinger's Estate*, 185 Pa. St. 399; *Wood v. Mason*, 17 R. I. 99.

<sup>42</sup> *Bennett v. Packer*, 70 Conn. 357. (Hence the widow was entitled to a distributive share of such personalty.)

<sup>43</sup> *Joslin v. Hammond*, 3 Myl. & K. 110; *Rand v. Butler*, 48 Conn. 293; *Harrison v. Weatherby*, 180 Ill. 418; *Coots v. Yewell*, 95 Ky. 367; *Hills v. Barnard*, 152 Mass.

67; 9 L. R. A. 211; *Nightingale v. Burrell*, 15 Pick. 104; *Harris v. McLaren*, 30 Miss. 533; *Robinson v. Palmer*, 90 Me. 246; *Gilpin v. Williams*, 25 O. St. 295; *Stokes v. Vanwyck*, 83 Va. 724; *In re Kenyon, Petitioner*, 17 R. I. 149; *Bigley v. Watson*, 98 Tenn. 353; 38 L. R. A. 679.

<sup>44</sup> *Folger v. Titcomb*, 92 Me. 184; *Collins v. Wickwire*, 162 Mass. 143.

<sup>45</sup> *Wilder v. Howland*, 102 Ga. 44.

<sup>46</sup> *Minkler v. Simons*, 172 Ill. 323.

the subject of partial intestacy, since the two are sharply contrasted, and possibly in some cases may even prove antagonistic. The older law books and many cases insist quite strenuously that every reasonable construction in the will must be made in favor of the heir at law; and that he can be disinherited only by words clearly and necessarily producing that effect.<sup>47</sup>

"In construing a will under which title is asserted by a stranger or person not claiming by immediate descent, all doubts will be resolved in favor of the heir or next of kin, it being a maxim that the heir will not be disinherited except by express words or by necessary implication."<sup>48</sup>

The earlier statements of this legal principle are possibly somewhat modified by modern authority. If the testator in any particular case had chosen to revoke his will and to die intestate, his property would descend in accordance with the Statutes of Descent and Distribution. This possibility that his relatives may succeed to his property under these statutes is one which is looked upon by many people as almost in the nature of a right, and there is a strong feeling that the testator owes a legal duty to provide for them by will. Further, if testator had made a will which disposed of but part of his property, the residue of his estate would pass under these laws.

The courts are nearly unanimous in holding that where testator does not by will dispose of the whole of his estate, no negative words of exclusion can prevent the rest of the property from passing under the Statutes of Descent and Dis-

<sup>47</sup> *Wilkins v. Allen*, 18 How. (U. S.), 385; *Walker v. Parker*, 13 Pet. (U. S.), 166; *Pendleton v. Larrabee*, 62 Conn. 393; *Bill v. Payne*, 62 Conn. 140; *Downing v. Bain*, 24 Ga. 372; *Wilder v. Holland*, 102 Ga. 44; *Andrews v. Harron*, 59 Kan. 771; *Howard v. American Peace Society*, 49 Me. 288; *Mullarky v. Sullivan*, 136 N. Y. 227; *Bane v. Wick*, 19 Ohio, 328; *Crane v. Doty*, 1 O. S.

279; *Mathews v. Krisher*, 59 O. S. 562; *McIntire v. Ramsey*, 23 Pa. St. 317; *Stewart's Estate*, 147 Pa. St. 383; *Hoover v. Gregory*, 10 Yerg. (Tenn.), 444; *Wootton v. Redd*, 12 Gratt. (Va.), 196.

This extreme statement is somewhat qualified by other cases. *Banning v. Banning*, 12 O. S. 437.

<sup>48</sup> *Stewart's Estate*, 147 Pa. St. 383.

tribution. It not infrequently happens that testator by name specifically provides that certain of his relatives shall not receive any part of his estate. Such a provision is entirely ineffectual as to his intestate property.<sup>49</sup>

And so where testator makes specific bequests of his property, and leaves a part of the same undisposed of, such part will descend in accordance with the law of descent and distribution, irrespective of the actual intention or expectation of testator.<sup>50</sup>

So where testator shows by his whole will that his intention is to exclude certain near relatives in favor of more distant ones, any property undisposed of will, nevertheless, descend as intestate property to such near relatives to the exclusion of those more remote.<sup>51</sup>

So where testator left his wife a life estate in his realty, and made no disposition of the remainder, which, under the statutes then in force, would descend to his brothers and sisters, it was held that where the law of descent was changed before testator's death so that this intestate realty, being non-ancestral property, descended to his wife in preference to his brothers and sisters, such property must descend in accordance with the statutes in force at testator's death, although testator clearly did not intend that his wife should have a fee.<sup>52</sup>

In some states, however, this rule is not in force. The courts attempt in these states to carry out testator's intention by construing these negative words as a gift to the remaining heirs or next of kin, to the exclusion of the heir excepted.<sup>53</sup>

This effect was given to a will as follows: "For sundry

<sup>49</sup> *Laurence v. Smith*, 163 Ill. 149; *Zimmerman v. Hafer*, 81 Md. 347; 32 Atl. 316; *Wells v. Anderson* (N. H.), 44 Atl. 103; *Andrews v. Harron*, 59 Kan. 771; *Gallagher v. Crooks*, 132 N. Y. 338; *Crane v. Doty*, 1 O. S. 279.

<sup>50</sup> *Bill v. Payne*, 62 Conn. 140; *Wilder v. Holland*, 102 Ga. 44; *Andrews v. Harron*, 59 Kan. 771;

*State v. Holmes*, 115 Mich. 456; *Clarkson v. Pell*, 17 R. I. 646; *Mathews v. Krisher*, 59 O. S. 562; *Young v. Kinkead*, 101 Ky. 252.

<sup>51</sup> *Bill v. Payne*, 62 Conn. 140.

<sup>52</sup> *State v. Holmes*, 115 Mich. 456; *Mathews v. Krisher*, 59 O. S. 562.

<sup>53</sup> *Tabor v. McIntire*, 79 Ky. 505; *Allen's Succession*, 49 L. A. Ann. 1096.

reasons and bad treatment, it is my will that Boone Tabor shan't have any of my property and Thos. McIntire only through a trustee in the way of clothes and something to keep him from suffering."<sup>54</sup>

Courts, however, go considerably farther than this in protecting the interests of the heirs and next of kin. In the construction of the provisions of a will in some jurisdictions the general rule is laid down in almost the same language as in the common law rule, that the heir at law is not to be disinherited unless such an intent clearly appears from the language of the will, either expressly or necessarily implied.<sup>55</sup>

Where this principle is not expressed in such sweeping language, it is always held by the courts where the will is equally susceptible of two constructions, one in favor of the heirs and the other in favor of some more distant relative, that the one in favor of the heir will be preferred.<sup>56</sup>

So in construing a will, the courts, in case of doubt, lean toward a construction which conforms as nearly as possible to the Statutes of Descent and Distribution.<sup>57</sup>

Thus, in a devise to testator's children in existence at the time of his death, it will be presumed that testator intended an equality of distribution among them.<sup>58</sup>

In the case of the death of some of testator's children, the law will, unless the contrary appear on the face of the will, assume that a distribution *per stirpes* in accordance with the principle of lineal representation is intended,<sup>59</sup> if lapse is prevented in any way.

<sup>54</sup> Tabor v. McIntire, 79 Ky. 505.

<sup>55</sup> Pendleton v. Larrabee, 62 Conn. 393; Wilder v. Holland, 102 Ga. 44; Mathews v. Krisher, 59 O. S. 562; Bell's Estate, 147 Pa. St. 389, 1892; 23 Atl. 577; Stewart's Estate, 147 Pa. St. 383.

<sup>56</sup> Pendleton v. Larrabee, 62 Conn. 393; Downing v. Bain, 24 Ga. 372; Thompson v. Shackelford, 6 Tex. Civ. App. 121.

<sup>57</sup> Geery v. Skelding, 62 Conn.

499; Fahnestock's Estate, 147 Pa. St. 327.

<sup>58</sup> Pinkham v. Blair, 57 N. H. 226; Patterson's App., 128 Pa. St. 269.

<sup>59</sup> Doe v. Considine, 6 Wall. 458; Dale v. White, 33 Conn. 294; Teele v. Hathaway, 129 Mass. 164; Edgerly v. Barker, 66 N. H. 434; 28 L. R. A. 328; Goebel v. Wolf, 113 N. Y. 405; Dunlap's Appeal, 116 Pa. St. 500; Chess's Appeal, 87 Pa. St. 362; 30 Am. Rep. 361.

Where a residuary clause is capable of two constructions, one of which, making it a general residuary clause, will result in the exclusion of testator's heirs, and the other of which, making it a particular residuary clause, will leave a provision for testator's heirs under the intestate laws, that provision will be preferred which leaves a provision for the heirs.<sup>60</sup>

#### §468. Devise by implication.

Since the courts endeavor to ascertain the intention of testator from his whole will, rather than disjointed parts thereof, and enforce this intention, if lawful, when thus ascertained, it follows that it is possible for testator to dispose of property, not by any formal disposition in his will, but by necessary implication from his will taken as a whole. The presumption is very strong, however, against his having intended any devise or bequest which he has not set forth in his will. There must, as has been quoted in recent cases, be a probability arising from the whole will that testator intended to make the bequest or devise, which he has not set forth expressly; so strong that it can not be supposed that any other intention existed in the mind of testator.<sup>61</sup>

But where testator clearly intends to dispose of property by his will to certain beneficiaries, the courts will enforce such a provision though no gift is made in formal language.<sup>62</sup>

Where an estate is devised to the heirs or next of kin of testator by such description, after the death of another, a life estate is by implication created in that other.<sup>63</sup>

<sup>60</sup> *Davis v. Davis*, 62 O. S. 411.

<sup>61</sup> *McMichael v. Pye*, 75 Ga. 189; *Reinhardt's Estate*, 74 Cal. 365; *Eneberg v. Carter*, 98 Mo. 647; *Barnhard v. Barlow*, 50 N. J. Eq. 131; *De Silver's Estate*, 142 Pa. St. 74; *Sutherland v. Sydnor*, 84 Va. 880; *Bartlett v. Patton*, 33 W. Va. 71; 5 L. R. A. 523. This is substantially the language used by Lord Eldon in *Wilkinson v. Adam*, 1 Ves. & B. 445.

<sup>62</sup> *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95; 8 L. R. A. 740; *Masterson v. Townshend*, 123 N. Y. 458; 10 L. R. A. 816, citing *Goodright v. Hoskins*, 9 East. 306; *Jackson v. Billinger*, 18 Johns. 386.

<sup>63</sup> *In re Springfield* (1894), 3 Ch. 603; 64 L. J. Ch. (N. S.) 201; *Smith's Trusts*, L. R. 1 Eq. 79; *Blake's Trusts*, L. R. 3 Eq. 799; *Masterson v. Townshend*, 123 N. Y. 458.

But where the devise after the death of another is to strangers to testator's blood<sup>64</sup> or to persons, describing them by name, who happen to be heirs or next of kin of testator,<sup>65</sup> there will be no devise by implication to the person at whose death the estate is to take effect. The reason for this distinction is, that where the testator specifically devises property to his heirs or next of kin at the termination of a life estate, he can not intend that they should take any sooner; and since he evidently means to dispose of the beneficiary interest entirely, the person at whose death the estate is to take effect must be intended by testator as the beneficiary in the meantime. But where the devise or bequest is to strangers at the termination of the life estate, it is simply a case of partial intestacy; and the undisposed of interest in the property during the life of the person indicated goes to the heirs and next of kin.

Where the testator recites in his will that he has made a specified provision for a designated person in another part of the will, and this recital incorrectly, but nevertheless clearly, shows the intention on the part of testator to make such disposition of his property by will, it is therefore held to create a devise by implication.<sup>66</sup> But where the testator in his will recites erroneously that he has conveyed certain of his real estate by deed to a certain named person, it does not show an intention to dispose of the property by will, but merely testator's opinion as to the legal effect of some pre-existing instrument. If, therefore, such pre-existing deed is for any reason invalid, the reference to it in the will can not be held to amount to a devise by implication of the property described in such deed to the grantee therein.<sup>67</sup>

<sup>64</sup> *Ralph v. Carrick*, 11 Ch. Div. 873.

<sup>65</sup> *Re Springfield* (1894), 3 Ch. 603; 64 L. J. Ch. (N. S.) 201; *Gilpin v. Williams*, 25 O. S. 283.

<sup>66</sup> *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19; *Jordan v. Fortescue*, 10 Beav. 259; *Harris v. Harris*, Ir. Rep. 3 Eq. 610; *Atwood*

*v. Geiger*, 69 Ga. 498; *Hunt ex rel v. Evans*, 134 Ill. 496; 11 L. R. A. 185.

<sup>67</sup> *Hunt ex rel v. Evans*, 134 Ill. 496; 11 L. R. A. 185; *Benson v. Hall*, 150 Ill. 60; *Williams v. Allen*, 17 Ga. 81; *Zimmerman v. Hafer*, 81 Md. 347; 32 Atl. 316; *Swenson's Estate*, 55 Minn.

So other declarations, merely showing testator's opinion as to the ownership of certain property, can not be construed so as to amount to devise by implication. Thus, a declaration in a will to the effect that testator had no separate property of his own, but that his entire estate consisted in his interest in the community property owned by himself and his wife, has not the effect of converting his separate property into community property, nor does it amount to an implied devise to his wife of one half of his separate estate.<sup>68</sup> Nor do testator's declarations, showing a mistake as to law of descent, amount to a devise by implication. Thus, where community property would descend to the wife in case of intestacy, no devise by implication was created by a provision that such property should go "according to law, except my sister A. . . . shall be excluded from any share in my estate," though testator evidently believed that his half of the community property would, in case of intestacy, go to his brothers and sisters.<sup>69</sup>

Where the testator provided that his estate should remain as it is during his wife's lifetime, and at her death it should be equally divided among his children, it was held that his wife took a life estate by implication.<sup>70</sup> And where the testator expressly devises a life estate to his wife, and then made a devise over "of so much thereof as may remain unexpended," it was held that such a provision conferred by implication a power of disposition upon the widow.<sup>71</sup> And where testator devised land in trust to pay a fixed annuity to his wife as long as she should remain unmarried, with power of sale if necessary, in which case his widow was to receive the same annuity as long as she remained unmarried, in which case, upon her death or second marriage, the proceeds should be paid to the brother of testator, it was held that this constituted

300; *In re Bagot* (1893), 3 Ch. 348; *Langslow v. Langslow*, 21 Beav. 552; *Ralph v. Watson*, 9 L. J. Ch. 328; *Bowles v. Caudle* (N. C.), 35 S. E. 604.

<sup>68</sup> *Hatch v. Ferguson*, 57 Fed. Rep. 966; *Clamorgan v. Lane*, 9 Mo. 446.

<sup>69</sup> *McCown v. Owens*, Tex. Civ. App. (1897), 40 S. W. 336.

<sup>70</sup> *Nicholson v. Drennan*, 35 S. C. 333; so *Anders v. Gerhard*, 140 Pa. St. 155.

<sup>71</sup> *Cashman's Estate*, 28 Ill. App. 346; see Sec. 695.



a devise of the property itself to testator's brother, subject to the annuity to the widow.<sup>72</sup>

And where testator devised to a son a certain farm, excluding the minerals, and then provided that each of his remaining seven children should receive an eighth interest in the estate, it is held that, since it appeared to be the general intention of testator to make an equal disposition of his property among his children, a devise by implication of the undisposed of eighth of the minerals was created in favor of the son to whom the farm was devised.<sup>73</sup>

A devise to A of all the property of testator, with a provision "I desire the said A and B to have the exclusive benefit of the above bequeathed estate, free from any control of C" [C being the husband, A the wife and B the daughter], was held not to be a gift by implication to B.<sup>74</sup>

A devise to one for life with a remainder over, if the life tenant dies without leaving children, does not of itself create a gift by implication to the children of the life tenant.<sup>75</sup>

#### §469. Construction of wills passing both realty and personalty.

While in some particular cases the *prima facie* meaning of words which refer to realty may be different from the meaning of the same words referring to personalty,<sup>76</sup> yet where the same words are used in a will, as applying generally to both real and personal property, it will not be presumed that testator intended these words to refer to one thing with reference to his realty and to another thing with reference to his personal property.<sup>77</sup>

<sup>72</sup> Masterson v. Townshend, 123 N. Y. 458; 10 L. R. A. 816.

<sup>73</sup> Christie v. Christie, 162 Pa. St. 485.

<sup>74</sup> Balliett v. Veal, 140 Mo. 187; 41 S. W. 736.

<sup>75</sup> Rawlin's Trust (C. A.), L. R. 45 Ch. D. 299; Scale v. Rawlins (H. L. E.), (1892), A. C. 342; Sparks

v. Restal, 24 Beav. 218; Turner v. Withers, 23 Md. 18; Hoopes's Estate, 185 Pa. St. 172.

<sup>76</sup> See Chapt. XXI.

<sup>77</sup> Heilman v. Heilman, 129 Ind. 59; Adams v. Farley, — Miss. — (1898); 18 So. 390; Morrison v. Truby, 145 Pa. St. 540; Sellers v. Reed, 88 Va. 377.

### §470. Inconsistent provisions.

We have seen that a fundamental rule of construction is that the court, in construing a will, will endeavor to give effect to every part of the same.<sup>78</sup> As a particular application of this rule rather than a separate rule, it follows that, within all reasonable limits, the courts will endeavor to reconcile two apparently inconsistent provisions of a will rather than to absolutely ignore either, or to declare that they are both void or uncertain.<sup>79</sup> This is especially true when the effect of the subsequent clause is not to cut down the preceding gift, but to enlarge it. "It has never been held, however, that a subsequent provision which diminishes a preceding gift, as by cutting down to a life estate a prior devise, is so far conflicting and irreconcilable with that gift as to be in a legal sense repugnant thereto, and emphatically never when the effect of the later gift is to enlarge the former."<sup>80</sup>

The rule already referred to,<sup>81</sup> that a codicil is to be construed, as far as is possible, so as to harmonize with the provisions of the will to which it is attached, is simply an application of the principle under discussion to a particular case.<sup>82</sup>

As a last resort, in case of an absolute and irreconcilable discrepancy between two clauses of a will, the courts will enforce the clause which is last in place in the will and abrogate the one which comes first.<sup>83</sup>

<sup>78</sup> See Sec. 462.

<sup>79</sup> *Wright v. Denn*, 10 Wheat. 239; *Vandiver v. Vandiver*, 115 Ala. 328; *Warner v. Willard*, 54 Conn. 470; *Jenks v. Jackson*, 127 Ill. 341; *Davis v. Hoover*, 112 Ind. 423; *Clafin v. Ashton*, 128 Mass. 441; *Cushing v. Burrell*, 137 Mass. 21; *Prosser v. Hardesty*, 101 Mo. 593; *Baxter v. Bowyer*, 19 O. S. 490; *James v. Pruden*, 14 O. S. 251; *Young v. McIntire*, 3 Ohio, 498; *Worman v. Teagarden*, 2 O. S. 380; *Parker v. Parker*, 13 O. S. 95; *Sullivan v. Strauss*, 161 Pa. St. 145; *Fahnestock's Estate*, 147 Pa. St. 327; *Shreiner's Ap-*

*peal*, 53 Pa. St. 106; *Dill v. Dill*, 1 De Saus (S. Car.), 237; *Duncan v. Philips*, 3 Head. (Tenn.), 415; *Coyne v. Palmer*, 63 Vt. 310; 21 Atl. 1101; *Houser v. Ruffner*, 18 W. Va. 244.

<sup>80</sup> *Fahnestock's Estate*, 147 Pa. St. 327.

<sup>81</sup> See Sec. 462.

<sup>82</sup> *Sturgis v. Work*, 122 Ind. 134; *Goodwinn v. Coddington*, 154 N. Y. 283.

<sup>83</sup> *Griffin v. Pringle*, 56 Ala. 486; *Parks v. Kimes*, 100 Ind. 148; *Jordan v. Woodin*, 93 Io. 453; *Covert v. Sebern*, 73 Io. 564; *Carter v.*

This rule, however, is resorted to only when two clauses are so irreconcilable that they can not stand together, and is inapplicable when the will can be so construed as to give effect to the whole of it.<sup>84</sup> "Both clauses are contained in the same instrument and are both, therefore, simultaneous expressions of the testator's intent," "and, beside, as already stated, the rule which gives effect to the later expression of the testator's intent is to be resorted to only when all attempts to reconcile inharmonious provisions have proved unavailing." \*

#### §471. General rules controlling definitions.

The law recognizes that in many cases wills are drawn by the testator without the assistance of legal advice. From this arose one of the most valuable maxims of law in the construction of wills, "*benigne interpretamur chartas propter simplicitatem laicorum.*"<sup>85</sup>

It is presumed, therefore, that the words of the will are used in their popular and conventional meaning, unless from the face of the will they appear to be otherwise used.<sup>86</sup>

Thus, a provision that the wife of testator should be "sole controller" of the property of testator, and charging all his just debts upon a certain fund, was held to constitute his wife his executrix, but not sole legatee.<sup>87</sup>

If, however, testator uses words which have a definite and well understood technical meaning, the *prima facie* presump-

Alexander, 71 Mo. 585; Hendershot v. Shields, 42 N. J. Eq. 317; Rogers v. Rogers, 49 N. J. Eq. 98; Kinkele v. Wilson, 151 N. Y. 269; Coonrod v. Coonrod, 6 Ohio, 114; Young v. McIntire, 3 Ohio, 498; Davis v. Boggs, 20 O. S. 550; Parker v. Parker, 13 O. S. 95; Howe v. Fuller, 19 Ohio, 51; Sheetz Appeal, 82 Pa. St. 213; Fraser v. Boone, 1 Hill (S. Car.), 360.

<sup>84</sup> Rogers v. Rogers, 49 N. J. Eq. 98.

\* *In re Fisher*, 19 R. I. 53.

<sup>85</sup> Blackstone's Com., Book 2, p. 379.

<sup>86</sup> *Hamilton v. Ritchie*, (H. L.), (1894); A. C. 310; *Crosby v. Mason*, 32 Conn. 482; *Robertson v. Johnson*, 24 Ga. 102; *Cowles v. Henry*, 61 Minn. 459; 63 N. W. 1028; *Taubenhau v. Dunz*, 125 Ill. 524, affirming 20 Ill. App. 262; *Vannerson v. Culbertson*, 18 Miss. 150; *Edgerly v. Barker*, 66 N. H. 434; 28 L. R. A. 328; *Carter v. Reddish*, 32 O. S. 1; *Hart v. White*, 26 Vt. 260; *Wallace v. Minor*, 86 Va. 550; 10 S. E. 23.

<sup>87</sup> *Wolffe v. Loeb*, 98 Ala. 426.

tion will be that he intended to use them in this sense, unless it appears plainly from the context that another meaning was intended.<sup>88</sup>

These rules are not to be disturbed by the fact that the testator was illiterate and uneducated. The presumption will be, notwithstanding that the words employed are used in their correct meaning, unless, from the will itself or from admissible evidence, it appears that some other meaning was intended.<sup>89</sup> Still the illiteracy of testator and his inability to express himself in language technically correct are important in arriving at the meaning of the language actually used by him.<sup>90</sup> The context of the will may show that even technical words were used in some meaning other than the one which is technically correct.<sup>91</sup>

#### §472. Punctuation and grammar.

Since the law deduces testator's intention from the whole will, the courts are within the proper scope of their powers in inserting punctuation, when necessary to explain the meaning, where the testator has omitted this aid to clearness.<sup>92</sup>

Further, if the intention of testator is clear the courts will give effect to it, although in so doing they may ignore in part the punctuation which the testator has actually employed.<sup>93</sup>

<sup>88</sup> *Wallace v. Minor*, 86 Va. 550; 10 S. E. 423; *Marshall v. Hadley*, 50 N. J. Eq. 547; *Evans v. Godbold*, 6 Rich. Eq. 26; *Townsend v. Townsend*, 25 O. S. 477.

<sup>89</sup> *Ihrle's Estate*, 162 Pa. St. 369.

<sup>90</sup> *Strong v. Cummin*, 2 Burr. 770; *Davis v. Boggs*, 20 O. S. 550.

<sup>91</sup> *Stevenson v. Evans*, 10 O. S. 307; *Davis v. Boggs*, 20 O. S. 550.

"Although the phrase 'in trust' has a well-defined and legal meaning, it must be remembered that it is a technical phrase and peculiarly liable, therefore, to be misapplied or used in some secondary sense by persons not learned in the law." *Davis v. Boggs*. 20 O. S. 550.

<sup>92</sup> *Napier v. Davis*, 7 J. J. Marsh (Ky.), 283; *Lycan v. Miller*, 112 Mo. 548; 20 S. W. 36.

<sup>93</sup> *Black v. Herring*, 79 Md. 146. (A gift was to be paid by executors to A "should they think proper so to do to pay over from time to time" the net income to B, testator's son. As from the context the testator evidently meant to dispose of the income, it was held that the phrase "should they think proper" applied to the gift to A, and not to the gift to B.) *Rose v. Hale*, 185 Ill. 378; *Wildberger v. Cheek*, 94 Va. 517.

And where the punctuation in the will is in evident accord with the intention of the testator, the use of capitals in the middle of a sentence may be regarded as unintentional.<sup>94</sup> Where testator's intention appears from the will taken as a whole, this intention can not be defeated because testator's intention is expressed in ungrammatical language.<sup>95</sup>

### §473. Modification by context.

A still more striking application of the principle that testator's intention is to be deduced from the whole will, is found where certain words are rejected, altered or transposed by the courts in order to give effect to his intention which appears from the consideration of the whole will. The courts are reluctant to do this. "Doubtless, unless forbidden by what appears to be the clear intention of the testator, effect should be given to every word used by him; but cases sometimes occur where from the misuse of terms this can not be done, and the meaning of terms have to be modified, and sometimes words even rejected in order to preserve and give effect to what is the manifest intention of the testator."<sup>96</sup> Still it not infrequently happens that testator makes use of words which, in their common and literal meaning, if unmodified by the context of the will, will either be inconsistent with the remainder of the will or will cause illegal dispositions of the property; in such case "the meaning of words and phrases used in some parts of the will must be derived from that which would attach to them standing alone, and then must be

<sup>94</sup> *Eberhardt v. Perolin*, 49 N. J. Eq. 570; *Kinkele v. Wilson*, 151 N. Y. 269.

<sup>95</sup> *Thompson v. Thompson*, 4 O. S. 333.

"The terms of a will are not, of necessity, to be construed technically and with strict reference to grammatical accuracy; but they are to be viewed sensibly and liberally in order to give effect to the testa-

tor's intentions. Of all instruments that need the benefit of a liberal construction—a construction that prefers substance to mere form—wills need it the most." *Thompson v. Thompson*, *supra*; so *Brasher v. Marsh*, 15 O. S. 103.

<sup>96</sup> *Dulaney v. Middleton*, 72 Md. 67, citing *Thelluson v. Woodford*, 4 Ves. 227.

compared with other language used in other portions of the instrument, and limitations must be implied, and thus the general meaning of all the language must be arrived at."<sup>97</sup> So, although reluctantly, the courts exercise this power of rejecting and transposing words.<sup>98</sup> And this power may extend to construing a will as if words were inserted there, where it appears clearly on its face that such words were omitted solely by inadvertence, and are essential to the expression of testator's manifest intention.<sup>99</sup>

Thus, where legatee had been given the income of a fund, a provision "for the distribution of her share" was construed as if modified so as to read "for the distribution of *the dividends* of her share";<sup>100</sup> and a bequest of "five thousand" in connection with other money legacies may be read "five thousand dollars."<sup>101</sup>

The courts may exercise this power where the fact that words are omitted by accident does not appear until the court endeavors by means of extrinsic evidence to apply the description in the will to the subject-matter.<sup>102</sup>

Thus, the courts do not hesitate, where the context requires it, to construe "and" as if it were "or";<sup>103</sup> and, if necessary,

<sup>97</sup> *Roe v. Vingut*, 117 N. Y. 204; so *Wood's Estate*, 36 Cal. 81; *Murphy v. Stanley*, 69 Tex. 227.

<sup>98</sup> *Huffman v. Young*, 170 Ill. 290; *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95; 8 L. R. A. 740; *Drew v. Drew*, 28 N. H. 489; *Kanouse v. Stockbower*, 21 Atl. 197; 48 N. J. Eq. 42; *Marshall v. Hadley*, 35 Atl. 325; 50 N. J. Eq. 547; *Hendershot v. Shields*, 42 N. J. Eq. 317; *Hotaling v. Marsh*, 132 N. Y. 29; *Duncan v. Philips*, 3 Head. (Tenn.), 415; *East v. Garrett*, 84 Va. 523.

<sup>99</sup> *Kellogg v. Mix*, 37 Conn. 243; *Cooper v. Cooper*, 7 Hous. (Del.), 488; *Glover v. Condell*, 163 Ill. 566; *Aulick v. Wallace*, 12 Bush. 531; *Heald v. Heald*, 56 Md. 300; *Hower-*

*ton v. Henderson*, 88 N. Car. 597; *Greenough v. Cass*, 64 N. H. 326; *Patterson v. Read*, 42 N. J. Eq. 146; *Van Houten v. Pennington*, 4 Hal. Ch. 272; *Stevenson v. Brown*, 3 Gr. 503; *Den v. Taylor*, 2 South. 413; *Nelson v. Combs*, 3 Harr. 27; *Reid v. Hancock*, 10 Hump. (Tenn.), 368; *Wootton v. Redd*, 12 Gratt. (Va.), 196.

<sup>100</sup> *Glover v. Condell*, 163 Ill. 566.

<sup>101</sup> *Ross v. Kiger*, 42 W. Va. 402.

<sup>102</sup> *Thomson v. Thomson*, 115 Mo. 56; 21 S. W. 1085.

<sup>103</sup> *Roe v. Vingut*, 117 N. Y. 204; *Hotaling v. Marsh*, 132 N. Y. 29; *Doebler's Appeal*, 64 Pa. St. 9; *Scott v. Price*, 2 S. & R. 59; *Wood v. Mason*, 17 R. I. 99.

the courts may read "or" as if it were "and."<sup>104</sup> So, where the word "donors" was clearly used for "donees" the court may read it as if it were written "donees."<sup>105</sup> And where the context requires it, a devise to the "youngest grandchild" of testator has been read as if it were to the "youngest grandchild already named."<sup>106</sup>

So in a gift of the share of the daughter who died without issue "to my children who may survive, or to the descendants of their children," it was held that "their" should be read "my."<sup>107</sup> So "her" may be read "his."<sup>108</sup>

The word "bequeath" is *prima facie* confined to personalty;<sup>109</sup> but where used with reference to real property it may be treated as synonymous with "devise."<sup>110</sup> And so the word "devise," where clearly referring to personalty, may be read as if it were "bequeath."<sup>111</sup>

Where testator's intention appears from his will the word "bequest" may even be held to apply to a deed given in the nature of an advancement.<sup>112</sup>

The word "any" must, from the context, often be read as if it were "all." Thus a devise over on the death of "any" child without issue, where the intention is clearly that the gift was not to take effect as long as any of testator's descendants were in existence, was read as if it were a gift over upon the death of "all" the children without issue.<sup>113</sup>

So the word "between" may be read as if it were "through"; as where testator divided his realty by a "line running north and south between" certain sections, where the line between such sections ran east and west.<sup>114</sup>

<sup>104</sup> Janney v. Sprigg, 7 Gill. (Md.), 197; Slingluff v. Johns, 87 Md. 273; Cody v. Bunn, 46 N. J. Eq. 131; Ward v. Barrows, 2 O. S. 241.

<sup>105</sup> White v. Mass. Institute of Tech., 171 Mass. 84.

<sup>106</sup> Roe v. Vingut, 117 N. Y. 204.

<sup>107</sup> Slingluff v. Johns, 87 Md. 273.

<sup>108</sup> Allen v. Boomer, 82 Wis. 361.

<sup>109</sup> Keating v. McAdoo, 180 Pa. St. 5.

<sup>110</sup> O'Toole v. Browne, 3 El. & Bl. 572; Stumpenhousen's Estate, 108 Io. 555; Allen v. White, 97 Mass. 504; Lamb v. Lamb, 131 N. Y. 227.

<sup>111</sup> *In re* White, 125 N. Y. 544; Clarke v. Clarke, 46 S. Car. 230.

<sup>112</sup> Forsythe v. Mintier, 39 O. S. 349.

<sup>113</sup> Banks' Will, 87 Md. 425.

<sup>114</sup> Briant v. Garrison, 150 Mo. 655.

Where it is necessary to carry into effect the clear intention of the testator, different parts of the will may be transposed.<sup>115</sup> Thus where the testator had put a provision for a bequest of a certain sum of money in the midst of a residuary clause which provided that the residue of the estate should be divided into a certain number of parts, and which disposed of all of these parts, it was held that the inserted clause must be read as if it preceded the residuary clause, since, if this legacy were deducted after allotting two of the shares of the estate, two remaining shares would be less than those already allotted, which was directly contrary to the clear intention of the testator.<sup>116</sup>

#### §474. Miscellaneous examples of definitions.

The word "legacy" in a codicil which gives a considerable sum to each of testatrix's cousins who have not been remembered by a money "legacy," does not include those who have received gifts of articles of small value in the will.<sup>117</sup> But one to whom a pair of rifles was given by will was held to be a legatee.<sup>118</sup>

Where the term "Judge of Probate" is used in one clause of the will with the meaning "Court of Probate," it will be construed to have the same meaning throughout the whole will unless the contrary clearly appears.<sup>119</sup>

The word "above" as used in a will refers to the clause preceding the one containing such word.<sup>120</sup>

And a direction for distribution of property "hereinbefore" given does not apply to property given in subsequent clauses.<sup>121</sup>

<sup>115</sup> *Latham v. Latham*, 30 Io. 294; *Hunt v. Johnson*, 10 B. Mon. (Ky.), 342; *Merkle's Appeal*, 109 Pa. St. 235; *Ferry's Appeal*, 102 Pa. St. 207; *O'Neill v. Boozer*, 4 Rich. Eq. 22; *Creveling v. Jones*, 1 Zab. (N. J.), 573.

<sup>116</sup> *Waters v. Waters*, — Ky. — (1895); 16 Ky. L. Rep. 429; 28 S. W. 958.

<sup>117</sup> *White v. Mass. Institute of Technology*, 171 Mass. 84.

<sup>118</sup> *Neville v. Dulaney*, 89 Va. 842.

<sup>119</sup> *Allen's Appeal*, 69 Conn. 702.

<sup>120</sup> *McGee v. Hall*, 26 S. Car. 179.

<sup>121</sup> *Reid v. Walbach*, 75 Md. 205; 23 Atl. 472.



Where the several devises are connected by the word "also," and one of such gifts clearly shows what duration of estate is intended and the rest are ambiguous, it was held that the ambiguous devises are to be considered as of the duration of the devise, which is stated in clear and unmistakable terms. This holds good even where the devises were in such general terms as to pass the fee or absolute ownership if standing alone; and they may thus be cut down to a life interest.<sup>122</sup>

<sup>122</sup> Rusk v. Zuck, 147 Ind. 388; Eberhardt v. Parolin, 49 N. J. Eq. 570; Noble v. Ayres, 61 O. S. 491; 56 N. E. 199.

Dupont v. DuBose, 52 S. C. 244; *contra*, Loring v. Hayer, 86 Me. 351; Moon v. Moon, 2 Strob. Eq. 327.

Thus a gift of certain land on condition; 'and also' certain other land gives the land last devised without condition. Yeatman v. Haney, 79 Tex. 67.

## CHAPTER XXI.

## DESCRIPTION OF PROPERTY DISPOSED OF BY WILL.

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§475. Words passing entire estate.

An application of the general principle that the courts endeavor to ascertain and enforce the intention of the testator, whether expressed in technical language or not, is found in the well-recognized rule that any words, no matter how informal, which clearly show testator's intention to dispose of his entire estate, will pass such estate, even though the description of the property may be very informal and lacking in technical accuracy. This result is also aided by the maxim that a partial intestacy is to be avoided where the construction warrants.<sup>1</sup>

Where a clear intent to dispose of all of testator's property is shown, the fact that in addition to a general gift an attempt is made at an enumeration of the specific articles owned by testator, does not prevent the general gift from taking effect.<sup>2</sup> So a gift of all the live stock "which I may own at

<sup>1</sup> Taubenhau v. Dunz, 125 Ill. 524, affirming 20 Ill. App. 262; Patrick v. Simpson, L. R. 24 Q. B. D. 128; Sites v. Eldredge, 45 N. J. Eq. 632; Sweitzer's Estate, 142 Pa. St. 541; Woodside's Estate, 188 Pa. St. 45;

Dempsey v. Taylor, 4 Tex. Civ. App. 126.

<sup>2</sup> Sites v. Eldredge, 45 N. J. Eq. 632; Woodside's Estate, 188 Pa. St. 45; Dempsey v. Taylor, 4 Tex. Civ. App. 126.

the time of my death" passes sheep owned by testator and leased by him to others.<sup>3</sup>

#### §476. Estate.

A devise of testator's "estate" is *prima facie* a gift of both realty and personalty where not modified by the context, since "estate" is a word of such general import as to pass property of every species.<sup>4</sup> Thus a devise of "all my estate" and of testator's "plantation" in a certain county is sufficiently definite.<sup>5</sup>

A gift of "all the real and personal estate above bequeathed to my wife" passes certain county bonds, the income of which was given to her for life.<sup>6</sup>

This *prima facie* meaning may, however, be modified by the context.

#### §477. Property.

A gift of testator's "property" may, if not controlled by the context, pass both realty and personalty, "property" being like "estate," a word of general import.<sup>7</sup>

A gift to testator's wife of "all of my personal property, both real and personal," passes all testator's real estate in fee simple.<sup>8</sup>

Language used in connection with such a gift, such as referring to an investment thereof and a direction for paying the "principal sum" at a certain time, may show that the gift

<sup>3</sup> Bray v. Pullen, 84 Me. 185.

<sup>4</sup> Flannery v. Hightower, 97 Ga. 592; Mark's Succession, 35 La. Ann. 1054; Dewey v. Morgan, 18 Pick. 295; Andrews v. Brumfield, 32 Miss. 107; Shumate v. Bailey, 110 Mo. 411; Cook v. Lanning, 40 N. J. Eq. 369; Norris v. Clark, 10 N. J. Eq. 51; Den v. Drew, 14 N. J. L. 68; Hofius v. Hofius, 92 Pa. St. 305; Naglee's Estate, 52 Pa. St. 154; Smith v. Smith, 17 Gratt. 268.

<sup>5</sup> Flannery v. Hightower, 97 Ga. 592.

<sup>6</sup> Price v. Hutchins, — Ky. — (1896); 33 S. W. 1120.

<sup>7</sup> White v. Keller, 68 Fed. 796; Taubenhau v. Dunz, 125 Ill. 524, affirming 20 Ill. App. 262; Morgan v. McNeely, 126 Ind. 537; Johnson v. Goss, 128 Mass. 433; Morris v. Henderson, 37 Miss. 492; Brawley v. Collins, 88 N. Car. 605; Den v. Payne, 5 Hayw. (Tenn.), 104.

<sup>8</sup> Morgan v. McNeely, 126 Ind. 537.

was one of personalty only.<sup>9</sup> So the insertion of words which are especially suitable for passing real estate may show that the words referred to realty only.<sup>10</sup>

A gift of all testator's property, which he may have at his death, passes his personal estate of every kind, no matter what its source; thus it includes the proceeds of lands subsequently sold by testator.<sup>11</sup>

A bequest of all the money arising from a sale of testator's "stock" and "loose property" was held to pass the entire personal estate, including money and negotiable instruments.<sup>12</sup>

#### §478. Effects.

The word "effects" is one used *prima facie* to denote personal property only. A bequest to one person of such "goods, books, clothing, furniture, etc., that he may desire" and giving to others "the balance of the personal effects," passes to the last-named beneficiaries the entire personal property of testator except such as is taken by the first beneficiary.<sup>13</sup>

The context, however, may show that testator did not intend by the word "effects" to pass the whole of his personalty. This intention may be shown by the words descriptive of the property with which "effects" is associated.<sup>14</sup> Thus a gift of "all my jewelry, wearing apparel and personal effects" was held not to include furniture and pictures.<sup>15</sup> Nor does a gift of "household furniture and effects" pass jewelry.<sup>16</sup>

Testator's intention to restrict the meaning of "effects" may also be shown by other directions in his will. Thus a provision for the sale of testator's "effects" was held to show that testator used "effects" as including only property which was

<sup>9</sup> Peirsol v. Roop, 56 N. J. Eq. 739.

<sup>10</sup> Dunham v. Marsh, 52 N. J. Eq. 256, 831.

<sup>11</sup> Simmons v. Beazel, 125 Ind. 362.

<sup>12</sup> Fry v. Shipley, 94 Tenn. 252.

<sup>13</sup> Reimer's Estate, 159 Pa. St.

212; *In re Jupp* (1891), P. D. 300.

<sup>14</sup> Rawlings v. Jennings, 13 Ves. Jr. 39; *In re Reynolds*, 124 N. Y. 388.

<sup>15</sup> Lippincott's Estate, 173 Pa. St. 368.

<sup>16</sup> Northey v. Paxton, 60 L. T. 30.

in fact subject to sale. Hence money, credits and the like were excluded.<sup>17</sup>

While the word "effects" *prima facie* applies to personalty only, it is not a word of rigid meaning, and may be used so as to include realty if the context shows testator's intention so to use it.<sup>18</sup> Thus a devise in which the article of the gift is referred to as "furniture, goods chattels and effects" in one place, and in another as "furniture and moneys or any property," was held to pass testator's real estate. In this case, however, any other construction would have left the testator intestate, practically, as to all his property.<sup>19</sup>

### §479. Surplus.

A gift of the "surplus" of testator's property may include real estate as well as personal property.<sup>20</sup>

### §480. Description of property by reference to its source.

A devise or bequest is often made of property simply described as property which testator has inherited from a given source. Such gifts include not only such property as remains in specie but the proceeds arising therefrom, whether the sale is had in the course of administration of the first estate or by testator after the property comes to his hand.<sup>21</sup>

Where the gift is described as the estate which testatrix is "to inherit as my portion after my father's death," this can not be taken to mean simply the estate which testatrix inherited from her father; but it will apply equally well to an estate which she had already inherited from her mother, but which she had no power to distribute until after her father's death.<sup>22</sup>

<sup>17</sup> *Goods of O'Loughlin*, L. R. 2 P. & D. 102.

<sup>18</sup> *White v. Keller*, 68 Fed. 796; *Adams v. Akerlund*, 168 Ill. 632; *Ruckle v. Graffin*, 86 Md. 627; *Page v. Foust*, 89 N. Car. 447.

<sup>19</sup> *Hall v. Hall* (C. A.), (1892), 1 Ch. 361, affirming (1891), 3 Ch. 389; *White v. Keller*, 68 Fed. 796; *Ruckle v. Graffin*, 86 Md. 627.

<sup>20</sup> *Byrnes v. Baer*, 86 N. Y. 210; *Lamb v. Lamb*, 131 N. Y. 227; *Chandler's App.*, 34 Wis. 505.

<sup>21</sup> *Aydlett v. Small*, 115 N. C. 1; *Graham v. Knowles*, 140 Pa. St. 325; *Newman v. Clyburn*, 40 S. C. 549.

<sup>22</sup> *Graham v. Grugan*, 132 Pa. St. 79.

So a gift of such property as came to testator as "heir" of his brother's estate passes such property as he had received by will and testament of such deceased brother where he took nothing as heir.<sup>23</sup>

#### §481. Property excepted from a general devise or bequest.

If testator's intention is clear to except certain specific pieces of property from a general devise, his intention must be enforced.<sup>24</sup> Thus a devise of all testator's real estate, excepting any lots which had been leased or sold by testator before the execution of the will, does not pass a lot so leased, although shortly after the execution of the will testator purchased the leasehold interest in such lot.<sup>25</sup>

So a bequest of testator's account books and the proceeds of all collections which can be made from the accounts of a certain business, does not pass accounts against testator's relatives where it expressly provides that the accounts against them are "to be treated as memorandums only, and not included in the above bequest."<sup>26</sup>

#### §482. Construction of devises of land.

At one time it was held that a devise of land *prima facie* passed a life estate only. But under our modern rule providing that a devise of land shall *prima facie* pass all of testator's interest therein, a devise of testator's lands will pass remainders and reversions therein<sup>27</sup> even where the devise is contained in a general residuary clause.<sup>28</sup>

So a devise to one of the "shares" given by will to two

<sup>23</sup> Shapleigh v. Shapleigh (N. H.), 44 Atl. 107.

<sup>24</sup> Dickinson v. Dickinson, 138 Ill. 541, affirming 36 Ill. App. 503; Chase v. Stockett, 72 Md. 235; Brady v. Brady, 78 Md. 461; Redford v. Redford, 45 Minn. 48; Johnson v. Johnson, 92 Tenn. 559; 23 L. R. A. 179.

<sup>25</sup> Chase v. Stockett, 72 Md. 235.

<sup>26</sup> Johnson v. Johnson, 92 Tenn. 559; 23 L. R. A. 179.

<sup>27</sup> Blakely v. Quinlan (Ky.), 1897; 39 S. W. 513; Woodman v. Woodman, 89 Me. 128; Watson v. Watson, 110 Mo. 164; Brown v. Boyd, 9 W. & S. 123; Drew v. Wakefield, 54 Me. 291.

<sup>28</sup> Reid v. Walbach, 75 Md. 205; High's Estate, 136 Pa. St. 222.

others carries the contingent remainders given by will to those two as well as the estate in possession.<sup>29</sup>

A general devise of land will pass real estate which testator had contracted to purchase, though at the time of the execution of the will he had not acquired the legal title thereto.<sup>30</sup>

Under a devise of real estate, whether specifically described or embraced in a general disposition of property, real estate belonging to testator which he has contracted to convey, will pass subject, of course, to the rights of the purchaser to enforce specific performance of the contract.<sup>31</sup> But if the purchaser completes the contract, the devisee of the realty can not, by virtue of the devise to him, enforce payment to himself of the purchase price.<sup>32</sup>

Where testator devises certain real estate, and before his death sells such realty without receiving the entire purchase money, it does not ordinarily pass under a devise of realty.<sup>33</sup> Testator may, however, indicate his intention that the purchase price in such case shall pass to the devisee of the land, and such intention will, of course, be enforced.<sup>34</sup>

Thus where testator leased the realty, with an option of sale upon the same day that he republished his will, it was held that these facts show that testator intended the purchase price of the realty to pass to the devisee.<sup>35</sup>

In some exceptional cases money may pass under a devise of land. These cases arise where the money is impressed with a trust under which it must be converted into land. In most cases the money has further arisen from the sale of the land.<sup>36</sup> But a devise of land in a specified county will not pass

<sup>29</sup> *Eisiminger v. Eisiminger*, 129 Pa. St. 564.

<sup>30</sup> *Atcherly v. Vernon*, 10 Mod. 518; *Gist v. Robinet*, 3 Bibb. (Ky.), 2; *Smith v. Jones*, 4 Ohio, 116.

<sup>31</sup> *Bogan v. Hamilton*, 90 Ala. 454; *Chadwick v. Tatem*, 9 Mont. 354.

<sup>32</sup> *Atwood v. Weems*, 99 U. S. 183; *Jackson v. Delancey*, 13 Johns. (N. Y.), 538.

<sup>33</sup> *Lawes v. Bennett*, 1 Cox. 167;

*Frick v. Frick*, 82 Md. 218; *Rogers v. Bayley*, — Md. — (1896); 35 Atl. 58.

<sup>34</sup> *In re Pyle* (1895), 1 Ch. 724; 13 Rep. 396.

<sup>35</sup> *In re Pyle* (1895), 1 Ch. 724; 13 Rep. 396.

<sup>36</sup> *Duke of Cleveland's Estate* (C. A.), (1893), 3 Ch. 244; *In re Lowman* (C. A.), (1895), 2 Ch. 348; *Basset v. St. Levan*, 13 Rep. 235.

money which is to be converted into land anywhere in the country, and not necessarily in the county named.<sup>37</sup>

### §483. Mortgages.

A devise of testator's land in general terms does not, however, pass his interest in mortgages which he holds upon land, unless the context of the will clearly shows that such mortgages were included in such devise.<sup>38</sup>

Nor does a devise of the "real estate" which came to testatrix from her son include land which she acquired by the foreclosure of mortgages bequeathed to her by her son.<sup>39</sup>

But a devise of specific realty of which testator is mortgagee will show testator's intention to pass the mortgage by that description.<sup>40</sup>

### §484. Effect of reference to a plat.

Where testator devises land, described by reference to a certain plat, and testator does in fact own the land thus referred to, the devisee must ordinarily abide by the description of the lot devised which testator has adopted by referring to the plat, and such devisee can not claim a greater quantity by alleging a mistake in this plat.<sup>41</sup> This rule applies where the will describes land by reference to streets as laid out, which have not been, in fact, laid out, and the lot of land is limited by such description.<sup>42</sup>

But where a lot was cut in two by a street and devisee had occupied the part on one side of the street, a gift to him of the lot by number, describing it as the lot on which he resides, was held to pass only the part on that side of the street.<sup>43</sup>

<sup>37</sup> *Duke of Cleveland's Estate* (C. A.), (1893), 3 Ch. 244.

<sup>38</sup> *In re Clowes* (C. A.), 1893, 1 Ch. 214; *Hollis v. Hollis*, 84 Me. 96; *Martin v. Smith*, 124 Mass. 111; *Marshall v. Hadley*, 50 N. J. Eq. 547; *Webster v. Wiggin*, 19 R. I. 73; 28 L. R. A. 510.

<sup>39</sup> *Coles v. Coles*, — N. J. Eq. — (1897); 37 Atl. 1025.

<sup>40</sup> *Woodhouse v. Meredith*, 1 Mer. 450.

<sup>41</sup> *Finelite v. Sinnot*, 125 N. Y. 683; *St. Margaret's Hospital v. Pa. Company*, 158 Pa. St. 441.

<sup>42</sup> *St. Margaret's Hospital v. Pa. Company*, 158 Pa. St. 441.

<sup>43</sup> *Hammel v. Palmer*, 12 Ohio C. C. 184.



Where there was a gift for life of the house and lot where testator resided "being parts of lots Nos. 15 & 16," and subsequently in the will testator gave to his daughter in fee "the same lot numbered 15 so devised to my said wife," it was held that the reference to the same property devised to the wife was sufficiently clear to pass the house and lot, in spite of the omission of one of the lot numbers in the second gift.<sup>44</sup>

A devise of "the house and lot of land situate on the north-westerly side" of the street, was held to pass two lots and a double house where testator had bought it as one tract.<sup>45</sup>

### §485. Devise by metes and bounds.

Where testator devises a specific tract properly described, and further refers to it as containing a certain number of acres, such will passes only the land thus described, and is not a devise of the number of acres therein named.<sup>46</sup> And this rule applies whether the specific tracts contain more acres than the number indicated,<sup>47</sup> or fewer.\*

This rule applies even where the addition of an adjoining tract undisposed of by will would make out the number of acres devised.<sup>48</sup>

A gift of real estate within certain described boundaries passes all of testator's property within those limits;<sup>49</sup> and where a tract is divided by metes and bounds, but the part to

<sup>44</sup> Groves v. Culph, 132 Ind. 186.

<sup>45</sup> Webb v. Carney (N. J. Eq.), 1896; 32 Atl. 705.

<sup>46</sup> Higgins v. Gwenn, 100 Ill. 554; Priest v. Lackey, 140 Ind. 399; Cundiff v. Seaton, Ky. (1899), 49 S. W. 179; Hobbs v. Peyson, 85 Me. 498; Pickett v. Leonard, 104 N. C. 326; Portland Trust Company v. Beatie, 32 Or. 305; Jones v. Quattlebaum, 31 S. C. 606; Oldham v. York, 99 Tenn. 68.

<sup>47</sup> Cundiff v. Seaton, — Ky. — (1899); 49 S. W. 179.

\* Pickett v. Leonard, 104 N. C. 326; Portland Trust Company v.

Beatie, 32 Or. 305; Jones v. Quattlebaum, 31 S. C. 606; Oldham v. York, 99 Tenn. 68.

So where testator intends to dispose of an entire tract, but by mistake as to the number of acres in the tract the aggregate number of acres given to the devise is less than the entire tract, the surplus acreage must be divided *pro rata* among the other devisees of such tract. Bennett v. Simon, 152 Ind. 490; Porter v. Gaines, 151 Mo. 560.

<sup>48</sup> Oldham v. York, 99 Tenn. 68.

<sup>49</sup> Chace v. Gregg, 88 Tex. 552.

be given to beneficiary is not described with certainty, it may be rendered certain where the remaining clauses of the will dispose of the rest of such tract.<sup>50</sup>

#### §486. Unimproved real estate.

A devise of "unimproved" real estate does not pass realty purchased by testator to be platted into city lots on which are three dwelling houses and which is leased out by testator.<sup>51</sup> But real estate does not cease to be "unimproved" because it is leased to a tenant who has erected buildings upon such realty, which buildings, in law, remain tenant's personal property.<sup>52</sup>

#### §487. Effect of mistake in description of real estate.

It not infrequently happens that a testator devises land by a description which is correct in some respects and erroneous in others. This most frequently happens where he attempts to describe the land devised by a reference to its location in a given county, or its lot number in a given plat, or its location in a specified section of a government survey. The general principles which control the effect of such mistakes are well settled. Upon the application of these principles of particular states of fact there is a wide divergence of authority. Practically all the courts agree that if, after the false description or part of a description is discarded, there remains in the devise language sufficiently full and accurate to identify the subject of the gift with sufficient certainty, the property thus indicated will pass; if, on the other hand, when the false description is eliminated from the will there is not enough left to afford a basis for identifying the subject of the gift, nothing can pass.<sup>53</sup> The difficulty is in determining what is a suffi-

<sup>50</sup> *Dunford v. Jackson*, — Va. — (1896); 22 S. E. 853.

<sup>51</sup> *Robb v. Robb*, 173 Pa. St. 620.

<sup>52</sup> *Coles v. Coles*, — N. J. Eq. — (1897); 37 Atl. 1025.

<sup>53</sup> *Patch v. White*, 117 U. S. 210; *Whitcomb v. Rodman*, 156 Ill. 116; 28 L. R. A. 149; *Allen v. Bowen*, 105 Ill. 361; *Decker v. Decker*, 121

Ill. 341; *Pocock v. Redinger*, 108 Ind. 573; *Cleveland v. Spilman*, 25 Ind. 95; *Groves v. Culph*, 132 Ind. 186; *Covert v. Sebern*, 73 Io. 564; *Christy v. Badger*, 72 Io. 581; *Eckford v. Eckford*, 91 Io. 54; 26 L. R. A. 370; *Thomson v. Thomson*, 115 Mo. 56.

cient description of the real estate intended to be conveyed after the false description is stricken out.

If the will describes the property by reference to the person from whom the testator acquired it,<sup>54</sup> or by its location with reference to well known natural objects,<sup>55</sup> or by reference to the name which popularly attaches to the property,<sup>56</sup> the fact that a further description contains an erroneous lot number, or a reference to a wrong part of a government survey, does not avoid the valid and accurate description already given.<sup>57</sup> So where a testator showed in his will a clear intention of disposing of the whole of his real estate, as where he devises "my real estate" or "all my lands," the addition of a further and more particularly erroneous description does not avoid the effect of the general description.<sup>58</sup>

Thus a devise of land, correctly describing it by metes and bounds, is not avoided by an erroneous statement in a will that it adjoins lands of the devisees;<sup>59</sup> nor was a devise of the only house and lot belonging to testatrix avoided by the fact that she described it as being in a named city when it was in fact situated in a suburb of said city.<sup>60</sup>

And a devise of a tract of land for which devisee "has a quitclaim deed of me, and that he now occupies," passes only land which has been quitclaimed by the testator and is also occupied by devisee, and does not pass another tract of land occupied by devisee but never quitclaimed.<sup>61</sup>

"If, after the false description is discarded, there remains in the devise language sufficient to direct to the identification of the subject with sufficient certainty, an estate will pass thereby. But when false language is eliminated, and nothing remains directing inquiry which may result in discovering the true subject of the devise, it is void." *Christy v. Badger*, 72 Io. 581; *Eckford v. Eckford*, 91 Io. 54.

<sup>54</sup> *Winkley v. Kaime*, 32 N. H. 268.

<sup>55</sup> *Riggs v. Myers*, 20 Mo. 239.

<sup>56</sup> *Emmert v. Hayes*, 89 Ill. 11.

<sup>57</sup> *Emmert v. Hayes*, 89 Ill. 11; *Riggs v. Myers*, 20 Mo. 239; *Winkley v. Kaime*, 32 N. H. 268; *Allen v. Lyons*, 2 Wash. C. C. (U. S.), 475.

<sup>58</sup> *Priest v. Lackey*, 140 Ind. 399; *Pocock v. Redinger*, 108 Ind. 573; *Black v. Richards*, 95 Ind. 184; *Judy v. Guilbert*, 77 Ind. 96; *Cleveland v. Spilman*, 25 Ind. 95.

<sup>59</sup> *Wales v. Templeton*, 83 Mich. 177.

<sup>60</sup> *Hawkins v. Young*, 52 N. J. Eq. 508; 28 Atl. 511.

<sup>61</sup> *Ogsbury v. Ogsbury*, 115 N. Y. 290.

Where the real property devised is correctly described, the fact that testator did not describe the nature of his interest correctly does not prevent the property thus described from passing.<sup>62</sup>

Where a tract of land is given to two or more in fixed proportions, and testator does not attempt to set off the portions by metes and bounds, the division of the property must be made according to value and not according to the number of acres. This rule holds good even where testator provides that, in the division, the part of the farm containing the homestead buildings must be given to a designated beneficiary.<sup>63</sup>

A devise of real estate may be so vague and uncertain as to pass no interest. This usually occurs where the property has not been referred to by ownership or by location. Thus where testator directed his executors to purchase "a tract of land at or near the residence" of beneficiaries for their use for life, it was held that such a devise was too vague to pass any interest in any real estate.<sup>64</sup>

Up to this point the authorities are comparatively unanimous. The conflict of authority arises in cases where there is no sufficient description of the property, by reference to its location, or its ownership, outside of the description which is in part erroneous. In these cases the question presented was whether the courts can reject a part of the description, such as the lot number, or the description of a quarter section, and treat the rest of the description as the plat, survey, or addition to the city, or the number of the section, township and range, as sufficient to pass the real estate. The greater weight of modern authority probably is that where the will is so worded as to show testator's intention to pass his lands in the given plat or section and the like, the description of the particular lot, quarter section and the like may be rejected if erroneous.<sup>65</sup>

<sup>62</sup> *Hatch v. Ferguson*, 68 Fed. Rep. 43; 33 L. R. A. 759; *Pearson's Estate*, 99 Cal. 30; *In re Smith*, 154 Mass. 479.

<sup>63</sup> *McClure v. Taylor*, 109 N. C. 641; *Sanderson v. Bigham*, 40 S. C. 501.

<sup>64</sup> *Taylor's Estate*, 81 Cal. 9.

<sup>65</sup> *Doughten v. Vandever*, 5 Del. Ch. 51; *Whitcomb v. Rodman*, 156 Ill. 116; 28 L. R. A. 149 (tacitly overruling *Bingle v. Volz*, 142 Ill. 214, 16 L. R. A. 321); *Seebrook v.*

In some cases the courts refuse to allow any part of the description by lot number or section to be varied or rejected, even though partial intestacy should result.<sup>66</sup> Where testator did not describe the land devised as belonging to him, and he did not own the quarter section devised, but owned another quarter section in the same section, it was held that such other quarter section could not pass under the devise.<sup>67</sup> So a devise of a "small farm in Wayne County, Iowa, near the Missouri line," was held not to pass a small farm in Lucas County undisposed of by will, though testator owned no land in Wayne County.<sup>68</sup>

#### §488. Description of realty by popular name.

Since the courts endeavor to enforce the intention of testator whenever the same can be ascertained by the will, it is not necessary that the estate devised by will should be described with the accuracy necessary in the case of a deed. Devises are constantly upheld where the testator has devised real estate by its popular name without any attempt at formal descrip-

Fedawa, 33 Neb. 413; Patch v. White, 117 U. S. 210. (An extreme case where a devise of Lot 6, Square 403, in a given town was held to pass Lot 3, Square 406, being the only lot owned by testator in that town otherwise undisposed of by will.) Eckford v. Eckford, 91 Io. 54; 26 L. R. A. 370; Merrick v. Merrick, 37 O. S. 126.

Huffman v. Young, 170 Ill. 290. (A devise "off the east side of the north-east quarter" of a certain section held to pass the same number of acres off the north side of such section, testator owning the latter tract, and not the former.)

Rook v. Wilson, 142 Ind. 24. (A devise of the "southwest quarter of the southeast quarter" of a given section held to devise the northeast

quarter of the southeast quarter of such section, being the only land owned by testator.)

Stewart v. Stewart, 96 Ia. 620; 65 N. W. 976. (A devise of the "south half of the northeast quarter" of a section held to devise the south half of the southeast quarter of that section, the latter property not being devised, and testator not owning the first tract.) Zirkle v. Leonard, 61 Kan. 636; 60 Pac. 318; Moreland v. Brady, 8 Oreg. 303.

<sup>66</sup> Bingle v. Volz, 142 Ill. 214; 16 L. R. A. 331; (ignored in Whitcomb v. Rodman, 156 Ill. 116); Hull v. Hull, 9 Ohio Dec. 19.

<sup>67</sup> McGovern v. McGovern, 75 Minn. 314.

<sup>68</sup> Christy v. Badger, 72 Io. 581.

tion.<sup>69</sup> And such general descriptions as "all the property I possess," or "the residue of my estate," and the like are sufficient to pass real estate.<sup>70</sup>

So a devise of "mountain lands,"<sup>71</sup> or "upland,"<sup>72</sup> is sufficiently definite.

A devise of property by such popular name includes the entire tract which is generally known by that name, and not merely the smallest portion thereof to which the name might be applied, nor does it include a larger tract which might come under a general designation. Thus a devise of the "old mill quarry" includes the entire tract known as the quarry property, although the quarry itself formed but a part thereof.<sup>73</sup> A gift of a farm by its popular name passes only the tract known by such name, and not an additional tract used at times in connection with it, but not spoken of as a part of it.<sup>74</sup>

A devise of the residence occupied by the testator during his lifetime and "premises thereto as the same are now occupied by me," does not entitle the beneficiary to the entire stable and coach house, but only to so much as actually was used by the testator.<sup>75</sup> So a devise of the "homestead" includes only the part of the tract of land used by testator for residence purposes, and not a building on another part of the same tract leased by testator for business purposes.<sup>76</sup> A devise of the "home place where I now live," carries only the farm-

<sup>69</sup> *In re Seal* (C. A.) (1894), 1 Ch. 316; *Beers v. Narramore*, 61 Conn. 13; *McAleer v. Schneider*, 2 App. D. C. 461; *Myers v. Norman*, Ky. (1898), 46 S. W. 214; *Hammel v. Palmer*, (1 Toledo Legal News, 301); 12 Ohio C. C. 184.

<sup>70</sup> *Le Breton v. Cook*, 107 Cal. 410; *Rockwell v. Swift*, 59 Conn. 289; *Taubenham v. Dunz*, 125 Ill. 524, affirming 20 App. 262; *Morgan v. McNeeley*, 126 Ind. 537; *Eckford v. Eckford*, 91 Io. 54; *Three States Lumber Co. v. Rogers*, 145 Mo. 445; *Shumate v. Bailey*, 110 Mo. 411; *Darlington v. Darlington*, 160 Pa. St. 65; *Stevenson v. Scott*,

188 Pa. St. 234; *Harris v. Dyer*, 18 R. I. 540.

<sup>71</sup> *Horneby v. Davis* (Tenn. Ch. App.) (1896), 36 S. W. 159.

<sup>72</sup> *Vandiver v. Vandiver*, 115 Ala. 328.

<sup>73</sup> *Beers v. Narramore*, 61 Conn. 13, citing and following *Minor v. Ferris*, 22 Conn. 371; *Holbrook v. Bentley*, 32 Conn. 502; *Peckham v. Lego*, 57 Conn. 553.

<sup>74</sup> *Chace v. Lamphere*, 148 N. Y. 206.

<sup>75</sup> *In re Seal* (C. A.) (1894), 1 Ch. 316.

<sup>76</sup> *Smith v. Dennis*, 163 Ill. 631.

house, surrounding enclosure and out-building used by testator in connection therewith, together with a wagon entrance.<sup>77</sup>

It is not necessary that the land devised by its popular name should be contiguous. Separate tracts used together and known by the name used by testator will pass under such devise.<sup>78</sup>

A devise of the "old homestead" *prima facie* passes the property used by testator as a residence at the time of the execution of his will and thereafter till his death, although he owned another tract of land on which he formerly had lived.<sup>79</sup>

A devise of an acre, to be taken off the west side of a given tract in the shape of a square, was held void as it was possible to lay off any number of such tracts along the west line.<sup>80</sup>

*Burial Ground.* This tract was to be reserved for use as a private burial ground, and was to include as part of itself the burial ground used during testator's lifetime. While the reservation of the whole acre was invalid, it was held good as to the tract already used as a burial ground.<sup>81</sup> But a devise for the improvement of a "burial lot," was held to authorize the executors to select the burial lot from the family burial ground.<sup>82</sup>

#### §489. After-acquired realty.

As has been stated at common law, a testator had no power to devise land acquired after the making of the will.<sup>83</sup> Statutes were subsequently passed in most jurisdictions giving a testator power to pass after-acquired realty. These statutes are not retrospective in their operation, and do not apply to wills made before the passage of such statutes where the testator died afterward.<sup>84</sup>

In wills made after the passage of these statutes, the only

<sup>77</sup> *McKeough's Estate v. McKeough*, 69 Vt. 34, 41; 37 Atl. 275.

<sup>78</sup> *Lord v. Simonson* (N. J.), 42 Atl. 741.

<sup>79</sup> *Moore v. Powell*, 95 Va. 258.

<sup>80</sup> *Edens v. Miller*, 147 Ind. 208.

<sup>81</sup> *Edens v. Miller*, 147 Ind. 208.

<sup>82</sup> *Joy v. Fesler*, 67 N. H. 257; 29 Atl. 448.

<sup>83</sup> See Sec. 142. *Dodge v. Gallatin*, 130 N. Y. 117.

<sup>84</sup> *Morgan v. Huggins*, 42 Fed. 869; 9 L. R. A. 540.

question involved is one of construction. Has the testator manifested his intention to dispose of after-acquired real estate with sufficient clearness? The statutes on this subject are not identical, and may be roughly grouped under two heads.

Statutes of the more liberal class substantially provide that after-acquired property will pass by such provisions of the will as would pass such property if owned at the time of the making of the will.<sup>85</sup> Under this rule a devise of "all the estate I now own and possess" passes after-acquired property,<sup>86</sup> and a general gift of all of testator's property, or a residuary clause, will pass after-acquired property.<sup>87</sup>

Even under these statutes a gift clearly intended to apply only to realty owned at the date of the will does not pass after-acquired realty.<sup>88</sup> Thus a devise of "the residue of my real estate, being a lot of land adjoining" a described tract, does not pass after-acquired realty not answering this description.<sup>89</sup>

The other class of statutes is somewhat less liberal in its terms, and provides that testator may pass after-acquired property where such intention clearly appears in the will. Under such statutes a residuary clause does not pass after-acquired real estate.<sup>90</sup>

<sup>85</sup> *Hardenbergh v. Ray*, 151 U. S. 112; *McClaskey v. Barr*, 54 Fed. 781; *Woman's Missionary Society v. Mead*, 131 Ill. 338; *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432; *Jacob's Estate*, 140 Pa. St. 268; 11 L. R. A. 767; *Haley v. Gatewood*, 74 Tex. 281.

<sup>86</sup> *Haley v. Gatewood*, 74 Tex. 281.

<sup>87</sup> *Ruckle v. Grafflin*, 86 Md. 627; *Webb v. Archibald*, 128 Mo. 299; *Woman's Missionary Society v. Mead*, 131 Ill. 338; *Morgan v. McNealey*, 126 Ind. 537; *Blackmore's Succession*, 43 La. Ann. 845; *Paine v. Forsaith*, 84 Me. 66; *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432; *Lamb v. Lamb*, 131 N. Y. 227; *Jacob's Estate*, 140 Pa. 268; 11 L.

R. A. 767; *Welborn v. Townsend*, 31 S. C. 408.

<sup>88</sup> *Wheeler v. Brewster*, 86 Conn. 177.

<sup>89</sup> *Wheeler v. Brewster*, 68 Conn. 177.

<sup>90</sup> *Webb v. Archibald*, 128 Mo. 299; 28 S. W. 80; *In re Pearce*, 20 R. I. 380; *Webster v. Wiggin*, 19 R. I. 73; 28 L. R. A. 510; *Church v. Warren Mfg. Co.*, 14 R. I. 539; *Lorillard's Petition*, 16 R. I. 254; *Bedell v. Fradenburgh*, 65 Minn. 361; 68 N. W. 41. Nor does a gift of all of testator's "belongings," even though coupled with a suggestion that devisee may give her sister a certain amount if she wishes to make a present. *McAleer v. Schneider*, 2 App. D. C. 461.



A gift of all testator's "real estate" has been held sufficient to pass after-acquired realty.<sup>91</sup> A gift of the "real estate I may now have or hereafter may acquire" is sufficient to show testator's intention to pass after-acquired realty.<sup>92</sup> And even where the will specifically describes the property devised, it may still appear from the will as a whole to be testator's intention to dispose of all his property.<sup>93</sup>

Testator's intention to pass after-acquired realty must, of course, appear on the will, and can not be shown by extrinsic evidence.<sup>94</sup>

#### §490. Gift of realty at fixed valuation.

A gift of real estate to one "to be valued at" a certain sum, is an ambiguous disposition of property. Where testator directs this valuation to be made in the settlement of his estate, and there are other words showing an intention that the property shall pass by will, it is held that the direction for valuation merely shows how to estimate the value in determining the shares of the estate that each beneficiary receives.<sup>95</sup> But where there is no other language tending to show the intention of testator to devise the property, it is held that such a gift gives to the parties named merely an option to purchase the land at such price from the residuary devisee.<sup>96</sup>

#### §491. Gifts of rents.

Rents, both in the technical common law sense and in the

<sup>91</sup> *Pruden v. Pruden*, 14 O. S. 251. But a gift of "all my property" was held insufficient to pass after acquired realty; *McCall v. Jones*, 4 W. L. M. 627. A gift of "all my other property consisting of horses, cattle, hogs, money and effects whatsoever" was held not to pass after acquired realty; but solely on the ground that such realty being of a different class from the property enumerated was excluded by such enumeration. *Smith v. Hutchinson*, 61 Mo. 83.

<sup>92</sup> *Hale v. Audsley*, 122 Mo. 316; *Applegate v. Smith*, 31 Mo. 166; *Liggatt v. Hart*, 23 Mo. 127.

<sup>93</sup> *Farrar v. Fallestine*, 4 Ohio C. C. 235.

<sup>94</sup> *Banning v. Banning*, 12 O. S. 437.

<sup>95</sup> *Fleming v. Carr*, 47 N. J. Eq. 549.

<sup>96</sup> *Wyckoff v. Wyckoff*, 49 N. J. Eq. 344; 48 N. J. Eq. 113.

popular modern sense, form a very important item in many estates.<sup>97</sup> A devise of rents which are due and payable in the future may be held to pass with it the reversionary interest in the property, especially where the purpose of the gift as given could not be carried out from the accruing rents alone.<sup>98</sup>

A bequest to testator's wife of a sum equal to the rental value of her land which had been used by testator in his lifetime, means the rental value for the entire time testator used it, both before and after the time of making the will. It means the gross rental value without deducting taxes or improvements.<sup>99</sup> And a gift of rents and profits includes real estate which was purchased with the proceeds of these rents.<sup>100</sup>

An absolute gift of the income of realty, in the absence of anything to indicate a contrary intention, passes the realty.<sup>101</sup> But a gift of the "profits and benefits" of certain real estate, followed by a provision for the sale of such real estate at a fixed time, shows that testator did not mean to pass the fee.<sup>102</sup> So a gift of the income of personalty without any limitation passes the personalty.<sup>103</sup>

It is held in some jurisdictions, further, that a gift of the income for life, or an absolute direction to the trustee to pay the income for life, gives a life interest of a legal or equitable nature, as the case may be, in the property from which the income is to arise.<sup>104</sup>

A devise of realty does not carry the rent of such realty from the last rent day to testator's death, even though under the lease it was not payable till after testator's death.<sup>105</sup>

<sup>97</sup> *Ogle v. Reynolds*, 75 Md. 145;  
*Gage v. Wood*, 171 Mass. 465;  
*Brady v. Brady*, 78 Md. 461.

<sup>98</sup> *Ogle v. Reynolds*, 75 Md. 145;  
*Alexander v. Paxson*, 47 Pa. St. 12.

<sup>99</sup> *Bush v. Couchman*, — Ky.—  
(1892); 17 S. W. 1020.

<sup>100</sup> *Roe v. Vingut*, 117 N. Y. 204.

<sup>101</sup> *Baker v. Scott*, 62 Ill. 86;  
*Bowen v. Swander*, 121 Ind. 164;  
*Hunt v. Williams*, 126 Ind. 493, 600;  
*Earle v. Rowe*, 35 Me. 414; *Cassilly v. Meyer*, 4 Md. 1; *France's Estate*, 75 Pa. St. 220.

<sup>102</sup> *Collier v. Grimesey*, 36 O. S. 17.

<sup>103</sup> *Angell v. Springfield Home for Aged Women*, 157 Mass. 241; *Thomae v. Thomae* (N. J. Ch.), 18 Atl. 355; *Hatch v. Bassett*, 52 N. Y. 359; *Collier v. Collier*, 3 O. S. 369; *Pendleton v. Bowler*, 27 Bull. 313.

<sup>104</sup> *Sampson v. Randall*, 72 Me. 109; *Brombacher v. Berking*, 56 N. J. Eq. 251; *Monarque v. Monarque*, 80 N. Y. 320.

<sup>105</sup> *Anderson v. Richards*, 99 Ky. 661.

## §492. Bequests of personalty—Furniture.

In passing from words descriptive of realty to those describing personalty, the word "furniture" will first be considered.

A bequest of "furniture" was originally held to include all property used in connection with a house to make it habitable and reasonably convenient for living purposes.<sup>106</sup> The popular meaning of the word "furniture" has undoubtedly changed since the early precedents were decided. "Furniture" then meant anything used to furnish a house. A house and its furniture was equivalent to a furnished house. This meaning of the word was fixed by early precedents, and is still retained by many courts. Thus, under a gift of "furniture," it has been held that china,<sup>107</sup> pictures and statuary,<sup>108</sup> gold and silver plate,<sup>109</sup> ornaments,<sup>110</sup> and linen for household use, are all included.<sup>111</sup> But it does not include money,<sup>112</sup> or securities.<sup>113</sup>

The popular meaning of the word today is narrower than the original meaning, though its limits are not easy to define. "Furniture," in popular use, includes such articles as chairs, tables, desks, and the like, and excludes silverware, glass, plate, books, pictures and other similar articles. Some courts have gone a considerable way towards adopting the modern meaning of the word. Thus a bequest of furniture was held to include carpets and cook stove, together with utensils used in connection with such stove, but it did not include silver ware, china, glass ware, or portraits.<sup>114</sup> The context may, however, show that such articles were included under the heading of furniture. Thus a gift of all the furniture in the house, excepting family portraits and silver ware, shows that the

<sup>106</sup> *Cole v. Fitzgerald*, 3 Russ. 301; *Manton v. Tabois*, 54 L. J. Ch. 1008.

<sup>107</sup> *Field v. Peckett*, 29 Beav. 573; *Endicott v. Endicott*, 41 N. J. Eq. 93.

<sup>108</sup> *Cremorne v. Antrobus*, 5 Russ. 312; 7 L. J. Ch. 88; *Richardson v. Hall*, 124 Mass. 228.

<sup>109</sup> *Stuart v. Bute*, 11 Ves. Jr. 657; *Nicholls v. Osborn*, 2 P. Wms. 421.

<sup>110</sup> *Field v. Peckett*, 29 Beav. 573.

<sup>111</sup> *Endicott v. Endicott*, 41 N. J. Eq. 93.

<sup>112</sup> *Kelly v. Richardson*, 100 Ala. 584; *In re Reynolds*, 124 N. Y. 388; *Smith v. Jewett*, 40 N. H. 513.

<sup>113</sup> *Andrews v. Schoppe*, 84 Me. 170; *Blackmer v. Blackmer*, 63 Vt. 236.

<sup>114</sup> *Ruffin v. Ruffin*, 112 N. C. 102.

testator had included them under the general heading of furniture because of his exception thereof; and hence china and plated ware will pass under such a gift.<sup>115</sup> Articles of personal use, such as a gold watch and chain, do not pass under a gift of "household furniture, silver ware, musical instruments, books and pictures"; since the word "furniture" does not *prima facie* include a watch, and the words associated therewith show that only articles of household use are intended. Whether books pass as "furniture" under the older meaning of the word has always been a matter of some doubt. Perhaps the weight of authority is that "furniture" does not *prima facie* include books,<sup>116</sup> but that slight indications from the context that testator intended books to pass as "furniture" will be sufficient to give that effect to the word.<sup>117</sup> Under the newer meaning of the word, books are clearly excluded.<sup>118</sup>

#### §493. Household goods.

"Household Goods" is a term of substantially the same meaning as "furniture," though of somewhat wider scope.<sup>119</sup> Thus coal and a shot gun may pass as "household goods."<sup>120</sup> Jewelry and clothing do not, on the other hand, pass under of gift of "household goods and effects."<sup>121</sup>

#### §494. Personal property described by its location.

A very interesting question is presented by gifts of all the furniture and personal property in a house when testator has stored his money, notes, securities and other choses in action therein. A gift of "all that therein exists" is, of course, broad enough to pass money contained in a safe in the house.<sup>122</sup> But

<sup>115</sup> Chase v. Stockett, 72 Md. 235.

<sup>116</sup> Porter v. Tourney, 3 Ves. Jr. 311; Le Farrant v. Spencer, 1 Ves. Sen. 97.

<sup>117</sup> Ousley v. Anstruther, 10 Beav. 462.

<sup>118</sup> Ruffin v. Ruffin, 112 N. Car. 107.

<sup>119</sup> Pellew v. Horsford, 2 Jur. N.

S. 514; Carnagy v. Woodcock, 2 Munf. (Va.), 234; 5 Am. Dec. 470; *In re Frazer*, 92 N. Y. 239.

<sup>120</sup> *In re Frazer*, 92 N. Y. 239.

<sup>121</sup> Kimball's Will, 20 R. I. (Part 3), 619.

<sup>122</sup> Garcia y Perea v. Barela, 5 N. M. 458; 23 Pac. 766.

a gift of "everything the house contains" was held to be so restrained by the preceding words "household effects, books, and papers of value" as to exclude a note.<sup>123</sup> The difficulty is generally presented in determining whether the words allied with and used in connection with the general words do not so restrict their meaning as to exclude money. Thus it was held in a gift of "all the furniture and personal property in and upon the same (building), or in any manner connected therewith," did not include money and securities situated in a vault in this building.<sup>124</sup>

So a gift of household goods, furniture, possessions and other goods and chattels for life, did not pass a life interest in certain promissory notes,<sup>125</sup> even though these notes were contained in the house.<sup>126</sup> And a gift of a desk and its contents was held to pass everything situated therein, including negotiable notes, but not to pass the contents of a box which contained some securities, where this box was not situated in the desk, although the key which opened it was found there,<sup>127</sup> nor real estate, the deed to which was in the desk.<sup>128</sup>

A bequest of household goods, furniture, etc., upon the testator's home place, includes all the articles corresponding to that description upon the home place, whether situated in the dwelling house or in other buildings used in connection therewith,<sup>129</sup> but a gift of the contents of the "barns" to testator's wife does not pass cotton stored in a buggy-house.<sup>130</sup>

Where a farm is devised with all the "personal property" on such farm at testator's death, it is held that growing crops pass by such a bequest.<sup>131</sup>

<sup>123</sup> Webster v. Wier, 51 Conn. 569.

<sup>124</sup> *In re* Reynolds, 124 N. Y. 388; to the same effect is Kelly v. Richardson, 100 Ala. 584.

<sup>125</sup> Andrews v. Schoppe, 84 Me. 170.

<sup>126</sup> Blackmer v. Blackmer, 63 Vt. 236.

<sup>127</sup> *In re* Robson (1891), 2 Ch. 559.

<sup>128</sup> Parrot v. Avery, 159 Mass. 594; 22 L. R. A. 153.

<sup>129</sup> Blackmer v. Blackmer, 63 Vt. 236.

<sup>130</sup> Johnson v. Johnson, 48 S. Car. 408; 26 S. E. 722.

<sup>131</sup> Dunford v. Jackson, — Va. (1896), 22 S. E. 853.

A bequest of crops "growing or maturing" upon certain tracts of land does not pass corn stored in cribs upon such land.<sup>132</sup>

#### §495. Personalty described by its use.

Under a bequest of "all my household furniture . . . and other articles of household or domestic use or ornament," it was held that certain orchids, which were used occasionally for ornamenting the house passed, although they ordinarily were not kept in the house or upon the premises; but other orchids kept in the same place, which were never used to ornament the house did not pass.<sup>133</sup>

A bequest of articles of "personal use and ornament" includes only articles coming under such description, and does not extend to all personal property; hence, it does not include a sailing yacht.<sup>134</sup>

#### §496. Money.

A bequest of "money" will *prima facie* pass such money as was in testator's possession at the time of his death, or is in deposit in bank subject to check.<sup>135</sup> But it does not include money deposited in a savings bank not subject to check, and which can be drawn out only at certain times in compliance with the rules of the bank;<sup>136</sup> nor does it include personal chattels generally;<sup>137</sup> nor does it include land which testator has ineffectually attempted to dispose of by oral contract, especially where there is money on hand;<sup>138</sup> nor does it include a balance not drawn out of a partnership of which the deceased husband of testatrix was a member;<sup>139</sup> nor securities and obligations of others owned by testator.<sup>140</sup>

<sup>132</sup> Edwards v. Rainier, 17 O. S. 597.

<sup>133</sup> *In re Owen*, 78 Law T. Rep. 643.

<sup>134</sup> Parry's Estate, 188 Pa. St. 33.

<sup>135</sup> Manning v. Purcell, 7 De Gex M. & G. 55; Dowson v. Gaskoin, 2 Keen 14.

<sup>136</sup> Hancock v. Lyons, 67 N. H.

216; 29 Atl. 638; Beatty v. Lalor, 15 N. J. Eq. 108.

<sup>137</sup> Levy's Estate, 161 Pa. St. 189.

<sup>138</sup> Sweet v. Burnett, 136 N. Y. 204.

<sup>139</sup> Levy's Estate, 161 Pa. St. 189.

<sup>140</sup> Beales v. Crisford, 13 Sim. 592; Smith v. Burch, 92 N. Y. 228.

However, where the context shows that the word "money" was meant to apply to other property, such as securities,<sup>141</sup> or reversionary interests in personalty,<sup>142</sup> it may include such property.

Thus a gift of money on deposit in a designated bank may pass stock in such bank where testator owned stock to the value designated in the will but had no money on deposit there.<sup>143</sup>

A gift of "money" may even, from the context, include interest in realty.<sup>144</sup>

### §497. Stocks and bonds.

Bequests of stocks and bonds are especially likely to be couched in informal language, and the nature of the subject of the gift must be especially regarded in determining the meaning of the will. A bequest of a specified number of bonds, or all of testator's stock, will include bonds or stock owned in fact by testator though not transferred to testator's name upon the books of the corporation.<sup>145</sup> Where the amount of stock is indicated in dollars, it passes a proportionate amount of the given stock at par, irrespective of the market value of the stock when the bequest takes effect.<sup>146</sup>

The context may, however, modify this rule. Thus, where the will evidently contemplated an equal division of testator's property, a gift of a certain amount of money to testator's son, providing that if he pleases he may take his legacy in certain bank stock at "par or market value," was held to be a gift of the stock at the market value only, since the equality of distribution would be entirely destroyed if it were estimated at par.<sup>147</sup>

<sup>141</sup> *Mosse v. Cranfield* (1895), 1 Ir. 80; *Gillen v. Kimball*, 34 O. S. 352; *Hinckley v. Primm*, 41 Ill. App. 759; *Fulkerson v. Chitty*, 4 Jones Eq. 244; *Dillard v. Dillard* (Va.) (1899), 34 S. E. 60.

<sup>142</sup> *In re Egan* (1899), 1 Ch. 688; 68 Law Journal Ch. N. S. 307; *Pritchard v. Pritchard*, L. R. 11 Eq. Cas. 232.

<sup>143</sup> *Mosse v. Cranfield* (1895), 1 Ir. 80.

<sup>144</sup> *Miller's Estate*, 48 Cal. 165.

<sup>145</sup> *Angell v. Springfield Home for Aged Women*, 157 Mass. 241; *Cumming's Estate*, 153 Pa. St. 397.

<sup>146</sup> *Johnston's Estate*, 170 Pa. St. 177.

<sup>147</sup> *Tandy v. Cook*, —Ky.—; 42 S. W. 741.

Where the testator devises the stock by indicating the number of shares, such bequest is usually taken literally. But in a recent case it was shown that a testator owned stock in a steam barge company, to which company he had sold the barge, and that he had always estimated this stock as consisting of one-twentieth of the actual number of shares owned, and estimated each share as being worth twenty times what it actually was. These facts were admitted to show the meaning of a bequest of a specified number of shares to testator's children, especially in view of the fact that a literal construction of the will would leave testator's children without any proper provision; and the bulk of testator's property, consisting of the remaining nineteen-twentieths of his stock, would pass under a residuary clause.<sup>148</sup>

Where a bequest is made of specified stock owned by the testator, and subsequent to the making of the will, such stock is exchanged for other stock in the same corporation, it is held in some jurisdictions, that under these facts the converted stock will pass by the bequest. This is specially provided in England by statute.<sup>149</sup>

A bequest of "shares" in a corporation does not, however, pass debenture stock.<sup>150</sup> And where testatrix bequeathed all the consols standing in her name and belonging to her at the time of her death, it was held that this did not pass consols which were purchased under order of the court as an investment of her property after she became insane.<sup>151</sup>

In view of the maxim *noscitur a sociis*, a bequest of notes, bonds, stock and money does not include live stock, such as horses and mules.<sup>152</sup>

Where, from the entire will, testator's intention to pass a specified block of stock is clear, the gift is not invalidated by the fact that the name of the corporation in which the stock is held is given erroneously.<sup>153</sup>

<sup>148</sup> *Oades v. Marsh*, 111 Mich. 168.

<sup>149</sup> *In re Howell-Shepherd* (1894), 3 Ch. 649; 64 Law Journal Ch. (N. S.), 42.

<sup>150</sup> *In re Bodman*, 35 Am. & Eng. Corp. Cas. 585; (1891), 3 Ch. 135.

*Contra*, where testator held no

stock in the corporation named, but held debenture stock. *In re Weeding* (1896), 2 Ch. 364.

<sup>151</sup> *In re Wood* (1894), 2 Ch. 577.

<sup>152</sup> *Copehart v. Burrus*, 122 N. C. 119; 42 L. R. A. 152.

<sup>153</sup> *Decker v. Decker*, 121 Ill. 341.



Where testator gave his interest in a manufacturing business to his wife for life, what was left at her death to go to her children, it was held that the organization of the business as a corporation did not destroy the rights of the remaindermen, but that their interests attached to the stock in such corporation which represented the share of testator's estate.<sup>154</sup>

### §498. Notes and other debts.

A bequest of a debt, which is described by indicating the name of the debtor and the security taken for the debt, passes the debt, although the amount may be erroneously stated.<sup>155</sup>

A testator had deeded land subject to a charge of \$5,000, the interest payable to himself and wife for life, the principal on his death "to those entitled thereto, for all of which a bond has been executed." There was no evidence to show that the bond was ever given. The testator by will made a gift of the bond. It was held that the indebtedness passed under the gift.<sup>156</sup>

Where testatrix had received the greater part of her property from her husband by will, and in her will she bequeathed a certain amount "in addition to the sums owing [the beneficiary] from my late husband's estate," it was held that this was a direction to pay to such beneficiary the amounts of a note and a due-bill given her by the husband of testatrix without consideration.<sup>157</sup>

Where testator by will had divided his personalty into two parts, one consisting of "stocks, bonds or other credits," and the other certain secured claims "books, jewelry and personal effects," it was held that an interest in an insurance business, purchased by testator out of the proceeds of the sale of stock, passed by the bequest of "credits."<sup>158</sup>

<sup>154</sup> Lewis v. Pitman, 101 Mo. 281.

<sup>155</sup> Fleming v. Carr, 47 N. J. Eq. 549; Wildberger v. Cheek, 94 Va. 517; 27 S. E. 441.

<sup>156</sup> Capp v. Brunner, 132 Pa. St. 417.

<sup>157</sup> *In re Rowe* (1898), 1 Ch. 153;

67 L. J. Ch. N. S. 87 (C. A.); 77 Law T. Rep. 475. (These notes had been treated as debts of her husband's estate by testatrix in settling his estate.)

<sup>158</sup> Brandon v. Yeakle, 66 Ark. 377.

### §499. Interest on investments.

A bequest of a fund or security carries with it the interest which had accrued at testator's death,<sup>159</sup> and of course it carries with it interest which accrues after testator's death while the fund is in the hands of the executor.<sup>160</sup>

The context, however, may prevent the application of this general rule. Thus, where the testator bequeathed to his grandson a certain sum of money less the amount of certain notes described in the will which were due from the father of this grandson to the testator, it was held that this deduction was to be of the face of the notes only, since if testator were to live long enough the legacy would thereby be defeated.<sup>161</sup>

But where the debt or security is not given, but a sum equal to the amount of debt is given, accrued interest will not pass, since the testator's intention is clearly to give the designated sum and no more.<sup>162</sup>

### §500. Life insurance.

A life insurance policy, payable to the legal representatives of testator and for the benefit of his estate, passes under a general bequest of his property,<sup>163</sup> and so does a policy in favor of testator upon the life of one who survives him.<sup>164</sup> But a life insurance policy, payable to any person the insured might nominate or subject to his disposition by will, deed, or other writing, does not pass under a general residuary clause, no reference being made to the policy.<sup>165</sup> Nor does a policy upon the life of the husband of testatrix, and payable to testatrix, her executor, administrators and assigns, pass by a bequest of her interest in their community prop-

<sup>159</sup> *Flemming v. Carr*, 47 N. J. Eq. 549, (a bequest of a bond held by testator against legatee), citing and following *Kent v. Tapley*, 11 Jur. 940; *Gibbon v. Gibbon*, 13 C. B. 205.

<sup>160</sup> *Sheffield v. Parker*, 158 Mass. 330.

<sup>161</sup> *Garth v. Garth*, 139 Mo. 456; 63.

(it appeared from the whole will to be testator's intention that a beneficial interest should pass by this gift).

<sup>162</sup> *Roberts v. Ruffin*, 2 Atk. 112.

<sup>163</sup> *Fox v. Senter*, 83 Me. 295.

<sup>164</sup> *Small v. José*, 86 Me. 120.

<sup>165</sup> *In re Davies* (1892), 3 Ch.

erty.<sup>166</sup> A bequest of all of testator's life insurance, however, passes policies payable to another, but of which testator has power to dispose by will.<sup>167</sup> A bequest of "all the insurance policies on my life," with certain specified exceptions, is held to include even those over which testator had no power of disposition.<sup>168</sup>

### §501. Release of obligations.

Where testator by will releases obligations against certain persons, it is to be determined from the construction of the whole will what obligations were included. Where the obligations are described the question is comparatively simple.<sup>169</sup> Where the testator refers to obligations which he holds "at this time," it is held that this simply releases such obligations that are incurred at the time of the making of the will, and does not include subsequent debts.<sup>170</sup> And a release of all notes which testator might hold against a legatee at the time of testator's death does not include subsequent notes made by a partnership of which legatee was a member, the money thus obtained being used in the firm business and the debt being secured by a conveyance of firm property,<sup>171</sup> nor does such a release include a note and mortgage given by legatee to testator where the land covered by the mortgage has been sold by the legatee to a purchaser who assumed and agreed to pay the note thus secured and received a corresponding reduction in the amount of purchase money paid by him to the legatee.<sup>172</sup>

A direction in a will that the debts of the brother of tes-

<sup>166</sup> *Evans v. Opperman*, 76 Tex. 293.

<sup>167</sup> *Tompkins v. Griffin*, 92 Va. 307 (1896); 23 S. E. 756.

<sup>168</sup> *Van Schaack v. Leonard*, 164 Ill. 602. (While testator could not by such a devise exclude the beneficiary of a policy over which testator had no power of disposition, he could put him to an election between surrendering such policy and

accepting the benefits under the will, or retaining the policy and renouncing the will.)

<sup>169</sup> *Garth v. Garth*, 139 Mo. 456.

<sup>170</sup> *Walls v. Walls*, 182 Pa. St. 226.

<sup>171</sup> *Waterman v. Alden*, 143 U. S. 196.

<sup>172</sup> *In re Lee*, 141 N. Y. 58, affirming 65 Hun, 524.

tatrix to her husband should first be paid out of the property given him by the will, includes notes given by such brother as agent for his brother where testatrix had always spoken of such notes as his debt, and he was morally if not legally bound to pay them.<sup>173</sup>

A bequest to testator's son, reciting that testator held a note against him for \$600, and providing that if he paid the note he should have \$600 in lieu of said note, was held to be a direction to pay the amount to the son where testator had voluntarily surrendered the note.<sup>174</sup>

### §502. General and particular description.

Where property is disposed of by words of a general description, which is coupled with an enumeration by way of a particular description, the authorities do not agree upon the abstract rule in determining which shall prevail. It is said by some courts that the general description is not to be limited by the particular one.<sup>175</sup> While in other cases it has been said in general terms that the particular description ordinarily controls the general description.<sup>176</sup> In actual practice the courts substantially agree that the intention of the testator must be deduced from the whole will, and that if it appears that the particular enumeration is given merely by way of example the general description controls; while if the general description is inserted by way of describing the articles given in the particular description, the particular description will control.

### §503. Inconsistent gift of property.

Where the description of the property seems at first glance so inconsistent that the same articles are disposed of several times over, the courts will not permit such a result if con-

<sup>173</sup> *Scott v. Neeves*, 77 Wis. 305.

<sup>174</sup> *In re Lewis*, 17 R. I. 642.

<sup>175</sup> *Wales v. Templeton*, 83 Mich.

<sup>176</sup> *Andrews v. Schoppe*, 84 Me.

170; *Kanouse v. Slockbower*, 48 N.

J. Eq. 42.

struction can reconcile the discrepancy.<sup>177</sup> Thus, where a gift was made of a dwelling house and all that is therein to a widow until her death, then providing that "it" shall go to the daughters, and subsequently devising a tract of land by description which includes the dwelling house to testator's son, it was held that "it" referred to the contents of the dwelling house which passed to the daughters, the house going to the son.<sup>178</sup>

But where a codicil to a will, which is evidently meant to change it, after disposing of certain personal property makes a gift of personal property "not previously disposed of," it is held that such previous disposal does not refer to the disposition by the will.<sup>179</sup>

If the two gifts can not be reconciled the last will takes effect, especially if the last is specific and the first is general.<sup>180</sup>

#### §504. Construction affected by nature of testator's property interests.

In construing a will disposing of property, a strong presumption exists that testator meant to dispose only of such property as belonged to him, or over which he had a power of disposition.<sup>181</sup> Thus a general devise of testator's property is construed not to show an intention to pass an estate held by him in trust;<sup>182</sup> nor will it be construed as attempting to pass the wife's interest in community property;<sup>183</sup> nor will it be construed as attempting to defeat dower or homestead rights.<sup>184</sup> Only by explicit and clear language can testator show an intention to dispose of property belonging to others,

<sup>177</sup> Ladd's Estate, 94 Cal. 670.

<sup>178</sup> Hart v. Stoyer, 164 Pa. St. 523. (The court in this case rested their decision on the theory that the construction adopted presented "the least difficulty.")

<sup>179</sup> White v. Mass. Institute of Technology, 171 Mass. 84.

<sup>180</sup> Young v. McIntire, 3 Ohio 498.

<sup>181</sup> Mann v. Martin, 172 Ill. 18, affirming 69 Ill. App. 501; Buffon

v. Tiverton, 16 R. I. 643; 7 L. R. A. 386; Sullivan v. Latimer, 35 S. C. 422; Haley v. Gatewood, 74 Tex. 281.

<sup>182</sup> Buffon v. Tiverton, 16 R. I. 643; 7 L. R. A. 386; Sullivan v. Latimer, 35 S. C. 422.

<sup>183</sup> Gilmore's Estate, 81 Cal. 240; Haley v. Gatewood, 74 Tex. 281.

<sup>184</sup> See Sec. 504.

or to defeat vested rights over which he has no power by will. In such case the parties whose rights are affected have the option of defeating the provision by asserting their rights if they wish.<sup>185</sup>

#### §505. Residuary clauses.

A residuary clause is that part of the will which makes disposition of the residuum of part or all of testator's property, that is that part thereof not otherwise disposed of by will. A general residuary clause disposes of all the residuum of testator's property; while a particular residuum clause disposes only of the residuum of certain specified property.

#### §506. Form of residuary clause.

Leaving for later discussion what can and does pass under residuary clauses, the form of such clauses will first be considered. The ordinary residuum clause speaks of the property passed as the residuum, or remainder, or residue of testator's estate.<sup>186</sup> Thus, where there was a direction in a poorly drawn will for the payment of testator's debts, and a statement that he wants certain named persons to have certain named chattels and amounts of money, a clause giving to other persons the "remainder to keep and dispose of as they think best" was treated as a residuary clause.<sup>187</sup> And where a clause purports to pass the residue of testator's estate, and attempts to give a list of the different items in such residue, the clause passes the entire residue, and is not limited to the items named.<sup>188</sup> This view has, however, been questioned recently, and a gift of "all the residue of testator's real estate and personal property not hereinbefore enu-

<sup>185</sup> See Chapt. XXXIV.

<sup>186</sup> *Simmons v. Spratt*, 26 Fla. 449; 9 L. R. A. 343; *Rush County Commissioners v. Dinwiddie*, 139 Ind. 128; *Logan's Estate*, 131 N. Y. 456; *Farnum's Estate*, 191 Pa. St. 75.

<sup>187</sup> *Cheney v. Plumb*, 79 Wis. 602.

<sup>188</sup> *In re Jupp* (1891), P. 300; *Miner's Will*, 146 N. Y. 121; *Tompkin's Estate*, 154 N. Y. 634, modifying 10 App. Div. 572.

merated as hereinafter described" is a specific gift of the property described, and is not a true residuary clause.<sup>189</sup>

The words "residuum," "remainder," and the like, are not at all necessary, however, to pass the residuum of testator's estate. Where the testator, after making specific devises and legacies, bequeathed the "balance" of his estate, this operates as a residuary clause.<sup>190</sup> Any form of words which shows an intention to dispose of all of testator's estate undisposed of, will serve as a residuary clause.<sup>191</sup> Thus a direction, after some specific legacies, that a certain person "shall have a full share of my estate, share and share alike with my brothers and sisters," is a residuary clause;<sup>192</sup> and so is a bequest of chattels described in general terms which constitute, in fact, all the residue of testator's estate.<sup>193</sup>

A provision in the middle of a will, "I appoint A my legatee, and give to her all not before specified in this, and request her to give as I may direct, or sell from what remains," was held to be a residuary clause.<sup>194</sup>

### §507. What passes by a residuary clause.

The residuum of an estate is that part of it left after paying the debts of testator and the expenses of administration and undisposed of by the rest of the will.<sup>195</sup> Where testator,

<sup>189</sup> Williams v. McKeand, 119 Mich. 507.

<sup>190</sup> Schumate v. Bailey, 110 Mo. 411; Davis v. Hutchings, 15 O. C. C. 174; 8 O. C. D. 52; overruled on another point in Davis v. Davis, 62 O. S. 411.

<sup>191</sup> Morgan v. Huggins, 42 Fed. Rep. 869; L. R. A. 540; ("I give and recommend to the earth to be buried in a decent Christian manner at the discretion of the executors. . . and so much of my wordly estate I give and bequeath unto (a person named), and I do hereby revoke and disannul all other wills"). Hale v. Audsley, 122 Mo. 316; Tompkin's Estate, 154 N. Y. 634; (an enumeration of the resid-

uary estate was held to be a residuary clause).

<sup>192</sup> Striewig's Estate, 169 Pa. St. 61.

<sup>193</sup> McNeil v. Masterson, 79 Tex. 670; Tompkin's Estate, 154 N. Y. 634, modifying 10 App. Div. 572.

<sup>194</sup> Morton v. Woodbury, 153 N. Y. 243.

<sup>195</sup> *In re Palmer* (C. A.) (1893), 3 Ch. 369; American Mortgage Company v. Boyd, 92 Ala. 139; Stebbins v. Stebbins, 86 Mich. 474; Meisenheimer v. Bost, 106 N. C. 10; Stevens v. Underhill, 67 N. H. 68; Sweitzer's Estate, 142 Pa. St. 541; Judevine v. Judevine, 61 Vt. 587; 7 L. R. A. 517; Bird v. Stout, 40 W. Va. 43.

after giving certain legacies, disposed of what was left after payment of "all debts and expenses," it was held that this did not revoke the legacies, but the "debts and expenses" included said legacies;<sup>196</sup> since, under a residuary clause, no part of the property passes which is specifically provided for by a valid legacy or devise.<sup>197</sup>

The word "residue," however, may be used in a different meaning, according to the context of the will. Where the word "residue" is used at the beginning of the will, as a name for what would be left of the estate after payment of funeral expenses, the word "residue," occurring in the latter part of the will after certain legacies have been bequeathed, will be construed as meaning the part of the estate which was called the residue at the beginning of the will.<sup>198</sup>

It is immaterial whether the specific bequest is contained in a part of the will preceding or following the residuary clause;<sup>199</sup> nor will a residuary clause carry property which testator has clearly excepted from the operation of such clause.<sup>200</sup> This exclusion must be plainly and unequivocally manifested upon the will.<sup>201</sup> Thus, where testator recited erroneously that he had settled certain specific property upon a person named, it was held that his interest in the property nevertheless passed under a general residuary clause.<sup>202</sup> Nor is a general

<sup>196</sup> *Stebbins v. Stebbins*, 86 Mich. 474; *Lepard v. Skinner*, 58 Conn. 329.

<sup>197</sup> *Loving v. Rainey*, — Tex.—; 1896 36 S. W. 335; *Mulligan's Estate*, 157 Pa. St. 98; *Waters v. Waters*, — Ky. — (1895), 28 S. W. 958; *Gage v. Wood*, 171 Mass. 465; *Dean v. Winton*, 150 Pa. St. 227; *Markle's Estate*, 187 Pa. St. 639.

<sup>198</sup> *Sherman v. Baker*, 20 R. I. 446; 40 L. R. A. 717; (in this case the construction adopted disposed of practically the entire estate. If the word "residue" had been construed as meaning what was left after deducting the debts and leg-

acies, a large portion of the estate would have been undisposed of).

<sup>199</sup> *Wheeler v. Brewster*, 68 Conn. 177; *Moffet v. Elmendorf*, 152 N. Y. 475; *Morton v. Woodbury*, 153 N. Y. 243; *Markle's Estate*, 187 Pa. St. 639.

<sup>200</sup> *Tindall v. Tindall*, 9 C. E. Green, 512; *Roy v. Monroe*, 47 N. J. Eq. 356. Thus a specific legacy payable out of the residuum is not as residuary gift. *Williams' Estate*, 112 Cal. 521.

<sup>201</sup> *Morton v. Woodbury*, 153 N. Y. 243.

<sup>202</sup> *In re Bagot* (C. A.) (1893), 3 Ch. 348.



residuary clause limited by a subsequent clause providing that the executors shall take any bequests or devises which may be adjudged illegal in trust to carry out provisions of such bequests or devises.<sup>203</sup>

In order to avoid partial intestacy, the general rule is that a residuary clause should be liberally construed.<sup>204</sup>

Under a residuary clause all property not otherwise disposed of, and not specifically excepted from the operation of such clause, passes.<sup>205</sup> Thus where a fund is disposed of, the gift to take effect at some time after testator's death, and the income arising from such fund is not disposed of, this income will pass under a residuary clause.<sup>206</sup>

So interest upon a fund reserved for payment of a legacy upon the arrival of the legatee at majority passes under a residuary clause.<sup>207</sup>

The residuary clause does not pass insurance upon a house which was specifically devised and was destroyed by fire.<sup>208</sup>

A residuary clause passes not only all the property which the testator did not attempt to dispose of, but also, as a general rule, all the property which he attempted to dispose of but of which his disposition has for any reason failed.<sup>209</sup> Thus, a legacy which has lapsed by reason of the death of

<sup>203</sup> *Booth v. Baptist Church*, 126 N. Y. 215.

<sup>204</sup> *Lamb v. Lamb*, 131 N. Y. 227; *Riker v. Cornwell*, 113 N. Y. 115; *Floyd v. Carow*, 88 N. Y. 560.

<sup>205</sup> *Bernard v. Minshall*, Johns. (Eng. Ch.), 276; *Molineaux v. Reynolds*, 55 N. J. Eq. 187; *Roberts v. Cooke*, 16 Ves. Jr. 451; *Wheeler v. Brewster*, 68 Conn. 177; *Harkness v. Harkey*, 91 N. Car. 195; *Floyd v. Carow*, 88 N. Y. 560; *Lamb v. Lamb*, 131 N. Y. 227; *Morton v. Woodbury*, 153 N. Y. 243.

<sup>206</sup> *In re Inman* (1893), 3 Ch. 518; *Youngs v. Youngs*, 45 N. Y. 254; *Cruikshank v. Home for the*

*Friendless*, 113 N. Y. 337; *In re Allen*, 151 N. Y. 243; *Cochrane v. Schell*, 140 N. Y. 516; *Minot v. Baker*, 147 Pa. St. 348.

<sup>207</sup> *In re Inman* (1893), 3 Ch. 518.

<sup>208</sup> *Green v. Green*, 50 S. Car. 514.

<sup>209</sup> *Leake v. Robinson*, 2 Meriv. 393; *Buchanan v. Lloyd*, 64 Md. 306; *Barnet v. Barnet*, 40 N. J. Eq. 380; *Rockwell v. Swift*, 59 Conn. 289; *Welman v. Neufville*, 75 Ga. 124; *Burke v. Stiles*, 65 N. H. 163; *In re Benson*, 96 N. Y. 499; *Miller's Appeal*, 113 Pa. St. 459; *Gallagher v. Rowan*, 86 Va. 825.

the beneficiary before that of testator, will pass under a residuary clause if there is no specific provision for it.<sup>210</sup>

Lapsed devises also pass under a residuary clause at modern law.<sup>211</sup>

So where a devise or bequest is void, as, for example, bequests to a charitable purpose made by a will executed within the time limited by statute,<sup>212</sup> it passes under a general residuary clause.<sup>213</sup>

And so gifts, which testator intended to take effect, but which are void because of a violation of the rule of perpetuities, pass under a general residuary clause;<sup>214</sup> and gifts on condition, which fail by reason of breach of condition.<sup>215</sup>

### §508. Effect of failure of part of residuary clause.

There is, however, a well recognized exception to the rule that lapsed and void legacies pass under the residuary clause. This exception is where the legacy, which has lapsed or become void, is contained in the residuary clause and gives the entire residuum, or a specific fraction thereof, to the beneficiary. A residuary clause which is void, or which lapses, does not pass to the other beneficiaries under a residuary clause, even if there are any, unless such provision is specifically made in the will.<sup>216</sup> It passes, as in cases of intestacy, according to its nature, personalty going to the next of kin and realty to the heirs.<sup>217</sup>

<sup>210</sup> Rotch v. Loring, 169 Mass. 191; Bagwell v. Dry, 1 P. Wms. 700; Leake v. Robinson, 2 Mer. 363; Skrymser v. Northcote, 1 Swanst. 566; Roberts v. Cooke, 16 Ves. 451; Floyd v. Carow, 88 N. Y. 560; Craighead v. Given, 10 S. & R. (Pa.), 351.

<sup>211</sup> Moffett v. Elmendorf, 152 N. Y. 475; O'Toole v. Browne, 3 El. & Bl. 572; Lamb v. Lamb, 131 N. Y. 227; Smith v. Smith, 141 N. Y. 29; Cruikshank v. Home, 113 N. Y. 337; *In re Bonnet*, 113 N. Y. 522.

<sup>212</sup> See Secs. 745, 746.

<sup>213</sup> Gray's Estate, 147 Pa. St. 67; Neff's Appeal, 52 Pa. St. 326; Woolmer's Appeal, 3 Wh. 477.

<sup>214</sup> Booth v. Baptist Church, 126 N. Y. 215.

<sup>215</sup> Rockwell v. Swift, 59 Conn. 289; (devise forfeited by presenting a bill against the estate, goes into the residuum); Rotch v. Loring, 169 Mass. 190.

<sup>216</sup> Gray's Estate, 147 Pa. St. 67.

<sup>217</sup> Silcox v. Nelson, 24 Ga. 84; Chadwick v. Chadwick, 37 N. J. Eq. 71; Beekman v. Bonson, 23 N. Y. 298; Floyd v. Carow, 88 N. Y. 560;

### §509. Pro rata distribution of residuum.

Testators sometimes provide that if there should be a residuum after payment of debts and legacies, the residuum is to be divided *pro rata* among the legatees. This is treated as an additional legacy, and not a means of paying the legacies already given.<sup>218</sup> As the name implies, the *pro rata* distribution is to be made by adding together all the legacies given, ascertaining the per cent. of each legacy to the whole, and giving to each legatee his proportionate per cent. of the residuum.<sup>219</sup>

Where testator had provided that part of his property should be divided in accordance with the statute of distribution, a provision that if testator's investments should either decrease or increase in amount or value, this gain or loss should be divided among devisees and legatees named above "as given above or *pro rata*," was held void for uncertainty, it not appearing whether this clause was intended to affect the provision for distribution in accordance with the statute, or not.<sup>220</sup>

### §510. Effect of inconsistent residuary clauses.

Where a poorly drawn will contains more than one general residuary clause, the rule is that the first clause is valid, and nothing passes under the remaining clauses.<sup>221</sup>

This is different from the rule in force in case of specific bequests and devises. It rests on the theory that the later residuary clauses only purport to dispose of what is undisposed of by the rest of the will, which is nothing

A direction that the residuum is to be divided equally among certain persons must be literally complied with, with-

Booth v. Baptist Church, 126 N. Y. 215; Kerr v. Dougherty, 79 N. Y. 327; Gray's Estate, 147 Pa. St. 67; Skipwith v. Cabell, 19 Gratt. (Va.), 758.

<sup>218</sup> Chambers v. Chambers, 41 La. Ann. 443.

<sup>219</sup> Rosenberg v. Frank, 58 Cal.

387; Chambers v. Chambers, 41 La. Ann. 443; Gray's Estate, 147 Pa. St. 67.

<sup>220</sup> Nelson v. Pomeroy, 64 Conn. 257.

<sup>221</sup> Wheeler v. Brewster, 68 Conn. 177; Morton v. Woodbury, 153 N. Y. 243.

out any reference to the equality of the other gifts in the will to such persons,<sup>222</sup> even where a valuation is placed by the will upon such other gifts.<sup>223</sup>

<sup>222</sup> *Bybee v. Bybee*, —Ky.— <sup>223</sup> *Bybee v. Bybee*, — Ky. —  
(1896); 35 S. W. 904; *In re Holder*, (1896); 35 S. W. 904.  
— R. I. —; 41 Atl. 576.

## CHAPTER XXII.

### DESCRIPTION OF BENEFICIARIES.

#### §511. Husband and wife.

The term "husband" and "wife" have for their primary meaning, undoubtedly, only those who are actually and lawfully in the designated relation. The context and the surrounding circumstances may extend the meaning of the term to one who was in the ostensible relation of husband or wife, although not legally so related. Thus, where testator had deserted his first wife, and had subsequently gone through the form of marriage with another woman, with whom he was living at the time of his death, and in his will he referred to her daughter by a former husband as his "stepdaughter" and to his children by his lawful wife as "my only children by my first wife," it was held that a devise to testator's "wife" meant the woman with whom he was living at the time of his death.<sup>1</sup>

Where the will refers by name to a woman with whom testator is living unlawfully as his "wife," the fact that she is not testator's lawful wife does not affect her rights as created by the will. Thus, a devise to such a person with an additional direction that "she shall be entitled besides the above bequest, to all under the law in such case made and

<sup>1</sup> *Pastene v. Bonini*, 166 Mass. 85.

provided as my widow" gives her in addition to such bequest the same interest that she would have been entitled to if she had been his lawful wife.<sup>2</sup>

A devise to the wife of a designated person often raises some question, where the wife who was living at the date of the execution of the will dies, and the person designated marries a second time. Where the first wife dies and the person designated remarries in the lifetime of testator, it is held that such second wife is entitled to a bequest in trust for the maintenance of such person "his wife and children." It was said in this case that the usual presumption would be that such a devise was for the benefit of wife living at the time of the execution of the will, but that the context rebutted this presumption by showing an intent to provide for the family of the person designated as it existed at testator's death.<sup>3</sup>

So a gift in support of A's "family" was held to include A's wife B, though A was not then married to B.<sup>4</sup>

But where the wife dies after the testator, and the person designated remarries, or where such person had never married before testator's death and marries afterward, it is usually held that such a devise, if construed as including the wife married after testator's death, would constitute a perpetuity. Accordingly, in such cases, the word "wife" is held not to include such wife married after testator's death.<sup>5</sup>

## §512. Heirs.—Primary meaning.

Heirs is a term whose primary meaning, in law, has long been recognized and defined. "An heir is he upon whom the

<sup>2</sup> Dicke v. Wagner, 95 Wis. 260; 70 N. W. 159.

<sup>3</sup> *In re Drew* (1899), 1 Ch. 336, 68 L. J. Ch. N. S. 157.

<sup>4</sup> Smith v. Greely, 67 N. H. 377.

<sup>5</sup> Beers v. Narramore, 61 Conn. 13; Dean v. Mumford, 102 Mich. 510; Van Syckel v. Van Syckel 51 N. J. Eq. 194; 26 Atl. 156.

But in *Wilmot v. De Mill*, 32 N. B. 8, it was held that such wife could take under a devise to tes-

tator's nephew and his wife and the survivor for their natural lives, or the widowhood of the wife.

Such a gift is held to be a perpetuity for the reason that a wife of the beneficiary by a marriage after testator's death might be a person not in being at the testator's death, whose parents were not then in being. This is a possible though not a usual combination. For the rule against Perpetuities see Sec. 625.

law casts the estate immediately upon the death of the ancestor.”<sup>6</sup> This definition must of course be understood as applying primarily to real estate, and to denote those who would be entitled to inherit the real estate of the deceased ancestor by descent if he died intestate.<sup>7</sup> This primary meaning of “heirs” is the meaning which should be given to it when employed in a will in the absence of anything in the will or in the surrounding circumstances to suggest a different meaning.<sup>8</sup> This rule applies even where the heirs are non-resident aliens, and can only take under limited conditions.<sup>9</sup>

### §513. Husband or wife as “heir.”

Where the statutes of descent and distribution limit the amount which the widow may take as heir, a provision in a will which divided a sum among the “heirs at law” of a deceased child of testator’s enures to the benefit of the surviving widow of such child, but only to the amount which she could take from the estate of her husband as “heir” had he

<sup>6</sup> 2 Black. Com. 201; Rawson v. Rawson, 52 Ill. 62; Kellett v. Shepard, 139 Ill. 433; Fabens v. Fabens, 141 Mass. 395; Lincoln v. Perry, 149 Mass. 368; Johnson v. Brasington, 156 N. Y. 181; Ashton’s Estate, 134 Pa. St. 390.

<sup>7</sup> Ruggles v. Randall, 70 Conn. 44; Philadelphia Trust, etc., Co. v. Isaac, 167 Pa. St. 270.

<sup>8</sup> *In re* Ferguson, 28 Can. S. C. 38; Allen v. Craft, 109 Ind. 476; Irvine v. Newlin, 63 Miss. 192; Woodward v. James, 115 N. Y. 346; Lawton v. Corlies, 127 N. Y. 100, affirming 12 N. Y. S. 484; Bodine v. Brown, 154 N. Y. 778; Johnson v. Brasington, 156 N. Y. 181; Ashton’s Estate, 134 Pa. St. 390; Harman’s Appeal, 135 Pa. St. 441; Wallace v. Minor, 86 Va. 550; 10 S. E. 423.

“Although in the case at bar the heirs of (the life tenant) do not take from her by inheritance, but take as persons designated by the will, yet we know no way of de-

termining the person intended by the will except by ascertaining the persons who by law would have inherited the estate from her if she had died seized of it and intestate.” Lavery v. Egan, 143 Mass. 389.

<sup>9</sup> Furenes v. Severtson, 102 Io. 322.

In this case, testator devised his real estate to his wife for life, and on her death one-half to her heirs and one-half to his. He had no children and no relatives except some non-resident aliens who were prohibited from acquiring land in Iowa by descent. Where the land was acquired by purchase, they can hold it for only ten years. It was held that the word “heirs” meant those who would have inherited but for the restrictions imposed by reason of alienage; hence the aliens took under the will. Furenes v. Severtson, 102 Io. 322; 71 N. W. 196.

died intestate.<sup>10</sup> So a husband may take as "heir."<sup>11</sup> Thus, under modern statutes it is provided that in case husband or wife dies intestate, and leaving no children or their representatives, the property of the decedent shall pass to the surviving spouse. Under these statutes such surviving spouse may, "with strict regard to the significance of the term, be designated as (an) heir," and the term heir as used in a will may, in the absence of anything to show a contrary intent, be treated as including such surviving spouse.<sup>12</sup>

#### §514. Heirs.—Extended meaning.

But the word "heirs" may be modified by the context of the rest of the will or surrounding facts and circumstances so as to have a very different meaning from this technical meaning. As has been said, there is no inflexible rule for determining the meaning of the words "heirs at law."<sup>13</sup>

<sup>10</sup> *Olney v. Lovering*, 167 Mass. 446 (in this case \$5000); *Weston v. Weston*, 38 O. S. 473.

<sup>11</sup> *Neeley's Estate*, 155 Pa. St. 133; *Olney v. Lovering*, 167 Mass. 46 (in this case \$5000).

*Contra*, that wife does not take in devise to heirs and next of kin. *Morris v. Bolles*, 65 Conn. 45; *Dodge's Appeal*, 106 Pa. St. 216; *Richardson v. Martin*, 55 N. H. 45; *Platt v. Mickle*, 137 N. Y. 106; nor does the husband; *Mason v. Baily*, 6 Del. Ch. 129; *Wilkins v. Ordway*, 59 N. H. 378; *Irvin's Appeal*, 106 Pa. St. 176

<sup>12</sup> *Durbin v. Redman*, 140 Ind. 694; *Lawrence v. Crane*, 158 Mass. 392; *Holmes v. Hancock*, 158 Mass. 398; *Durfee v. MacNeil*, 58 O. S. 238; *Neeley's Estate*, 155 Pa. St. 133.

The context may show that a different meaning was intended. Thus, where the wife of testator would have been a statutory heir, a devise to the wife in lieu of dower, but if she should claim dower then to the "heirs" of testator was held

to be a devise to testator's brothers and sisters, there being no children. *Jones v. Lloyd*, 33 O. S. 572; so *Stewart v. Powers*, 9 Ohio C. C. 143.

<sup>13</sup> *Swenson's Estate*, 55 Minn. 300; *Townsend v. Townsend*, 25 O. S. 477.

"It is well known that persons unskilled in the law, use the word "heirs" as descriptive of a class of persons who can not, in fact, take as heirs. In recognition of this doctrine, the words "heirs at law" have been construed to mean adopted children; next of kin, heirs of a particular class or description, heirs presumptive, heirs apparent, heirs at the date of the will, heirs at the decease of the testator, or heirs at even a later date, the construction resting in each particular case upon an ascertainment of the testator's intention from the words used, from the context of the instrument and from the surrounding circumstances." *Furenes v. Severtson*, 102 Ia. 322.



"The word 'heirs' is a flexible one, and when used in the will should be so construed as to give effect to the manifest intention of the testator," and the sense in which it is used is "always open to inquiry."<sup>14</sup>

The word "heir" or "legal heir" of a person who is living may mean the "heir apparent," or the person who would be entitled to inherit from the person named if he were dead.<sup>15</sup> So where testator's intent is clear, "heirs" may be held to mean those who would be regarded as testator's heirs if the parents of such persons were dead.<sup>16</sup>

This primary meaning may either be extended by the context or surrounding circumstances so as to include meanings outside of its primary signification, or it may be so restricted by context or surrounding circumstances as to exclude classes of persons who otherwise would be included under the primary meaning.

To consider first, cases where the meaning is extended.

### §515. Meaning of "heirs" in bequests of personalty.

When in the will the word "heirs" is used as indicating the beneficiary of a bequest of personalty, the *prima facie* presumption is that it means the next of kin under the Statute of Distribution of Personal Property.<sup>17</sup>

<sup>14</sup> Jones v. Lloyd, 33 O. S. 572.

<sup>15</sup> Barber v. R. R., 166 U. S. 83; Healey v. Healey, 70 Conn. 467; Strain v. Sweeney, 163 Ill. 603; (construction adopted in order to keep the title to realty from being in abeyance); Barton v. Tuttle, 62 N. H. 518; or "next of kin," Montignani v. Blade, 145 N. Y. 111; Cushman v. Horton, 59 N. Y. 149.

<sup>16</sup> McKelvey v. McKelvey, 43 O. S. 213.

<sup>17</sup> Thompson's Trusts, 9 Ch. D. 607; Keay v. Boulton, 25 Ch. D. 212; Eddings v. Long, 10 Ala. 203; Lord v. Bourne, 63 Me. 368, overruling Mace v. Cushman, 45 Me. 250; Kendall v. Gleason, 152 Mass. 457;

9 L. R. A. 509; Swasey v. Jaques, 144 Mass. 135; Harraden v. Larabee, 113 Mass. 430; Houghton v. Kendall, 7 All. 72; Swenson's Estate, 55 Minn. 300; Reen v. Wagner, 51 N. J. Eq. 1; 26 Atl. 467; Montignani v. Blade, 145 N. Y. 111; Corbitt v. Corbitt, 1 Jones Eq. 114; Nelson v. Blue, 63 N. Car. 659; Cosbey v. Lee, 3 Gaz. 173 (Ohio); 2 Dis. 460; Ashton's Estate, 134 Pa. St. 390; Comly's Estate, 136 Pa. St. 153; Croom v. Herring, 4 Hawks, 393; see on the same point, Fabens v. Fabens, 141 Mass. 395; Merrill v. Preston, 135 Mass. 451; Minot v. Harris, 132 Mass. 528; Sweet v. Dutton, 109 Mass. 589.

"The word 'heirs,' when used to denote succession in a gift of personalty is always a misnomer, because 'heirs' is a word of limitation, and there can be no limitation, in strictness, of a chattel interest. Its popular meaning comprehends those who succeed to the property of an ancestor, and hence includes next of kin and those who take under the statutes of distribution as well as heirs at law." The courts are forced to accept this definition where a gift of personalty is to one and his heirs, or to one for life and then to his heirs.<sup>18</sup>

And "where certain personalty of a testator who was childless and whose wife was past the age of childbearing was bequeathed to his 'heirs at law,' and upon the death of his widow his realty was devised to his 'heirs at law,' it was held that this term had the same meaning in both provisions, and that was 'next of kin.'" <sup>19</sup> On the other hand, when a testator made a devise of realty with remainder to his "heirs at law," and also provided for a division of personalty among his "heirs at law," it was held that the phrase had the same meaning in both places, and that meaning was those who would take land by descent if testator had died intestate.<sup>20</sup>

And where the will provides for a conversion of realty into personalty, and bequeaths the proceeds arising by such conversion to the "legal heirs," this expression means those who would take personalty under the Statute of Distributions governing.<sup>21</sup> But this is only a *prima facie* rule of presumption as to the meaning of the term. The rest of the will may show that the word "heirs" was used of a beneficiary of a bequest of personalty in its technical legal sense in the primary meaning of the term. The provisions disposing of personalty may show an intent not to use "heirs" as meaning "next of kin." Thus a bequest to the "heirs" of a niece of testa-

<sup>18</sup> McCrea's Estate, 180 Pa. St. 81, citing (where the gift is to A for life and then to his heirs), Comly's Estate, 136 Pa. St. 153; Neeley's Estate, 155 Pa. St. 133; Ashton's Estate, 134 Pa. St. 390; (where the gift is to "A and his heirs") Eby's Appeal, 84 Pa. St.

241; Patterson v. Hawthorn, 12 S. & R., 112; McGill's App. 61 Pa. St. 46.

<sup>19</sup> Swenson's Estate, 55 Minn. 300.

<sup>20</sup> Forrest v. Porch, 100 Tenn. 391.

<sup>21</sup> Kendall v. Gleason, 152 Mass. 457; 9 L. R. A. 509.

tor's was held to be the "heirs" in the technical sense where such niece was domiciled in another state, the laws of which could control as to who was the next of kin, and where such a bequest was connected with another bequest to the "heirs" of another niece in the same state.<sup>22</sup>

In some jurisdictions "heirs" is held, even in bequests of personalty, to mean those upon whom the law would cast the descent of realty.<sup>23</sup>

Where the word "heir" is used, not with reference to a beneficiary under the will but to a testator, it is held in some courts that even in gifts of personalty it means the common law heirs.<sup>24</sup>

#### §516. "Heirs" including legatees.

The word "heir" may be extended to include "legatee." Thus a bequest was made to "heirs resident in the state." There were no heirs or next of kin of testatrix resident in the state, but there were legatees under the will resident in the state, and the term "heirs" was construed to include all the legatees resident in the state who were natural persons, but excluding corporations.<sup>25</sup>

#### §517. "Heirs"—restricted meanings—"children."

The word "heir" may be so restricted by the context as to have a meaning more limited than its technical one. Of these restricted meanings "children" is perhaps the one most fre-

<sup>22</sup> *Ruggles v. Randall*, 70 Conn. 44.

<sup>23</sup> *Mason v. Baily*, 6 Del. Ch. 129; *Gordon v. Small*, 53 Md. 550.

<sup>24</sup> *Mounsey v. Blamire*, 4 Russ. 384; *Hamilton v. Mills*, 29 Beav. 193; *De Beauvoir v. De Beauvoir*, 3 H. L. 524; *In re Rootes*, 1 Dr. & Sm. 228; *Southgate v. Clinch*, 27 L. J. Ch. 651; *McCrea's Estate*, 180 Pa. St. 81; *Stewart' Estate*, 147

Pa. St. 383. "His 'right heirs' were his heirs at common law, and he used the words properly as words of purchase." *McCrea's Estate*, 180 Pa. St. 81.

<sup>25</sup> *Graham v. De Yampert*, 106 Ala. 279; 17 So. 355; *McKelvey v. McKelvey*, 43 O. S. 213; *Corbley v. Patterson*, 3 Ohio N. P., 315; *Collier v. Collier*, 3 O. S. 369.

quently thus suggested.<sup>26</sup> Thus a devise is not infrequently given to one of two or more brothers and sisters, with a provision that if such devisee should die without heirs capable of inheriting, the share of such decedent shall pass to the survivor or survivors. In such case, since the surviving brothers and sisters are heirs in the technical sense of the word, and under the provisions of the will one can not die without technical "heirs" while his brothers and sisters survive him, the word must have a restricted meaning, which must be that of "children."<sup>27</sup>

So a devise to "the heirs of S. D. that she now has, and to the heirs of A. M., should they arrive to the age of twenty-one, and in case they should not I give and devise" to others, the word heirs was held to mean children.<sup>28</sup>

#### §518. "Heirs of the body."

The word "heirs" may be so used as to show an intention to restrict its meaning to "heirs of the body," or lineal descendants or issue living at his decease.<sup>29</sup> So where "lawful

<sup>26</sup> *Anthony v. Anthony*, 55 Conn. 256; *McCartney v. Osburn*, 118 Ill. 403; *Kellett v. Shephard*, 139 Ill. 433; *Fishback v. Joesting*, 183 Ill. 463; *Allen v. Craft*, 109 Ind. 476; *Barton v. Tuttle*, 62 N. H. 558; *Eldridge v. Eldridge*, 41 N. J. Eq. 89; *Bunnell v. Evans*, 26 O. S. 409; *Hoagland v. Marsh*, 4 Ohio C. C. 31; *Evan's Estate*, 155 Pa. St. 646; *Hayne v. Irvine*, 25 S. C. 289; *Franklin v. Franklin*, 91 Tenn. 119.

<sup>27</sup> *Young v. Harkleroad*, 166 Ill. 318; *Francks v. Whitaker*, 116 N. Car. 518; *Durfee v. Mac Neil*, 58 O. S. 238; *Jones v. Lloyd*, 33 O. S. 572; *Boyd v. Robinson*, 93 Tenn. 1; *Franklin v. Franklin*, 91 Tenn. 119.

In construing one of these wills the court said: "Since a brother is an heir in the general sense of the term, the provision that the es-

tate of Mrs. MacNeil should upon her death without heirs, pass to her brother by way of executory devise in the case that the term was not used in that sense. The testator could not have contemplated the death of one of his children without heirs while the other survived. We think the testator used the term as meaning children." *Durfee v. Mac Neil*, 58 O. S. 238.

<sup>28</sup> *Barton v. Tuttle*, 62 N. H. 558.

<sup>29</sup> *Rollins v. Keel*, 115 N. Car. 68. (A devise to A, and if he died "without lawful heir" to his widow for life, with remainder over. The widow was heir by statute, but as the context showed that "lawful heir" meant "issue," she did not take the fee.) So *Snider v. Snider*, 160 N. Y. 151; *Canfield v. Fallon*, 161 N. Y. 623; 162 N. Y. 605; 55 N. E. 1093.

begotten heirs" is used, it means "heirs of the body."<sup>30</sup> Thus a devise over if a son should die "without heirs of his own" has been held to mean heirs of the body.<sup>31</sup>

**§519. "Heir" meaning grandchildren.**

The word "heir" may, by force of the context, exclude children and include only grandchildren. Thus, where testator devised one-half of his real estate to a named son and the other half to be divided among testator's "legal heirs," it was held that the term "legal heirs" could only apply to testator's grandchildren and that the named son must be excluded.<sup>32</sup>

**§520. "Heir" including illegitimate children.**

The primary meaning of the word "heir" is, under common law definitions, restricted to legitimate descendants of the stock of the ancestor who trace each step of descent through legitimacy. Under our modern statutes it is provided in many states that a child born illegitimate may be subsequently made legitimate. In some states this is to be effected simply by open recognition on the part of the father of the child as his. In other jurisdictions an illegitimate child can be made legitimate only by the subsequent intermarriage of his parents and their recognition of the child as their own; and it is also provided in many jurisdictions that an illegitimate child may inherit from its mother.

The question under construction presented by these statutes is as to the effect of a devise to the "heirs" of a specified person when such person had an illegitimate child who would inherit from him under the statutes already referred to. The weight of authority is that a devise to "heirs" includes such illegitimate descendants as would inherit from the designated ancestor under the statutes of descent and distribution.<sup>33</sup>

<sup>30</sup> *Good v. Good*, 7 El. & Bl. 295; citing *Jones v. Miller*, 13 Ind. 337; *Holt v. Pickett*, 111 Ala. 362; *Clarke v. Ridgeway v. Lanphear*, 99 Ind. 251; *v. Smith*, 49 Md. 106. *Underwood v. Robbins*, 117 Ind.

<sup>31</sup> *Abbott v. Essex Co.*, 18 How. 308. (U. S.) 202.

<sup>32</sup> *Griffin v. Ulen*, 139 Ind. 565, *Ives v. McNicoll*, 59 O. S. 402.

<sup>33</sup> *Johnson v. Bodine*, 108 Ia. 594;

A devise to the "heirs by blood" of testator's niece includes her illegitimate son where, under the statute of descent, he would take as heir of his mother if she died intestate.<sup>34</sup>

Since status is fixed by domicile, a natural child, who is legitimated by marriage of parents domiciled in Cuba under the laws thereof, can take under a devise to "heirs."<sup>35</sup>

Thus where testator devised property to his son A for life, remainder to the "heirs of his body," it was held that the term "heirs of his body" included a child born illegitimate, the offspring of adulterous intercourse with a married woman, whose parents had intermarried after the divorce of its mother from her first husband, and whose father had recognized it as his child.<sup>36</sup>

#### §521. Next of kin.

"The words 'next of kin' do not of themselves impart '*succession ab intestato*,' and, taken alone, mean nothing more than nearest blood relations; and unless there is something more in the will indicating that the testator intended statutory next of kin, or that the property should be distributed as intestate property, the words must have their customary meaning."<sup>37</sup>

The words "next of kin" in a will mean the nearest blood relations, and not all those who would take under the Statute of Distributions.<sup>38</sup> Thus "next of kin" means a brother in preference to nephews, sons of a deceased brother;<sup>39</sup> and nieces in preference to grandnieces.<sup>40</sup>

<sup>34</sup> Hayden v. Barrett, 172 Mass. 472.

<sup>35</sup> De Wolfe v. Middleton, 18 R. I. 810.

<sup>36</sup> Ives v. McNicoll, 59 O. S. 402.

<sup>37</sup> Swasey v. Jaques, 144 Mass. 135.

<sup>38</sup> Withy v. Mangles, 10 Cl. & F. 215; Harris v. Newton, 25 W. R. 228; Fargo v. Miller, 5 L. R. A.

690; 150 Mass. 225; Swasey v. Jaques, 144 Mass. 135; Redmond v. Burroughs, 63 N. Car. 242; Davenport v. Hassel, Busb. Eq. (N. Car.), 29; Wright v. M. E. Church, Hoff. Ch. (N. Y.), 202.

<sup>39</sup> Swasey v. Jaques, 144 Mass. 135.

<sup>40</sup> McComas v. Amos, 29 Md. 120; Garrison v. Hill, 81 Md. 206.

### §522. Children.—Primary meaning.

The primary meaning of "children" is the immediate legitimate offspring of the person indicated as the parent.<sup>41</sup>

A bequest to a "child" includes "children" when there is more than one.<sup>42</sup>

A child *en ventre sa mere* is considered in law as a child *in esse*, and is included in a devise to the "children" of its parents generally.<sup>43</sup> Stepchildren are not ordinarily included in a devise to "children."<sup>44</sup> And where testator married for his second wife a widow with one child, and in his will made a devise to "my first children," and then provided "I desire that my present wife and her children shall have" certain specified property, it was held that the devise to "her children" included only her children by testator.<sup>45</sup>

A devise to "children" does not ordinarily include illegitimate children.<sup>46</sup> But children born illegitimate, who are subsequently rendered legitimate by the means provided by statute, are included under a devise to the "children" of such parent.<sup>47</sup> More remote legitimate descendants, such as grandchildren and great-grandchildren, are not included in a de-

<sup>41</sup> *Arnold v. Alden*, 173 Ill. 229; *Pugh v. Pugh*, 105 Ind. 552; *Ward v. Cooper*, 69 Miss. 789; *Dunn v. Cory*, 56 N. J. Eq. 507; *Hone v. Van Schaick*, 3 N. Y. 538; *Shannon v. Pickell*, 8 N. Y. S. 584; 55 Hun, 127; *Guernsey v. Guernsey*, 36 N. Y. 267; *Magaw v. Field*, 48 N. Y. 668; *Palmer v. Horn*, 84 N. Y. 516; *Wylie v. Lockwood*, 86 N. Y. 291; *Hunt's Estate*, 133 Pa. St. 260; *McIntosh's Estate*, 158 Pa. St. 528; *Lytle v. Beveridge*, 58 N. Y. 592.

<sup>42</sup> *Dunn v. Cory*, 56 N. J. Eq. 507.

<sup>43</sup> *In re Burrows* (1895), 2 Ch. 497; 13 Reports, 689; *McLain v. Howald*, 120 Mich. 274; 79 N. W. 182; *Starling v. Price*, 16 O. S. 29.

<sup>44</sup> *Kurtz's Estate*, 145 Pa. St. 637. (This is especially where as in this case testator carefully distinguished

step-children from his own children by providing in the will for them as children which came to him by marriage.) *Lawrence v. Hebbard*, 1 Bradf. 252; *In re Hallet*, 8 Paige, 375.

<sup>45</sup> *Blankenbaker v. Snyder* (Ky.), 36 S. W. 1124; *Bolton v. Bolton*, 73 Me. 299.

<sup>46</sup> *Dorin v. Dorin*, L. R. 7 H. L. 568; *Hill v. Crook*, L. R. 6 H. L. 265; *Flora v. Anderson*, 67 Fed. Rep. 182; *Hicks v. Smith*, 94 Ga. 809; *Kent v. Barker*, 2 Gray, 535; *Adams v. Adams*, 154 Mass. 290; *Haraden v. Larrabee*, 113 Mass. 430.

<sup>47</sup> *Grey's Trusts* (1892), 3 Ch. 88.

*Contra*, *Hicks v. Smith*, 94 Ga. 809.

wise to "children" when there are children in existence to whom the name evidently applies, and there is nothing in the context to show that testator used the word in a more extended meaning.<sup>48</sup>

A devise was to testator's children for life, "and on the decease of either of the above-named children leaving a child or children, the proportion of such deceased's child's income to such child or children." A child who had a life interest died leaving a child and some grandchildren, children of a deceased child. It was held that the devise inured only to the benefit of the surviving child to the exclusion of the grandchildren.<sup>49</sup>

### §523. Extended meaning of "children."

But the primary meaning of children is not an unyielding and rigid one. The will itself, or the surrounding facts and circumstances, may give to it a broader meaning, though hardly a narrower one.<sup>50</sup> Thus a devise by a testator who had been married twice, and left children by each marriage, to "our children" was held to include his children by each marriage.<sup>51</sup> Thus in a gift to two sons, and if they or either should die without issue then to "my other children," it was held that on the death of one son without issue the other son was one of the "other children" to whom the estate passed.<sup>52</sup>

How strong the necessity of the case, or the necessary implications must be in order to extend the meaning, is a proposition upon which in the abstract form of statement the courts

<sup>48</sup> *Arnold v. Alden*, 173 Ill. 229; *Annable v. Patch*, 3 Pick. 360; *Ward v. Cooper*, 69 Miss. 789; *Feit v. Van Atta*, 21 N. J. Eq. 83; *Howe v. Van Schaick*, 3 N. Y. 538; *In re Sanders*, 4 Paige, 293; *Stokes v. Stokes* (Ohio), 12 Weekly Law Bull. 135; *Hunt's Estate*, 133 Pa. St. 260; *Guthrie's Appeal*, 37 Pa. St. 9; *Tingley v. Harris*, 20 R. I. 517; *Williams v. Knight*, 18 R. I.

333; *Tillinghast v. De Wolfe*, 8 R. I. 69; *Winsor v. Odd Fellow's Association*, 13 R. I. 149; *Neal v. Hodges* (Tenn. Ch. App. 1899), 48 S. W. 263 (affirmed Supreme Court).

<sup>49</sup> *Bragg v. Carter*, 171 Mass. 324.

<sup>50</sup> *Ward v. Cooper*, 69 Miss. 789.

<sup>51</sup> *Crosson v. Dwyer*, 9 Tex. Cir. App. 482.

<sup>52</sup> *Brooks v. Kip*, 54 N. J. Eq. 462.



do not fully agree,<sup>53</sup> and which is better presented in the concrete by a discussion of the various extended meanings which the word may assume.

#### §524. "Children" including grandchildren.

The context and the surrounding circumstances may show that the word "child" means grandchild.<sup>54</sup> Children may mean grandchildren;<sup>55</sup> or great-grandchildren.<sup>56</sup> Thus, where a will gave a devise to certain of testator's children and their "heirs," providing that "if any of said heirs of mine should die leaving no child or children" the share of such person should be divided among the survivors, it was held that the context showed that the words "child" or "children" were synonymous with the word "heirs" in the prior devise and thus included grandchildren and great-grandchildren.<sup>57</sup> Facts outside the will may, furthermore, show that the intention of the testator was to use the word "children" as inclusive of grandchildren and great-grandchildren, and as practically synonymous with issue.<sup>58</sup> Where a devise is made to the "children" of one who has been married and had children and grandchildren, and the children have died, so that at the time of making the will he has only grandchildren, such devise to the "children" is held to include grandchildren.<sup>59</sup>

<sup>53</sup> Arnold v. Alden, 173 Ill. 229; Cummings v. Plummer, 94 Ind. 403; Ward v. Cooper, 69 Miss. 789; Hunt's Estate, 133 Pa. St. 260.

A mere marginal note, or memorandum, on a will devising all testator's property to his children, to the effect that the personal estate is to be divided equally among the "heirs," will not have the effect of extending the sense of the word "children" so as to comprehend grandchildren. *In re* Hunt's Estate, 133 Pa. St. 260.

<sup>54</sup> Prowitt v. Rodman, 37 N. Y. 42; Scott v. Guernsey, 48 N. Y. 106; Douglass v. James, 66 Vt. 21; Radcliffe v. Buckley, 10 Ves. 195.

<sup>55</sup> Bowker v. Bowker, 148 Mass. 198; Brokau v. Peterson, 2 McCart. 194; Feit v. Vanatta, 6 C. E. Green, 84.

<sup>56</sup> Miller v. Carlisle (Ky.) (1890), 14 S. W. 75.

<sup>57</sup> Miller v. Carlisle (Ky.) (1890), 14 S. W. 75.

<sup>58</sup> See cases in preceding notes under this section.

<sup>59</sup> Gale v. Bennett, Amb. 681; Fenn v. Death, 2 Jur. (N. S.), 700; 23 Beav. 73; Earl of Oxford v. Churchill, 3 V. & B., 59; Crook v. Brookeing, 2 Vern. 107; Reeves v. Brymer, 4 Ves. 692; Berry v. Berry, 3 Giff. 134, 7 Jur. (N. S.), 752;

### §525. "Children" including illegitimate children.

The term "children" may be extended by the terms of the will itself,<sup>60</sup> or by the surrounding facts and circumstances,<sup>61</sup> so as to include illegitimate children. Thus where the illegitimate child was the offspring of open and notorious cohabitation, and the will speaks of the parties as husband and wife, and refers to the illegitimate offspring specifically as "children" of the designated parents, it is held that a subsequent devise generally to the "children" of such parents will include illegitimate children.<sup>62</sup>

Extrinsic evidence of the surrounding facts and circumstances may serve to extend the meaning of "children" to illegitimate children. Thus, evidence that the parents of the illegitimate children lived together as husband and wife, and were recognized as such by testator, may serve to show that in the "children" of such parents, spoken of in the will, the illegitimate children were included.<sup>63</sup>

Where the illegitimate child is not testator's, it is held, in some jurisdictions, that even though it is legitimated subsequently, it can not take under a devise to the "children" of its parent without anything further to show that such children were to be included, as the statute making them legitimate did not have such effect for all purposes, but only to enable them to take by descent from their father.<sup>64</sup>

### §526. Issue and offspring

Issue is a word whose primary meaning, in the absence of anything to show a contrary intent, is that of legitimate lineal

*In re Smith*, 35 Ch. Div. 558; *Dunn v. Cory*, 56 N. J. Eq. 507.

A devise to "the youngest child which shall hereafter be born of all my said children," was held to mean testator's youngest grandchild. *Otterback v. Bohrer*, 87 Va. 548.

<sup>60</sup> *Flora v. Anderson*, 67 Fed. 182.

<sup>61</sup> *In re Jeans*, 13 Rep. 627; *In re Byron*, 30 Ch. Div. 112.

<sup>62</sup> *In re Harrison* (1894), 1 Ch. 561; *In re Humphries*, 24 Ch. Div. 691; *Hill v. Crook*, L. R. 6 H. L. 265; *Dickison v. Dickison*, 39 Ill. App. 503; *Sullivan v. Parker*, 113 N. Car. 301.

<sup>63</sup> *In re Harrison* (1894), 1 Ch. 561; *Sullivan v. Parker*, 113 N. Car. 301.

<sup>64</sup> *Hicks v. Smith*, 94 Ga. 809.

descendants indefinitely.<sup>65</sup> The rule therefore is, that the word "issue" in its general sense, in the absence of any indication of intention to the contrary, includes in its meaning descendants generally.<sup>66</sup>

But the context, the entire will, or the surrounding circumstances may modify this primary meaning.<sup>67</sup> The courts which adhere to the first meaning concede that "issue" is ambiguous.<sup>68</sup> Thus where "issue" is correlated with "parent," as where the "issue" are indicated as the substitutional beneficiaries of their deceased "parent," it ordinarily means children.<sup>69</sup> "Where the word 'issue' is used with reference to the parent of such issue, as where the issue is to take the shares of the deceased parent, it must mean his children; that is, the word 'parent' confines the word 'issue'."<sup>70</sup> This meaning may be rebutted by the context. Thus, in a gift of eleven legacies to "children" and a twelfth to "issue," it was held that the word "issue" in the twelfth legacy was carefully inserted as not synonymous with "children."<sup>71</sup> Where the word "issue" is used in this manner in one clause of the will with the meaning of "children," it will be presumed to be used in the same sense in another clause of the will with the same meaning.<sup>72</sup> The primary meaning of

<sup>65</sup> *Weldon v. Hoyland*, 4 De G. F. & J. 564; *Bigelow v. Morong*, 103 Mass. 287; *Hall v. Hall*, 140 Mass. 267; *Dexter v. Inches*, 147 Mass. 324; *Jackson v. Jackson*, 153 Mass. 374; 11 L. R. A. 305; *Hills v. Barnard*, 152 Mass. 67; 9 L. R. A. 211; *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 475; *Chwatal v. Schreiner*, 148 N. Y. 683; *Drake v. Drake*, 134 N. Y. 220; *Soper v. Brown*, 136 N. Y. 244; *Ward v. Stow*, 2 Der. Eq. 509; *Moon v. Hapford* (Com. Pl.), 2 Ohio N. P. 365; 3 Ohio Dec. 508; *Robins v. Quinliven*, 79 Pa. St. 333; *Pearce v. Rickard*, 18 R. I. 142; 19 L. R. A. 472.

Illegitimate children are therefore excluded even though the devise is to their mother, and by the local

statute they could inherit from her. *Gibson v. McNeely*, 11 O. S. 131.

<sup>66</sup> *Chwatal v. Schreiner*, 148 N. Y. 683.

<sup>67</sup> *Arnold v. Alden*, 173 Ill. 229.

<sup>68</sup> *Palmer v. Horn*, 84 N. Y. 516; *Chwatal v. Schreiner*, 148 N. Y. 683..

<sup>69</sup> *Arnold v. Alden*, 173 Ill. 229; *Chwatal v. Schreiner*, 148 N. Y. 683.

<sup>70</sup> *Madison v. Larmon*, 170 Ill. 65, citing *Fairchild v. Buchell*, 32 Beav. 158; *Sibley v. Perry*, 7 Ves. Jun. 552; *Arnold v. Alden*, 173 Ill. 229; *Drake v. Drake*, 134 N. Y. 220; 17 L. R. A. 664.

<sup>71</sup> *In re Birks* (1899), 1 Ch. 703; 68 L. J. Ch. N. S. 319.

<sup>72</sup> *Madison v. Larmon*, 170 Ill. 65.

"issue" as given above has been questioned. "'Issue,' in its primary signification, imports 'children' . . . It is a secondary meaning by which it has been held to include the issue of issue in an indefinitely descending line."<sup>73</sup> So in another case a devise in trust for A, and at his decease to his issue, was held to mean to his children.<sup>74</sup>

It is possible for testator, by the context and associations of the will, to restrict the meaning of "children" to that of "sons," though such restriction can be made only on a very clear intent of testator as manifest in the will.<sup>75</sup>

An adopted illegitimate child is not "issue" of the adopting parent so as to defeat a remainder contingent upon the death of such person without issue.<sup>76</sup>

"Offspring" is said to be synonymous with issue.<sup>77</sup> It includes lineal descendants, however remote in degree.<sup>78</sup>

## §527. Descendants.

A descendant is "one who descends as offspring, however remotely; correlative to ancestor or ascendant."<sup>79</sup> The term includes the most remote lineal offspring, and is practically synonymous with "issue" in its legal meaning.<sup>80</sup> Hence it

<sup>73</sup> Thomas v. Levering, 73 Md. 451, citing Carter v. Bentall, 2 Beav. 552; 2 Redf. on Wills, p. 38 n. 5: In this case a devise was made to devisee's "issue, children or descendants," *per capita*, and not *per stirpes*; and the living children and the descendants of the deceased children were held to take to the exclusion of the children of the living children.

<sup>74</sup> Dexter v. Inches, 147 Mass. 324. The court said that they entertained this view, "however the English courts would construe the word 'issue' in the clause before us," and citing, but not following, the following cases in which "issue" was held to show representation. Ross v. Ross, 20 Beav. 645; Robin-

son v. Sykes, 23 Beav. 40, 51; Orton's Trust; L. R. 3, Eq. 375.

<sup>75</sup> Weatherhead v. Baskerville, 11 How. (U. S.), 329.

<sup>76</sup> Wyeth v. Stone, 144 Mass. 441; Jenkins v. Jenkins, 64 N. H. 407. *Contra*, Hartwell v. Tefft, 19 R. I. 644; 34 L. A. R. 500 (adopted only, not illegitimate).

<sup>77</sup> Mitchell v. Ry. 165 Pa. St. 645.

<sup>78</sup> Thompson v. Beasley, 3 Drewry, 7; Young v. Davies, 2 Dr. & Sm. 167; Barber v. Ry. 166 U. S. 83; Allen v. Markle, 36 Pa. St. 117.

<sup>79</sup> Tichenor v. Brewer's Ex'r, 98 Ky. 349; 33 S. W. 86.

<sup>80</sup> Bates v. Gillett, 132 Ill. 287; Tichenor v. Brewer's Ex'r, 98 Ky. 349; 33 S. W. 86.

excludes collateral relations;<sup>81</sup> nor does it include relatives in the ascending line.<sup>82</sup>

### §528. Family.

At one time the word "family" was held to be of a meaning so uncertain that a devise to a "family" of a named person was void for uncertainty;<sup>83</sup> and trusts generally for the benefit of the "family" of a designated person have been held void for uncertainty.<sup>84</sup> This extreme view has since been abandoned by the courts with substantial unanimity, and "family" is held to be a word of such definite meaning when employed in a will that a devise to a "family" of a person is valid. But what that meaning is, is not so unanimously agreed upon by the courts. Probably the statement once made by an Alabama court that it is a term "of more or less extensive import, according as the context of the will may indicate," may stand as fairly representative of the consensus of judicial opinion.<sup>85</sup> Thus in some jurisdictions "family" includes the wife and children of testator resident at the homestead together with such servants as are there residing.<sup>86</sup> And in carrying out this theory to a logical conclusion, children of the party designated who have reached full age, and who live away from the paren-

<sup>81</sup> *Bates v. Gillett*, 132 Ill. 287; *Tichenor v. Brewer's Ex'r*, 98 Ky. 349 (such as half-brothers and sisters); *Baker v. Baker*, 8 Gray (Mass.), 101.

*Contra* as to the meaning in Ohio, *Turley v. Turley*, 11 O. S. 173, where it is said that the word descendants "includes both lineal and collateral relations—all, in short, that would take the estate under the statute of descents if (testator) had died intestate. All such persons may not be *in fact*, but they are *in law*, the descendants of the person from whom they receive the estate."

<sup>82</sup> *Tichenor v. Brewer's Ex'r*, 98 Ky. 349; 33 S. W. 86 (such as

mother); *Mitchell v. Thorne*, 134 N. Y. 536; *Schmaunz v. Goss*, 132 Mass. 141.

(A devise to A and his "descendants" was held not to mean a devise to A and "the heirs of his body," since the devise to A was *prima facie* a fee simple, and, therefore, was not cut down by words of doubtful import.)

<sup>83</sup> *Harland v. Trigg*, 1 Bro. C. C. 142; *Robinson v. Waddelow*, 8 Sim. 134.

<sup>84</sup> *Warner v. Rice*, 66 Md. 436.

<sup>85</sup> *Rugely v. Robinson*, 10 Ala. 702.

<sup>86</sup> *Huckabee v. Swoope*, 20 Ala. 491; *Wood v. Wood*, 63 Conn. 324.

tal domicile, are held to be not included within the meaning of "family."<sup>87</sup> In other jurisdictions the primary meaning of "family" is held to be that of "children" unless the context indicates a different signification.<sup>88</sup> So a devise to A's family has always been held to exclude A.<sup>89</sup> It has also been said to mean "next of kin" in its primary signification.<sup>90</sup> In jurisdictions where the word "family" means either "children" or "next of kin," it makes no difference whether the children or next of kin live with the person whose "family" is the object of testator's bounty or not. Thus, where a son of A by A's first marriage removed from A's home upon A's second marriage, it was held that a devise to support A or his "family" would include the support of this son.<sup>91</sup> The term "family," as used in a will to indicate beneficiaries, does not in its primary signification include stepchildren, even when they live with the person designated as the head of the family.<sup>92</sup> Whether the term "family" includes the wife or widow of the person designated as the head of the family is a question of some difficulty. In jurisdictions in which the primary sense of "family" is members of the same household, a devise to one's family is held to include his wife.<sup>93</sup> And a devise to be used for the support of "the family" of a designated person is usually held to include the wife of such person.<sup>94</sup> But in a

<sup>87</sup> Wood v. Wood, 63 Conn. 324, citing and following Hart v. Goldsmith, 51 Conn. 479; Bradlee v. Andrews, 137 Mass. 50; Bates v. Dewson, 128 Mass. 334; Kain v. Fisher, 6 N. Y. 597.

<sup>88</sup> Pigg v. Clarke, 3 Ch. 672; Gregory v. Smith, 9 Hare, 708; 15 Eng. L. & Eq. 202; Snow v. Teed, L. R. 9 Eq. 622; Beales v. Crisford, 13 Sim. 592; *In re Muffett*, 55 L. J. 671; Flournoy v. Johnson, 7 B. Mon. (Ky.), 693; Heck v. Clippenger, 5 Pa. St. 385; Alsop's App. 9 Pa. 374; White v. White, 30 Vt. 338; Phillips v. Ferguson, 85 Va. 509; 1 L. R. A. 897.

<sup>89</sup> Barnes v. Patch, 8 Ves. Jr.

604; Wallace v. M'Micken, 2 Disney (Ohio), 564.

<sup>90</sup> Smith v. Greeley, 67 N. H. 377.

<sup>91</sup> Smith v. Greeley, 67 N. H. 377; 30 Atl. 413.

<sup>92</sup> Bates v. Dewson, 128 Mass. 334.

<sup>93</sup> Cosgrove v. Cosgrove, 69 Conn. 416; Bates v. Dewson, 128 Mass. 334; Langmaid v. Hurd, 64 N. H. 526.

<sup>94</sup> Rugely v. Robinson, 10 Ala. 702; Bowditch v. Andrew, 8 Allen (Mass.), 339; Bradlee v. Andrew, 137 Mass. 50; Smith v. Greeley, 67 N. H. 377; White v. White, 30 Vt. 338.

gift to "the surviving members of my brother's and sister's families, which are above named, in equal parts," it was held that "family" meant "stock," and the beneficiaries were the children of the persons named, excluding surviving spouses.<sup>95</sup>

### §529. Relatives.

The popular meaning of the word "relatives" or "relations" is that of all persons within any degree whatever of consanguinity or affinity.<sup>96</sup> But when the word "relations" is used in a will to denote a class of beneficiaries, it is settled that the law imposes a technical meaning and not the popular one. The primary meaning of "relatives" or "relations" is, such persons as would take under the statutes of descent and distributions if testator had died intestate.<sup>97</sup>

This primary meaning may, however, be modified by the context or by the surrounding circumstances. Thus where testator has in one clause of his will enumerated certain persons as his "nearest relations," it will be presumed that the same expression in a later clause includes the same persons.<sup>98</sup>

The primary meaning of "relatives," of course, imports legitimacy. But this meaning may be extended by the context. Thus certain persons who were related to testator by blood, but were illegitimates, were referred to by him in his will as "cousins." It was held that these persons could take under a bequest to testator's "relatives hereinbefore named," especially since the bequest to these "relatives" would be a bequest to one person only, if the illegitimate relations were excluded.<sup>99</sup>

<sup>95</sup> *Hoadley v. Wood*, 71 Conn. 452. (The court laid down the general rule that "family" in a gift to the "family" of A, seldom includes the wife unless A (the husband) is to share in the bounty.)

<sup>96</sup> *Esty v. Clark*, 101 Mass. 36; *Huling v. Fenner*, 9 R. I. 410.

<sup>97</sup> *Ross v. Ross*, 25 Can. S. C. R. 307; *Drew v. Wakefield*, 54 Me.

291; *Handley v. Wrightson*, 60 Md. 198; *Varrell v. Wendell*, 20 N. H. 431; *Hall v. Wiggin*, 67 N. H. 89 (1894); 29 Atl. 671.

<sup>98</sup> *Hall v. Wiggin*, 67 N. H. 89; 29 Atl. 671.

<sup>99</sup> *In re Jodrell* (C. C. A.), L. R. 44, Ch. D. 590; *Seale-Hayne v. Jodrell*, 65 L. J. 57—H. L. (E.); (1891), A. C. 304.

### §530. Brothers and sisters.

The word "brothers" in a devise to the brothers of testator has been held under special circumstances to include a brother who was dead when the will was executed. In this case there was but one brother living when the will was executed, in which there was a devise to testator's "brothers," and the children of deceased brothers were otherwise unprovided for.<sup>100</sup> A direction for the distribution of a fund among the "brothers and sisters" of testator and their lineal heirs includes brothers and sisters of the half blood as well as those of the whole blood.<sup>101</sup>

### §531. Nephews and nieces.

The words "nephews" and "nieces" do not ordinarily include grandnephews and grandnieces. This is especially true where these grandnephews and grandnieces have been already referred to in the will as the children of a deceased niece.<sup>102</sup> The context and extrinsic evidence, however, may show that "niece" was used for "grandniece." Thus a devise to the three "nieces" of testator was held to mean a devise to his grandnieces where he had no nieces at the time of the making of the will but had grandnieces, with which facts he was acquainted;<sup>103</sup> nor does the term "nephews" ordinarily include nephews of the wife of the party designated.<sup>104</sup>

### §532. Cousins.

When used in a will to denote a beneficiary, the word "cousin" ordinarily means a first cousin; that is, a son or daughter of an uncle or an aunt.<sup>105</sup> And a legacy to each of

<sup>100</sup> *Fuller v. Martin* — Ky. — (1895); 29 S. W. 315.

<sup>101</sup> *Yetter's Estate*, 160 Pa. St. 506.

<sup>102</sup> *In re Woodward*, 117 N. Y. 522; 7 L. R. A. 367.

<sup>103</sup> *In re Davis* — R. I. —, (1896); 35 A. 1046.

<sup>104</sup> *Root's Estate*, 187 Pa. St. 118.

<sup>105</sup> *Stevenson v. Abington*, 8 Jur. (N. S.) 811; 6 L. J. 345; 10 W. R. 591; *Stoddart v. Nelson*, 6 De G. M. & G. 68; *White v. Mass. Inst. of Tech.*, 171 Mass. 84, distinguishing *Nutter v. Vickery*, 64 Me. 490.



the "cousins" of testatrix passes to the first cousins only, and not to first cousins once removed.<sup>106</sup> But where testator in his will specifically refers to his first cousins once removed as his "cousins," they will be included under a subsequent legacy to his cousins.<sup>107</sup>

The term "second cousin" is one whose meaning is open to much popular dispute though it seems well settled at law. By "second cousin" in a will is meant a child of a first cousin of a parent of the person whose relationship to such child is in question.<sup>108</sup> It does not include the child of testator's first cousin, who is technically the first cousin once removed.<sup>109</sup> But the context and the surrounding circumstances may show that by a devise to a "second cousin" is meant a devise to a first cousin once removed. Thus where testator had no second cousins but had first cousins once removed, it was held that a devise to his "second cousins" would enure to the benefit of his first cousins once removed.<sup>110</sup>

The term "cousin," like other terms indicating relationship, ordinarily imports legitimacy, but this rule yields to testator's clear intention, as where he specifically describes certain illegitimate relations as his "cousins."<sup>111</sup>

<sup>106</sup> *Sanderson v. Bayley*, 4 Myl & C. 56; *White v. Mass. Inst. of Tech.*, 171 Mass. 84; *Howland v. Slade*, 155 Mass. 415 (to "all my first cousins" does not include first cousins once removed, citing *Merriam v. Simonds*, 121 Mass. 198); *Webster's Estate*, 23 Ch. D. 737; *In re Chinery*, 39 Ch. D. 614; *Groves v. Musther*, 43 Ch. D. 569; *In re Hotchkiss*, L. R. 8 Eq. 643; *Haberg-ham v. Ridehalgh*, L. R. 9 Eq. 395.

<sup>107</sup> *Wilkes v. Bannister*, 30 Ch. Div. 512.

<sup>108</sup> *In re Parker*, 15 Ch. Div. 528. In this case the court said: "The relationship is a perfectly well-known and perfectly well-settled relationship. There never was any

doubt about its meaning suggested by anybody that I am aware of." Popular American usage is by no means as accurate, but except where altered by the context the legal meaning of the word seems well settled, as being the same meaning as that given by the English courts. In popular language, "second cousin" is used of the child of a first cousin of the person whose relationship to such person is in question.

<sup>109</sup> *In re Parker*, 15 Ch. Div. 528.

<sup>110</sup> *In re Bonner*, 19 Ch. Div. 201.

<sup>111</sup> *In re Jodrell* (C. A.), L. R. 44, Ch. D. 590.

### §533. Representatives.

While the word "representatives" is a word which "may mean almost anything, especially in wills,"<sup>112</sup> it has a primary meaning which is adhered to in the absence of anything to suggest a different meaning. This primary meaning is that of "legal personal representatives;" that is, of executors and administrators.<sup>113</sup>

But this primary meaning is not a firm one. The context often shows that the word "representative" does not mean the executor or administrator, but those persons who would take, if the person to whose "representatives" the devise is made had died intestate.<sup>114</sup> Thus a devise to testator's grandchildren and "the representatives of any deceased grandchild" is a devise to those who would take on the death of such deceased grandchild, intestate, under the statute of descent and distribution.<sup>115</sup>

The context may limit the meaning of "legal representatives" even more. Thus, where testator devised to his sisters, and if either of them died "without legal representatives," then to the survivor's, it was held that "legal representatives" meant lineal descendants.<sup>116</sup>

### §534. Servants.

A devise to "such persons as shall be in my employ at the time of my death" does not include persons who were hired a day or so at a time to assist the regular servants;<sup>117</sup> nor does a devise "to my other employees and laborers" include employees in a public park under testator as a park commis-

<sup>112</sup> *Walter v. Hensel*, 42 Minn. 204. It has "no precise determinate meaning." *Staples v. Lewis*, 71 Conn. 288.

<sup>113</sup> *In re Ware*, L. R. 45 Ch. D. 269.

<sup>114</sup> *Bains v. Ottey*, 1 M & K. 465; *Cotton v. Cotton*, 2 Beav. 67; *Long v. Blackall*, 3 Ves. 486; *Staples v. Lewis*, 71 Conn. 288; *Wil-*

*liams v. Knight*, 18 R. I. 333; *In re Bates*, 159 Mass. 252; 34 N. E. 266; *Halsey v. Paterson*, 37 N. J. Eq. 445.

<sup>115</sup> *In re Bates*, 159 Mass. 252; 34 N. E. 266.

<sup>116</sup> *Staples v. Lewis*, 71 Conn. 288.

<sup>117</sup> *Metcalfe v. Sweeney*, 17 R. I. 213.

sioner, where he had employees in a private garden, and the clause of his will immediately preceding the clause in dispute had given legacies to certain of these private laborers.<sup>118</sup> But a devise to the servants who have been in the employment of testator for ten years in a certain place includes a servant who was in the employment of testator for the required time at the place specified, even if he was not in testator's employment at testator's death.<sup>119</sup>

### §535. Legatees.

A "deceased legatee" in a gift to a certain class, "the issue of any deceased legatee to take its parent's legacy," means a person included within such class, who would have been a beneficiary under the will if he had survived.<sup>120</sup> In a devise to the legatees, share and share alike, the executor to whom certain property is bequeathed in trust is to be included among the "legatees," taking his share on the same trusts as the preceding bequest.<sup>121</sup> So a further bequest to be divided among the "legatees" includes a corporation to which a bequest has been made.<sup>122</sup>

A gift of small mementos by will does not make the recipient a legatee,<sup>123</sup> yet it has been held that a gift of a pair of rifles makes the recipient a legatee.<sup>124</sup>

### §536. Survivors.

The word "survivors," when used of a class, is limited to the individuals of such a class, and does not include their children. Thus a devise to testator's grandchildren, subject to be defeated on their death without issue, in which event such share is to go to the survivors, is not a devise to any of the children of these grandchildren.<sup>125</sup>

<sup>118</sup> *Shaw's Estate*, 51 Mo. App. 112.

<sup>119</sup> *In re Sharland*, (1896), 1 Ch. 517.

<sup>120</sup> *Hills v. Barnard*, 152 Mass. 67; 9 L. R. A. 211.

<sup>121</sup> *Logan's Estate*, 131 N. Y. 456.

<sup>122</sup> *Gray's Estate*, 147 Pa. St. 67.

<sup>123</sup> *White v. Massachusetts Institute of Technology*, 171 Mass. 84.

<sup>124</sup> *Neville v. Dulaney*, 89 Va. 842.

<sup>125</sup> *Coleman Bush Investment Co. v. Figg* (Ky.), (1894), 25 S. W. 888.

**§537. Miscellaneous.—Occupations.**

A devise of a law library to testator's "nephews who may read law" includes those who have begun the study of law with the intention of being admitted to the bar and practicing law, and also those who have already been admitted, but does not include a nephew who had registered as a law student, but had abandoned the study, and did not intend to apply for admission to the bar.<sup>126</sup>

And a devise to such of certain persons as should be "preparing for the ministry" includes such as have begun a strict theological course of study, but it does not include one who is studying general collegiate work as a preparation for this theological course of study.<sup>127</sup> So a devise to be expended in educating certain designated persons at a college to be erected on a specified piece of ground dedicated by testator, fails entirely and passes under an alternative clause to other named colleges, where the college was not erected because testator did not dedicate the land.<sup>128</sup>

A devise to testator's "spinster or unmarried nieces" was held to include such as were widows at testator's death in addition to such as had never been married.<sup>129</sup>

**§538. Misdescription of beneficiary.—Natural persons.**

The indulgence shown to the intention of testator manifests itself in a striking manner in cases of misdescription. It is a fundamental rule in these cases that a mere matter of misdescription does not vitiate—that is, if no person exists who corresponds in all particulars with the description given in the will, but if a person does exist who corresponds to the description in enough particulars to make it reasonably certain that he was intended and no other person exists who corresponds sufficiently to the description to raise a doubt as to the

<sup>126</sup> *Benson's Estate*, 169 Pa. St. 602.      *College v. Shoemaker College*, 92 Va. 320.

<sup>127</sup> *Clayton v. Robards*, 54 Mo. App. 539.      <sup>129</sup> *Convay's Estate*, 181 Pa. St. 156.

<sup>128</sup> *Trustees of Emory and Henry*

identity of the beneficiary, the beneficiary thus indicated will be held to be the beneficiary intended under the will, even though he does not in all respects correspond to the description in the will.<sup>130</sup> There is, however, no need of applying this doctrine where there is no real misdescription or ambiguity in view of the established rules of law. Thus a legacy was given "unto my nephew, William Root." There were two persons of that name, one a relative of testator's by blood, the other a nephew of testator's wife. Since the primary meaning of "nephew" is that of a blood relative, it was held that there was no ambiguity of any sort in such devise.<sup>131</sup>

A bequest was made to one who was designated as testator's "sister, Anastasia Cummings." Testator had only two sisters, Maria Cummings and Katherine Kelly. A similar bequest was made to Katherine Kelly. It was held that, in spite of the misnomer, Maria Cummings was entitled to the bequest to Anastasia Cummings.<sup>132</sup>

So where testator made a bequest to the children of "Dr. James B. S.," testator having a brother named Joseph B. S., who was a doctor, and a nephew named James B. S., who was not, it was held that the name of devisee, referring to a person in existence, was clear, notwithstanding a possible misdescription.<sup>133</sup>

### §539. Misdescription of beneficiary.—Corporations.

Misnomer is especially frequent in devises to charitable corporations. The real names of such corporations are often never used and never known by people generally; and many testators do not feel the need, in preparing a will, of getting the real name of the proposed beneficiary. They prefer to

<sup>130</sup> *In re Whitty*, 30 Ont. Rep. 300; *Doughten v. Vandever*, 5 Del. Ch. 51; *Woman's, etc., Missionary Society v. Mead*, 131 Ill. 338; *Reilly v. Union Protest. Infirmary*, 87 Md. 664; *Smith v. Kimball*, 62 N. H. 606; *Elwell v. General Universalist Convention*, 76 Tex. 514.

<sup>131</sup> *Root's Estate*, 187 Pa. St. 118.

<sup>132</sup> *In re Whitty*, 30 Ont. Rep. 300.

<sup>133</sup> *Atterbury v. Strafford* (N. J.) (1899), 44 Atl. 160. An additional fact in this case was that James B. S. was once a clerk in a drug-store and was nicknamed "Doc."

guess at the name. Hence the number of adjudicated cases upon this point.

It is an elementary principle that where a corporation is indicated in a will by an erroneous name, such a mistake will not avoid the gift if it is possible by means of the name used, or by extrinsic evidence, to identify the corporation intended as beneficiary with sufficient certainty.<sup>134</sup>

No difficulty is presented where a bequest is made to the board of trustees of a specified corporation, and their successors and assigns, and the name has been changed before the execution of the will; while a technical misnomer, the intention of testator in such a case is too clear for mistake.<sup>135</sup>

A more difficult question is presented where the name given in the will is not the name of any existing corporation. If such corporation can be identified by the location of its buildings the misnomer will not invalidate the gift. Thus a bequest to the "Presbyterian Infirmary" situated on a certain street was held to mean the "Union Protestant Infirmary" situated on the named street. But there was no other organization which could have taken under this bequest.<sup>136</sup>

Where the name given to the corporation is not that of any existing organization, but closely resembles the name of a corporation engaged in similar work, the gift will be held a gift to such corporation if the evidence indicates that this corporation was intended by testator.<sup>137</sup>

<sup>134</sup> *Reilly v. Union Protestant Infirmary*, 87 Md. 664; *Moore v. Moore*, 50 N. J. Eq. 554; 25 Atl. 403; *Van Nostrand v. Board of Domestic Missions* (N. J.) (1899), 44 Atl. 472; *Elwell v. Universalist General Convention*, 76 Tex. 514.

<sup>135</sup> *Elwell v. Universalist General Convention*, 76 Tex. 514.

<sup>136</sup> *Reilly v. Union Protestant Infirmary*, 87 Md. 664.

<sup>137</sup> *Woman's, etc., Missionary Society v. Mead*, 131 Ill. 338.

(A gift to the "Woman's Union Mission" (of Chicago) was held to

mean the "Woman's Missionary Society of America for Heathen Lands"; a gift to the "Hahnemann Hospital at Chicago" was held to mean the "Board of Trustees of the Hahnemann Medical College"; a gift to the "Fund for Disabled Ministers of the Presbyterian Church" was held to mean the "Presbyterian Board of Relief for Disabled Ministers," and a legacy to the "Chicago Training School for Nurses," was held to mean the "Illinois Training School for Nurses," which was located at Chicago. The soci-

Where two organizations each claim the same name, a somewhat difficult question is presented by a devise to a corporation of this name without indicating which corporation was intended. In a recent Pennsylvania case, where a bequest was made in this manner, the old organization was empowered to hold property. It was affiliated with a general church, but nothing in the constitution of the general church, or the agreement of affiliation, operated to transfer the property of the individual churches to the general organization. Subsequently the old society, by a majority vote, severed its connection with the general church, and thereupon the minority seceded from the majority, and, under direction of the general church, formed a new society. In the absence of anything to indicate a contrary intention it was held that the legacy was meant for the original local organization.<sup>138</sup>

Where a devise is unmistakably meant to go to certain named natural persons as trustees for a charitable purpose (establishing a home for destitute children) it could not be construed as intended for a corporation of which these natural persons were the incorporators, formed for the same purpose.<sup>139</sup>

eties which received the bequests were the only ones in any way corresponding to the names used in the will, and testatrix was personally interested in each of them.)

*Chambers v. Higgins* (Ky.), (1899), 49 S. W. 436.

(A devise to the "Christian Missionary Society or Convention of the Christian Church of Kentucky," was held to mean an incorporated association known as the "Kentucky Christian Missionary Convention.")

*Reilly v. Union Protestant Infirmary*, 87 Md. 664.

(A legacy to the "Home Mission of the Presbyterian Church" of a named city was held to mean the "Trustees of the Presbytery" of this city. In this case the committee of the trustees of the Presbytery which had charge of the home missionary work was the most prominent part of the organization.)

<sup>138</sup> *Aitkin's Estate*, 158 Pa. St. 541.

<sup>139</sup> *Woodruff v. Marsh*, 63 Conn. 125.

## CHAPTER XXIII.

## GIFTS TO A CLASS.

## §540. Definition.

“In legal contemplation a gift to a class is an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number.”<sup>1</sup>

This definition is the favorite one and has the sanction of authority. It is defective, however, in restricting the time of ascertainment of the numbers of the class to a future time. It is possible for testator to devise to a class as fixed at the time that he makes the will.<sup>2</sup>

A similar definition was given in a recent Tennessee case. The court said that the beneficiaries take as a class under the will, the bequest being to a class of persons subject to fluctuation by an increase or diminution of its number in consequence of future births or deaths, and the time of payment or distribution of such fund being fixed at a subsequent period, on the happening of a designated event, and the bequest being

<sup>1</sup> *In re Brown*, 154 N. Y. 313, citing *In re Kimberly*, 150 N. Y. 90; *Dulany v. Middleton*, 72 Md. 67; *Jarman on Wills*, 5th Ed. \*269.  
<sup>2</sup> See Sec. 546.



of an aggregate fund given to the children as a unit and passing a joint interest.<sup>3</sup>

#### §541. Examples of gifts to a class.

Where a devise does not indicate the individual members of the class by name or by description, but merely designates the class, such as "children,"<sup>4</sup> or "nephews,"<sup>5</sup> the courts treat such devise as a gift to a class and apply the rules peculiar to such gifts.

#### §542. Examples of gifts held not to a class.

When a testator devises property to persons who are designated individually, as by name or description, or where he devises property in severalty to a number of persons, the courts do not treat such devises as devises to a class, since the share of each does not depend upon the ultimate number of those who compose the class.<sup>6</sup>

A gift to "each" of testator's two children was held to be a gift to them individually and not as a class.<sup>7</sup>

#### §543. Effect of naming members of a class.

Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class.<sup>8</sup>

<sup>3</sup> Franklin v. Franklin, 91 Tenn. 119, citing Frierson v. Van Buren, 7 Yer. 606; Satterfield v. Mayes, 11 Hum. 58; Womack v. Smith, 11 Hum. 478; Bridgewater v. Gordon, 2 Sneed. 5.

<sup>4</sup> Dryer v. Crawford, 90 Ala. 131; Haas v. Atkinson, 9 Mackey (D. C.), 537.

<sup>5</sup> Pendleton v. Kinney, 65 Conn. 222.

<sup>6</sup> Sturgis v. Work, 122 Ind. 134; Townsend v. Townsend, 156 Mass. 454; Frost v. Courtis, 167 Mass.

251; Horton v. Earle, 162 Mass. 448; Markle's Estate, 187 Pa. St. 639; Hick's Estate, 134 Pa. St. 507.

<sup>7</sup> Rogers v. Strobach, 15 Wash. 472.

<sup>8</sup> Bill v. Payne, 62 Conn. 140; Rockwell v. Bradshaw, 67 Conn. 8; Frost v. Courtis, 167 Mass. 251; Dildine v. Dildine, 32 N. J. Eq. 78; Moffett v. Elmendorf, 152 N. Y. 475.

(In such cases if one of the beneficiaries dies before the testator,

The context, however, may show that the names of the beneficiaries were added to the description of them as members of a class for the purpose of greater certainty, and that the paramount intention of testator was to make the gift to a class. In such case the gift will be treated as one to a class even if their names are given in the will.<sup>9</sup> So a devise to "the heirs" of A, "namely, B, C and D," was held to be a gift to a class.<sup>10</sup>

#### §544. Exclusion from a class.

A testator has full power to exclude any designated person or persons from a general class of beneficiaries under his will if he makes clear his intention so to do.<sup>11</sup> Thus a devise to testator's "children" does not include children to whom testator, as in the preceding clause, bequeathed property "to be in full of their portion of my estate, both real and personal."<sup>12</sup> And where the testator provides in his will that the rest of his estate should be distributed among his "children and

there is, therefore, no right of survivorship to the other named beneficiaries.)

*Saxton v. Webber*, 83 Wis. 617; 20 L. R. A. 509

Thus a gift "to my brothers Ralph and Abram" is not a gift to the brothers as a class, although they were in fact the only brothers of testator. *Dildine v. Dildine*, 32 N. J. Eq. 78.

<sup>9</sup> *Bolles v. Smith*, 39 Conn. 217; *Warner's Appeal*, 39 Conn. 253 "to the sons of my two sisters, deceased, H and C," where the sisters had been the wives of the same husband, successively, and H was the son of one sister and C of the other. *Talcott v. Talcott*, 39 Conn. 186 (to A, C and D and all the children of A, where C and D were children of A). *Springer v. Congelton*, 30 Ga. 976 (to all the children of X, namely, A, B and C). *Jackson v. Roberts*, 14 Gray, 546 (to A, B, C, D

and E, the children of X). *Stedman v. Priest*, 103 Mass. 293 (to A, B and C, grandchildren of X). *Swallow v. Swallow*, 166 Mass. 241; *Rixey v. Stuckey*, 129 Mo. 377 (to the children of X, namely, A, B and C). *Church v. Church*, 15 R. I. 138.

<sup>10</sup> *Swallow v. Swallow*, 166 Mass. 241. (Hence where only one of the three heirs survived at testator's death he took the entire gift to the three.)

<sup>11</sup> *Griffin v. Ulen*, 139 Ind. 565; *Dickison v. Dickison*, 39 Ill. Appeal, 503; *Sullivan v. Straus*, 161 Pa. State, 145; *Wildberger v. Cheek*, 94 Va. 517 distinguishing *Patch v. White*, 117 U. S. 210.

<sup>12</sup> *Dickison v. Dickison*, 138 Ill. 541, affirming 39 Ill. Appeal, 503; so "heirs," *Ober v. Hickox*, 10 Ohio C. D. 128.

*Contra*, *Fahnestock's Estate*, 147 Pa. St. 327.

grandchildren," it does not include a son whom he had previously expressly disinherited by the will;<sup>13</sup> nor a son to whom he had expressly given half his estate where he devises the rest to his "heirs."<sup>14</sup>

But the intention of testator to exclude those who would naturally be included within the class designated must be clear.<sup>15</sup> Thus where testator had given reason for excluding his brother-in-law and children on account of their wealth, such children, nevertheless, are included in a bequest to the surviving heirs of the father and mother of testator;<sup>16</sup> and so a devise to the "other legal heirs and representatives not hereinbefore named" of testator, is not held to exclude a brother who had been named previously in the will, but only in a phrase describing beneficiaries named as the children of such brother, naming him.<sup>17</sup>

**§545. Time of determining the members of a class.—General rule where possession is immediate.**

Since a will speaks from the day of testator's death, that is, since it must *prima facie* be considered with reference to the state of affairs as they exist at the date of his death, the numbers of the class of beneficiaries, where a devise is made to a class, is *prima facie*, in the absence of anything showing a contrary intention, to be determined upon the death of the testator.<sup>18</sup> Thus, ordinarily, a devise over after life estate

<sup>13</sup> *Sullivan v. Straus*, 161 Pa. State, 145.

<sup>14</sup> *Griffin v. Ulmer*, 135 Ind. 565.

<sup>15</sup> *Fahenstock's Estate*, 147 Pa. State 327.

<sup>16</sup> *Deiter v. Shafter*, 70 Vt. 150.

<sup>17</sup> *Faulstich's Estate*, 154 Pa. St. 188.

<sup>18</sup> *Ruggles v. Randall*, 70 Conn. 44; *Hoadly v. Wood*, 71 Conn. 452; *Kellett v. Shepard*, 139 Ill. 433; *Hill v. Harding*, Ky. (1892), 17 S. W. 437; *Sevier v. Douglas*, 44 La. Ann. 605; *Coggins v. Flythe*, 113 N. C. 102; *Clark v. Benton*, 124 N. C. 200; *Richardson v. Willis*,

163 Mass. 130; *Shaw v. Eckley*, 169 Mass. 119; *Marsh v. Hoyt*, 161 Mass. 459; *Whall v. Converse*, 146 Mass. 345; *Hall v. Smith*, 61 N. H. 144; *Starling v. Price*, 16 O. S. 29; *In re Smith*, 131 N. Y. 239; *Soteldo v. Clement*, 29 Weekly Law Bull. 384; *Landwehr's Estate*, 147 Pa. State, 121; *Striewig's Estate*, 169 Pa. St. 61; *Chase v. Peckham*, 17 R. I. 385; *Sherman v. Baker*, 20 R. I. 446; 40 L. R. A. 717; *Tucker's Will*, 63 Vt. 104; *Buzby v. Roberts*, 53 N. J. Eq. 566. 1895; 32 Atl. 9.

to the "heirs" of a designated person, means to the heirs of such person as determined at the death of testator.<sup>19</sup>

"Speaking generally, when a gift is made to a class of persons to take effect immediately in possession, those who constitute the class at the death of testator, when the will becomes operative, take unless a different intent appears from the will or from such intrinsic circumstances as may properly be taken into account."<sup>20</sup> So a gift of "as many thousand dollars as I have grandchildren at my decease" specifically fixes testator's death as the time for determining the class.<sup>21</sup> Since the class is to be determined at the death of the testator, it follows that those who have died before testator can not be counted in the class, so that the devise will inure to their heirs or representatives.<sup>22</sup> And members of the class born after testator's death can not be counted in the class so as to affect the share of those living at testator's death, or so as to become beneficiaries themselves.<sup>23</sup> But, in accordance with the usual rule of construction, all unborn members of the class may be counted in such class where potentially in existence at the time of testator's death, *en ventre sa mere*.<sup>24</sup> Thus a devise to testator's "children" by his wife inures to the benefit of a posthumous child.<sup>25</sup>

Where no class of beneficiaries under the will is entirely unrepresented at the death of testator, those born after the death of testator and not *en ventre sa mere* at his death, can not take.<sup>26</sup>

<sup>19</sup> Johnson v. Webber, 65 Conn. 501; Ruggles v. Randall, 70 Conn. 44; Kellett v. Shepard, 139 Ill. 433; Tucker's Will, 63 Vt. 104.

<sup>20</sup> Howland v. Slade, 155 Mass. 415, citing Worcester v. Worcester, 101 Mass. 128; Merriam v. Simonds, 121 Mass. 198; Campbell v. Rawden, 18 N. Y. 412; Baldwin v. Rogers, 3 De G. M. & G. 649.

<sup>21</sup> Richardson v. Willis, 163 Mass. 130; Chapin v. Parker, 157 Mass. 63.

<sup>22</sup> Hoadly v. Wood, 71 Conn. 452; Striewig's Estate, 169 Pa. St. 61;

Chase v. Peckham, 17 R. I. 385; Buzby v. Roberts, 53 N. J. Eq. 566, 1895; 32 Atl. 9.

<sup>23</sup> Hill v. Harding, Ky. (1892), 17 S. W. 437; Sevier v. Douglass, 44 La. Ann. 605; *In re Smith*, 131 N. Y. 239.

<sup>24</sup> Culp v. Lee, 109 N. C. 675; Clark v. Benton, 124 N. C. 197; Evans v. Opperman, 76 Tex. 293.

<sup>25</sup> Clark v. Benton, 124 N. C. 197.

<sup>26</sup> Parker v. Churchill, 104 Ga. 122; Martin v. Trustees, 98 Ga. 320; Wood v. McGuire, 15 Ga. 202.

But a gift to "my daughter-in-law (A) and her children," has been held to pass an estate to all the children of A by her husband, who was testator's son, whether such children were born before or after the death of the testator.<sup>27</sup>

**§546. Where time for determining members of class is fixed by will.**

But the rule that the members of the class are to be determined at the day of the death of testator is not, by any means, an unyielding rule.<sup>28</sup> The will may specifically fix some time other than that of the death of testator as the time at which the members of the class are to be determined. It not infrequently happens that the time thus fixed by will is the date of the execution of the will.<sup>29</sup> Thus a devise to the members of a class living at the date of the execution of the will fixes such date as the time for determining the members.<sup>30</sup> The same result is sometimes obtained by providing that if any member of a class die before testator the share of such member shall pass to his children.<sup>31</sup>

The time fixed by will as the time at which the members of a class are to be determined may also be some time after the death of the testator, as long as this time fixed is not so remote as to violate the rule against the perpetuities.<sup>32</sup> This time may be either indicated by the express language of the will or may be inferred from the general nature of its provisions. Thus where a particular estate is devised by will with the remainder to the "living children,"<sup>33</sup> or to issue "then living,"<sup>34</sup> the

<sup>27</sup> *Lynn v. Hall*, 101 Ky. 738, distinguishing *Williams v. Duncan*, 92 Ky. 125, as a case in which testator's intention to exclude after-born children was clear.

<sup>28</sup> *Swenson's Estate*, 55 Minn. 30; 56 N. W. 1115.

<sup>29</sup> *In re Wood* (1894), 3 Ch. 381; *In re Musther*, 43 Ch. D. 569; *Palmer v. Dunham*, 125 N. Y. 68; *Morrison's Estate*, 139 Pa. St. 306; *Dunn v. Cory*, 56 N. J. Eq. 507.

<sup>30</sup> *In re Wood* (1894), 3 Ch. 381.

<sup>31</sup> *In re Musther* (C. A.), 43 Ch. D. 569; *Palmer v. Dunham*, 125 N. Y. 68; *Morrison's Estate*, 139 Pa. State, 306.

<sup>32</sup> *Sec Sec. 625, et seq.*

<sup>33</sup> *Larby v. Crewson*, 21 Ont. 93; *Blass v. Helms*, 93 Tenn. 166; *Inge v. Jones*, 109 Ala. 175.

<sup>34</sup> *Patchen v. Patchen*, 121 N. Y. 432; *Madison v. Larmon*, 170 Ill. 65; *Heard v. Read*, 169 Mass. 216;

class is to be determined not as of the testator's death, but as it existed at the expiration of the particular estate. So where a devise is made to the "then heirs" of a person, provided that person was not living at the death of another, the heirs are to be determined as of the moment of the death of that other.<sup>35</sup>

So in a devise at the expiration of a life estate which was given by will to testator's nephew "at his death to his surviving children," it was held that the class of children were to be determined as of the death of the life tenant;<sup>36</sup> and so where a gift after the death of the particular tenant is to pass to "surviving children" or "survivors," the class is to be determined as of the death of the life tenant.<sup>37</sup> And where a testator devised a life estate to his wife, with direction that after his death the property should be sold and the proceeds should be paid to his legal heirs in the same proportions as they would have inherited the same if testator "had died the survivor" of his wife, and had thus died intestate, it was held that the class of his legal heirs should be determined as if he had died intestate immediately after the death of his wife.<sup>38</sup>

The use of the word "survivors" does not always, however, refer to those surviving at the time of taking possession. In these cases as in many others "we have to go upon slight differences."<sup>39</sup> Where the will shows an intention that the descendants of deceased children shall take, and an evident intention of equality of distribution is manifested, the word "surviving" has been held to apply to the death of testator.<sup>40</sup>

So where a will manifests an intention to provide for testator's grandchildren equally, it was held that the expression

Wood v. Bullard, 151 Mass. 324; 7 L. R. A. 304; Hemenway v. Hemenway, 171 Mass. 42; Shank v. Mills, 25 S. Car. 358.

<sup>35</sup> Procter v. Clark, 154 Mass. 45; 12 L. R. A. 721.

<sup>36</sup> Cheatham v. Gower, 94 Va. 383; 26 S. E., 853, citing Slack v. Bird, 23 N. J. Eq. 238.

<sup>37</sup> Winter's Estate, 114 Cal. 186; Dutton v. Pugh, 45 N. J. Eq. 426; Roundtree v. Roundtree, 26 S. Car.

450; Simpson v. Cherry, 34 S. Car. 68; Selman v. Robertson, 46 S. Car. 262 ("surviving legatees" held to mean those surviving at the defeazance of a conditional fee).

<sup>38</sup> Peck v. Carlton, 154 Mass. 231; Smith v. Greene, 19 R. I. 558; 35 Atl. 148.

<sup>39</sup> Lee v. Welsh, 163 Mass. 312.

<sup>40</sup> Grimmer v. Friederich, 164 Ill. 245; Lee v. Welsh, 163 Mass. 312.

"any child who shall survive me" might be either rejected or construed as meaning "any child who shall live after me" where the literal interpretation would exclude a number of grandchildren born after the death of testator and whom it was the evident intention of testator to benefit.<sup>41</sup>

The intention of the testator to postpone the time for determining the members of a class of beneficiaries may also be inferred from the will without any specific provision to that effect. Thus where the testator devises to the "brothers and sisters" of certain of testator's grandchildren, and it appeared from the will in a provision providing for testator's grandchildren that he contemplated that a grandchild would be born to him in addition to those named in the will, it was held that such provision would inure to the benefit of grandchildren born after testator's death and in existence at the death of the life tenants.<sup>42</sup>

**§547. Effect of postponement of time of distribution.—Gift to "heirs."**

When the testator in his will makes a provision for a devise to a class, and provides that the property shall be distributed among such class at some fixed time after testator's death, an important question is presented in determining whether the class of beneficiaries is to be ascertained at testator's death or at the time of the distribution of the gift. The authorities are not in absolute harmony on this subject. The general rules are clear and well defined.

Where the class of beneficiaries is described by the word "heir," the class must be determined as of the death of the testator, unless the will plainly indicates otherwise. "The word 'heir,' in its strict and technical import, applies to the person or persons appointed by law to succeed to the estate; hence, where the word occurs in the will it will be held to apply to those who are heirs of the testator at his death, unless the intention of the testator to refer to those who shall be his heirs at a period subsequent to his death is plainly manifest in the will. This construction or definition is not changed by the fact that a life

<sup>41</sup> *Bailey v. Brown*, 19 R. I. 669; 36 Atl. 581.

<sup>42</sup> *Madison v. Larmon*, 170 Ill. 65.

estate may precede the bequest to the heirs at law, or by the circumstances that the bequest to the heirs is contingent on an event that may or may not happen.”<sup>43</sup>

But while a gift to the heirs or next of kin of testator is ordinarily to be construed as calling for a determination of the class as of testator's death, this rule is not an inflexible one. The context may show that the testator intended even these classes to be determined at a subsequent time. It is held that where a devise is made for life to one of the heirs of testator and the remainder over is to go to the “heirs” of testator, this does not take the gift to the heirs out of the general rule, but that the class of heirs is still to be determined as of the death of the testator.<sup>44</sup>

But where a bequest is to a person who is the sole next of kin or heir of the testator, with the provision that the remainder shall pass to the next of kin of testator, it has been held, where the context of the will showed clearly that the testator did not intend the remainder to pass to the life tenant, the next of kin shall be determined as of the date of the termination of the life estate.<sup>45</sup>

<sup>43</sup> *Kellett v. Shepard*, 139 Ill. 433. In support of the proposition in the text, the following cases may also be cited: *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448; *Elmsley v. Young*, 2 Myl. & K. 780; *In re Ford*, 72 Law. T. 5; *Ruggles v. Randall*, 70 Conn. 44; *Morris v. Bolles*, 65 Conn. 45; *Abbott v. Bradstreet*, 3 Allen (Mass.), 587; *Minot v. Tappan*, 122 Mass. 536; *Dore v. Torr*, 128 Mass. 38; *Minot v. Harris*, 132 Mass. 528; *Whall v. Converse*, 146 Mass. 345; *Shaw v. Eckley*, 169 Mass. 119; *Rotch v. Rotch*, 173 Mass. 125; *Lawrence v. McArter*, 10 Ohio, 37.

<sup>44</sup> *Minot v. Tappan*, 122 Mass. 536; *Stewart's Estate*, 147 Pa. St. 383. In support of this proposition are: *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimore v. Mortimore*, 40 L. J. Ch. 470, 27 N. R. 575; H. L.

(E.), 4 App. Cas. 448; *Elmsley v. Young*, 2 Myl. & K. 780; *Cable v. Cable*, 16 Beav. 507; *Ware v. Rowland*, 2 Phill. C. C. 635; *Buzby's Appeal*, 61 Pa. St. 111; *Rupp v. Eberly*, 79 Pa. St. 141; *Cowles v. Cowles*, 53 Pa. S. 175; *Brendlinger v. Brendlinger*, 26 Pa. St. 131.

<sup>45</sup> *Lay v. Creed*, 5 Hare, 580; *Clapton v. Bulmer*, 5 Myl. & C. 108; *Jones v. Colbeck*, 8 Ves. 38; *Long v. Blackall*, 3 Ves. 486; *Butler v. Bushnell*, 3 Myl. & K. 232; *Bird v. Luckie*, 8 Hare, 301; *Wharton v. Barker*, 4 Kay & J. 483; *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448; *Welch v. Brimmer*, 169 Mass. 204; *Sears v. Russell*, 8 Gray (Mass.), 86; *Hardy v. Gage*, 66 N. H. 552; *Pinkham v. Blair*, 57 N. H. 226; *Delany v. McCormack*, 88 N. Y. 174.



Thus where the testatrix bequeathed all her property for the support and maintenance of her father during his lifetime, with the direction that, if necessary, the whole estate should be used for his support, and that upon his death or remarriage the estate should pass to her next of kin, it was held that the intention of testatrix was clear that this remainder should not, under any circumstances, pass to her father, and that the next of kin must be determined as of his death.<sup>46</sup> In the same will where part of the estate of testatrix was to pass to the next of kin of the husband of testatrix, it was held that this next of kin must be determined as of the same time as to the next of kin of testatrix.<sup>47</sup>

<sup>46</sup> *Fargo v. Miller*, 150 Mass. 225; 5 L. R. A. 690.

<sup>47</sup> *Fargo v. Miller*, 150 Mass. 225.

In a recent Rhode Island case property was left after the terms of a life estate to "my heirs at law according to the Statute of Descents." A son of testator was at that time domiciled in a foreign country, and as an alien could not at that time take title to real estate by devise. Testator died in 1829. The last life tenant died in 1890. In the meantime statutes allowed aliens to take by devise. In deciding whether the heir was to be determined as of the death of testator in 1829, or as of the death of the life tenant in 1890, the court in holding that date for fixing the heirs was in 1890, said:

"While the general rule is that the heirs of a testator are to be taken from the time of his death, yet the rule gives way to a contrary intent to be found in the will. Assuming, then, that the cases referred to go no further than this, we think that the will in this case shows such an intent. The property given to Charlotte or Maria is

to go 'on their decease' in the second clause, and on 'both of their decease', in the fifth clause, to the heirs at law of the testator. In making such a gift his mind would naturally look forward to the time when the estate might vest in possession, and so the words used comport with an intent to point out the time and mode of ascertaining who the heirs will be by designating a class to take as executory devisees. The agreed facts also point to such an intent. When the will was made, the son William was a domiciled resident of Cuba, who, being an alien, was incapable, as our law then stood, to take by descent; but that there can be no inference of an attempt to exclusion on this account, appears by the fact of a devise of real estate to him, and the fact that he, with the other children, was one of the residuary legatees in the will. Of course the testator could not foresee changes in our law in regard to alienage, but it is not improbable that he looked forward to a return of his son or his family to citizenship in this country when he or they could stand as legatees in the class which he

**§548. Effect of postponement of time of distribution.—Gift to others than “heirs.”**

In a devise to a class described in any other way than as already stated, the effect of postponing the period of distribution to some time subsequent to testator's death, is to cause such a devise to pass to all who are in existence at the time allowed for the distribution among such class who answer the description in the will.<sup>48</sup>

“Wherever a personal estate or interest is carved out with a gift over to the children of a person taking that interest, or of any other person, the limitations will embrace not only the objects living at the death of testator, but all who shall subsequently come into existence before the period of distribution. Such a remainder vests in the objects to whom the distribution applies at the death of the testator, subject to open and let in others answering the description as they are born successively.”<sup>49</sup>

So in a gift to one for life of the interest of a fund, and a direction that at his death the principal “is to go to his chil-

designated them. Moreover, the words are that the estate ‘on their decease *be divided* among my heirs at law.’ The division was to be prospective, and we see no reason why the class should not also be taken to be so. For this reason as well as those given in the previous opinion, we think that these words were intended to fix the time for the vesting of the estate and the ascertaining of the persons to take in the possession. They are not substantially different from cases where the devise is to those who shall *then* answer the description.”

DeWolf v. Middleton, 18 R. I. 810.

<sup>48</sup> Doe v. Sheffield, 13 East, 526; Phinzy v. Foster, 90 Ala. 262; Cavalry's Estate, 119 Cal. 406; Hovey v. Nellis, 93 Mich. 374 (citing Doe

v. Perryn, 3 T. R. 484); McArthur v. Scott, 113 U. S. 340; Baker v. McLeod, 79 Wis. 534; Wilson v. White, 109 N. Y. 59; Taggart v. Murray, 53 N. Y. 233; L'Estorneau v. Henquet, 89 Mich. 428; Fitzhugh v. Townsend, 59 Mich. 427; Campbell v. Stokes, 142 N. Y. 23; Evan's Estate, 155 Pa. State, 646; Franklin v. Franklin, 91 Tenn. 119; Blass v. Helms, 93 Tenn. 166; DeWolfe v. Middleton, 18 R. I. 810; *In re* Allen, 151 N. Y. 243, affirming 81 Hun, 91; Goebel v. Wolf, 113 N. Y. 405; Ringquist v. Young, 112 Mo. 25; Sinton v. Boyd, 19 O. S. 30; Peterson v. Beach, 6 Rec. (Ohio), 513.

<sup>49</sup> Evan's Estate, 155 Pa. St. 646, citing Bower's Estate, 11 Philadelphia. 620; Minnig v. Batdorf, 5 Pa. St. 503.

dren if he has any," the children of such life tenant who are in existence at his death take as a class.<sup>50</sup>

So a legacy payable to the children of A, begotten by him during his natural life, passes to A's children, whether begotten before or after the death of testator.<sup>51</sup> And a gift to A's children "hereafter to be born or begotten," is construed to include those already begotten.<sup>52</sup>

So, on the other hand, a gift to the "grandchildren," payable as each arrives at majority, does not include a grandchild born after testator's death and after the oldest grandchild who was living at testator's death had attained his majority.<sup>53</sup>

But where the postponement of the distribution among the beneficiaries is not to create an intermediate estate, but simply to give the executors, having power of the distribution, a reasonable time in which to convert the property into money; and the distribution to the class of beneficiaries will be ascertained as of the time of testator's death and not as of the period of distribution.<sup>54</sup>

#### §549. Time of vesting taken as time for determining members of class.

It has been suggested by some courts that where the interest does not vest until a future time, as in case of a contingent remainder or an executory devise, that the class should be determined at the time when such interest finally vests. This rule has been suggested even in the case of the word "heirs," and with greater insistence in the other classes.<sup>55</sup>

<sup>50</sup> *Franklin v. Franklin*, 91 Tenn. 119. To the same effect are *Forest Oil Company v. Crawford*, 77 Fed. 106; *Knorr v. Millard*, 57 Mich. 265; *Hovey v. Nellis*, 98 Mich. 374.

<sup>51</sup> *Parker v. Leach*, 66 N. H. 416; *Benton v. Benton*, 66 N. H. 169; *Ordway v. Dow*, 55 N. H. 11.

<sup>52</sup> *Parker v. Leach*, 66 N. H. 416.

<sup>53</sup> *Thomas v. Thomas*, 149 Mo. 426.

<sup>54</sup> *Landwher's Estate*, 147 Pa. State, 121.

<sup>55</sup> *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448; *Coltsman v. Coltsman*, L. R. 3 H. L. 121; *Doe v. Frost*, 3 B. & Ald. 546; *Doe v. Pratt*, 5 B. & Ald. 731; *Stewart's Estate*, 187 Pa. St. 383; *Ken-*

So a devise to one for life and at his "decease" to his children, was held to include all his children living at testator's death, whether alive at the death of the life tenant or not.<sup>56</sup>

A gift to A for life and on his death to go to his issue "*per stirpes*," was held to be a gift to the issue in existence at A's death.<sup>57</sup>

This distinction possesses the advantage of simplicity and accuracy of statement, but is not acquiesced in by sufficient jurisdictions to justify the statement of it as a general rule.

### §550. Lapse in case of gift to a class.—Common law rule.

When a member of a class of beneficiaries dies before the time fixed under the will for determining the members of that class, the common-law rule applying to gifts to classes generally was that the children and descendants of such deceased member could not take in place of their ancestor.<sup>58</sup> This rule is, of course, subject to modification where testator, in his will, specifically provides that upon the death of a member of a class before the time of the distribution leaving descendants, the share of such member shall pass to such descendants.<sup>59</sup>

yon, Petitioner, 17 R. I. 149; De Wolfe v. Middleton, 18 R. I. 810, citing Goodright v. Searle, 2 Wils. 29; Cain v. Teare, 7 Jur. 567; Tucker's Will, 63 Vt. 104.

<sup>56</sup> "These words are construed to refer to the time of payment or possession, and do not postpone the moment when the gift shall operate." Lombard v. Willis, 147 Mass. 13, citing and following Shattuck v. Stedman, 2 Pick. 468; Childs v. Russell, 11 Met. 16; Wright v. Shaw, 5 Cush. 56; Fay v. Sylvester, 2 Gray, 171; Bowditch v. Andrew, 8 Allen, 339; Pike v. Stephenson, 99 Mass. 188.

<sup>57</sup> "It is plain that upon settled rules of construction, the issue of any child of the testator living at his death, took under the will a vested remainder in the share held

in trust for the parent for life, subject to open and let in after-born children, and to be divested by their death before their parents." Campbell v. Stokes, 142 N. Y. 23.

<sup>58</sup> Wilhelm v. Calder, 102 Io. 242; 71 N. W. 214; Ashhurst v. Potter, 53 N. J. Eq. 608; *In re* Truslow, 140 N. Y. 599, modifying 71 Hun, 77; Gammell v. Ernst, 19 R. I. 292; 33 Atl. 222; Roundtree v. Roundtree, 26 S. C. 450. Nor does the husband or wife of such deceased beneficiary take any interest in such property. Hardin v. Ardeburt (Ky.), 46, 718; 20 Ky. L. R. 486.

<sup>59</sup> Crozier v. Cundall, 99 Ky. 202; Hopkins v. Keazer, 89 Me. 347; Lee v. Welch, 163 Mass. 312; Bragg v. Carter, 171 Mass. 324; Dawson v. Shaefer, 52 N. J. Eq. 341;

§551. Lapse in case of gift to a class.—Modern statutory rule.

This rule is further modified by statutes which have been passed in different jurisdictions, providing that if certain named beneficiaries die before testator, or before their interests vest, that their descendants shall take the share to which their ancestor would have been entitled.<sup>60</sup> These statutes apply generally when the beneficiary is a descendant or blood-relative of testator.<sup>61</sup>

In some states it has been held that these statutes do not affect the pre-existing rule upon the subject of gifts to classes.<sup>62</sup> The reason which the courts give for this rule is that indicated by the preceding note, that is, that the statutes against lapse apply only where something is given by will to one who dies before testator, and, therefore, have no application to gifts to a class where the gift is in legal effect only to the members of the class in existence at a designated time. Where the class contains only one member, it is an interesting question whether a gift, which in terms is a gift to a class, will lapse by reason of the death of the one member of the class before the death of testator. Upon this point the authorities are at variance. In an English case testator gave property to the child of A, or to his children if there should be more than one. At the time of making the will A had but one child, and never had more than one. This child died before testator,

affirmed *Shaefer v Dawson*, 53 N. J. E. 238, 341; *Van Houten v Pennington*, 4 Halst. Ch. 272, 745; *Wurt v. Page*, 4 C. E. Greene, 365; *Cascaden's Estate*, 153 Pa. St. 170; *Denlinger's Estate*, 170 Pa. St. 104; *Kelley v. Kelley*, 182 Pa. St. 131; *Haszard v. Haszard*, 19 R. I. 374; 34 Atl. 150; *R. I. Hospital Co. v. Peckham*, 20 R. I. 332.

<sup>60</sup> See Sec. 742, *et seq.*

<sup>61</sup> *Bradley's Estate*, 166 Pa. St. 300; *Swallow v. Swallow*, 166 Mass. 241. And see Sec. 743.

<sup>62</sup> *In re Harvey* (1893), 1 Ch. 567; *Browne v. Hammond*, Johns.

210; *Springer v. Congleton*, 30 Ga. 976; *Davie v. Wynn*, 80 Ga. 673; *Martin v. Trustees of Mercer University*, 98 Ga. 320 (decided by a divided court).

"The effect of the devise . . . was to give to children living at the death (of testator) and, therefore, there was no gift to Mrs. F., and the statute only applies to the representatives of children or issue to whom something is given." *In re Harvey*, *Harvey v. Gillow* (1893), 1 Ch. 567, quoting *Olney v. Bates*, 3 Drew, 319.

leaving issue. The court held that the statute preventing lapse had no application, since this was a gift to a class, and no member of the class was in existence at the time fixed for determining it.<sup>63</sup>

In a Georgia case testator gave property to the "children of A." At the death of testator A was dead and her only child was dead, leaving surviving two children of such child. It was held that the statute against lapse applied and that such children of the deceased child took.<sup>64</sup>

In most states these statutes are held to apply to gifts to classes as well as to gifts to individuals.<sup>65</sup> "It makes no difference whether the bequest is such to a relative by name or whether he is designated in the will only by his relationship."<sup>66</sup>

These statutes preventing a lapse in cases of a gift to a class are merely *prima facie* rules, reversing the rules of the common law, but subject to be contradicted by the context of the will. Thus a gift specifically to those of a certain class "who may then be living," or any similar expression, is held to prevent the application of the statute. Under such gifts the issue of deceased members of a class do not take.<sup>67</sup>

<sup>63</sup> *In re Harvey* (1893), 1 Ch. 567

<sup>64</sup> *Cheney v. Selman*, 71 Ga. 384.

<sup>65</sup> *Howland v. Slade*, 155 Mass. 415; *In re Stockbridge*, 145 Mass. 517; *Moore v. Weaver*, 16 Gray, 305; *Bray v. Pullen*, 84 Me. 185; *Strong v. Smith*, 84 Mich. 567; *Paraker v. Leach*, 66 N. H. 416; *Benton v. Benton*, 66 N. H. 169; *Edgerly v. Barker*, 66 N. H. 434; 28 L. R. A. 388; *Mather v. Copeland*, 5 Ohio N. P. 151; *Woolley v. Paxson*, 46 O. S. 307; 7 Ohio Dec. 257; *Bradley's Estate*, 166 Pa. St. 300; *Moore v. Dimond*, 5 R. I. 121; *Jones v. Hunt*, 96 Tenn. 369; *Wildberger v. Cheeck*, 94 Va. 517, 1897; 27 S. E. 441.

<sup>66</sup> *Bray v. Pullen*, 84 Me. 185.

"Its effect, however, will be modified by the Pub. Sts. C. 127, Sec.

23, which provide that where a legacy is given to a child or other relation of the testator, and such child or other relative dies before the testator, leaving issue surviving the testator, such issue shall take legacy unless a different intent is manifested by the will. It does not matter, as has been held, that such child or other relative is treated as one of a class by the testator; the issue will still take the legacy which the deceased person would have taken had he survived the testator." *Howland v. Slade*, 155 Mass. 415.

<sup>67</sup> *Bigelow v. Clap*, 166 Mass. 88; *Bragg v. Carter*, 171 Mass. 324; *Almy v. Jones*, 17 R. I. 265; 12 L. R. A. 414.

A provision that a legacy should be paid to "their or each of their heirs" in case the beneficiary should die before the testator, gives a legacy of the amount specified to be divided among all the heirs of such person, and does not give a legacy of such amount to each of the heirs separately.<sup>68</sup>

The courts prefer, wherever possible, a construction which allows the issue of the deceased beneficiary to take the share which its parent would have taken had he lived, especially where such parent is a descendant of testator.<sup>69</sup>

The direction for a substitution of a deceased beneficiary may be made by the general intention of the will without any specific provision to that effect.<sup>70</sup> A special application of this principle is found in a devise to a class with a provision that if any of the class died without issue their interest shall pass to the survivor. Under such a gift if A, one of the class, has died leaving children, and subsequently B, another of the class, dies without issue, the question is presented whether the children of A will share in the property given to B, or whether it will pass only to the surviving members of the original class. It is held in some jurisdictions that such a gift is to be divided among the surviving members of the original class to the exclusion of the children of a member previously deceased.<sup>71</sup> Where the general intention of the will, however, is manifestly that the property disposed of is to be equally divided among the stocks representing members of the original class, the children of A will share in the property devised to B.<sup>72</sup>

<sup>68</sup> *Ruggles v. Randall*, 70 Conn. 44. *Cleghorn v. Scott*, 86 Ga. 496, [inferred from a direction to divide certain property "on the same principle last provided," which directed a substitution of children for deceased parents].

<sup>69</sup> *Soper v. Brown*, 136 N. Y. 244, affirming 65 Hun, 155. But a gift to the "surviving" members of the class is so clear as to leave no room for construction. *Mullarky v. Sullivan*, 136 N. Y. 227.

<sup>70</sup> *Cooper v. Cooper*, 7 Houst. Del. 488. (Inferred from an expression of the testator's wish that the re-

mainder man who was not of testator's blood should not take as long as any of testator's blood survived.)

<sup>71</sup> *Ashhurst v. Potter*, 53 N. J. Eq. 608; *In re Truslow*, 140 N. Y. 599, modifying 71 Hun, 77; *Gammell v. Ernst*, 19 R. I. 292; 33 Atl. 222; *Roundtree v. Roundtree*, 26 S. C. 450.

<sup>72</sup> *Graves v. Spurr*, 97 Ky. 651, citing *Wilmot v. Wilmot*, 8 Ves. Jr. 10, *Birney v. Richardson*, 5 Dana, 424; *Harris v. Berry*, 7 Bush. 113; *Cummings v. Stearns*, 161 Mass. 506.

## CHAPTER XXIV.

DISTRIBUTION PER STIRPES AND PER CAPITA.

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## §552. General principles of distribution in intestacy.

A very important question that presents itself for consideration under the law of intestate succession, and under the law of wills alike, is the question whether distribution among those who are to take shall be *per stirpes* or *per capita*. The difference between these two classes of distribution manifests itself in two different methods: first, with reference to the determination of the persons who shall take; second, with reference to the share which passes to each person thus ascertained.

First, with reference to the determination of the persons who shall take, a distribution *per stirpes* means that the principle of representation so applies that the heirs or representatives of one previously deceased, who would have taken if alive, will take by the right of their ancestor. A distribution *per capita* means that no representation applies, and that the favored class is to be determined upon as it exists at the time prescribed by the law or the will, and that the heirs or representatives of one previously deceased can not take, although such decedent would have taken in his own right, as a member of the favored class, had he survived.



The question of distribution *per stirpes* or *per capita* also affects the determination of the beneficiaries under a will in another way. Under a distribution *per stirpes* the children of living parents take nothing, the share which passes to that branch or stock being taken by such living parents. A gift *per capita* passes to all who are included within the description of the beneficiaries, irrespective of whether their parents are alive or not.

Second, with reference to the share which the beneficiaries thus indicated are to take, the question whether the distribution is *per stirpes* or *per capita* is often of great importance. A distribution *per capita* is an equal division of the property to be divided among the beneficiaries, each receiving the same share as each of the others, without reference to the intermediate course of descent from the ancestor. A distribution *per stirpes*, on the other hand, is a distribution with reference to the intermediate course of descent from the ancestor. It is literally a distribution according to "stock." It gives the beneficiaries each a share in the property to be distributed, not necessarily equal, but the proper fraction of the fraction to which the person through whom he claims from the ancestor would have been entitled.<sup>1</sup>

<sup>1</sup> An elementary illustration may make this clear. A has two sons, B and C. B dies before A, leaving two children, D and E. C also dies before A, leaving three children, F, G and H. On A's death there are thus five grandchildren, whom we will suppose are the beneficiaries of his will. If the will calls for a distribution of the property *per capita*, each of these five grandchildren will receive one-fifth of the property. If the distribution is to be made *per stirpes*, the property is first divided according to the stock, or immediate course of descent—that is, one-half to those claiming through B, and one-half

to those claiming through C. B's two children will then divide B's share between them, each thus receiving one-fourth of the original estate. C's three children will divide C's share among them, each thus receiving one-sixth of the original estate. This principle of distribution *per stirpes* is, of course, capable of indefinite extension. Thus, if D and H had each died before A, D leaving one child and H two, D's one child would, on distribution *per stirpes*, receive one-fourth of the original estate, and H's two children would each receive a twelfth of the original estate.

Whether in cases of intestacy realty descends *per stirpes* or *per capita* is a question which should be considered here only so far as it affects the construction of wills. It is sometimes laid down as a general proposition, both at common law and under modern statutes of descent and distribution, that where the heirs are all in the same degree of relationship to the ancestor they take *per capita*, but if in unequal degrees they take *per stirpes*. This is without doubt correct as a broad and general proposition, but like most legal principles it has its exceptions and qualifications. Under modern statutes it is generally indicated in a clear manner by the use of such expressions as "or legal representatives," where the doctrine of representation applies. Where the statute provides that the property shall descend to a certain class, and omits "or their legal representatives," or some similar phrase, the principle of representation does not apply.<sup>2</sup> The same principles, of course, apply to distribution of personalty under the statute.

**§553. Statutory distribution adopted in absence of testator's manifest intention.**

The nature of descent and distribution under the statute is important because, unless the intention of testator is clearly

<sup>2</sup> Clayton v. Drake, 17 O. S. 367.

"The plaintiffs, therefore, are not entitled under the statute to share in the inheritance, unless, as is claimed by their counsel, they can be let in as the legal representatives of the deceased grand-uncle whose children and grandchildren they are. But the clause of the statute which governs the descent in this case gives the estate to the next of kin without any reference to the principle of representation. In the prior clauses of the same section, when the estate is given to 'children' or to 'brothers and sisters' the principle of representation is expressly

provided for by the words 'or their legal representatives,' and as there are no such words in this clause, it is not easy to perceive how the words 'next of kin' can be construed as embracing those *not* next of kin. These words describe a class of persons to be ascertained by the rules of law; and, when ascertained, the words become as definite and specific as the words 'children' or 'brothers and sisters,' and are as effectually exclusive of all other persons. None of these words, *ex vi termini*, import representation, and whether that principle shall be applied in respect to any of them, must depend on the express provi-

manifest in his will, the courts construe a will by which property is to be divided among a specified class as contemplating a division in analogy to the statute of descent and distribution.<sup>3</sup> Thus when the persons designated stand in equal degree or degrees of relationship to testator, and the devise or bequest is to enure to the benefit of all of them, the court will order a division *per capita*.<sup>4</sup>

Thus a devise to the "issue" of testatrix was held to call for an equal division among the children and grandchildren of testatrix where all the children of testatrix were living and there was no opportunity for any substitutional taking.<sup>5</sup>

While if the devisees or legatees stand in unequal degrees of relationship to testator the law favors a construction which results in a distribution *per stirpes* among the beneficiaries.<sup>6</sup>

**§554. Intention clear.—Construction of specific forms of devise.**  
**—Per capita.**

When the will shows a clear intention of testator of devising either *per capita* or *per stirpes*, the courts give effect to such intention without reference to the statute of descents and

sions of the statute. If they direct the admission of 'legal representatives' into any class of descendants, they must, of course, be admitted, but if they exclude representatives, or are silent on the subject, courts have no power to enlarge the plain terms of the statute, by admitting into any class those who do not come within the meaning of the words descriptive of that class." *Clayton v. Drake*, 17 O. S. 367. While in this particular respect the statute construed in the case cited in the note has since been so amended as to permit representation in case of the next of kin, the principle of the case holds good in statutes where representation is not specifically provided for.

<sup>3</sup> *Huggins v. Huggins*, 72 Ga. 825; *Kelley v. Vigas*, 112 Ill. 242; *Hills v. Barnard*, 152 Mass. 67; 9 L. R. A. 211; *Ferer v. Pyne*, 89 N. Y. 281; *Gerrish v. Hinman*, 8 Ore. 348; *Pearce v. Rickard*, 18 R. I. 142; 19 L. R. A. 472; *Lott v. Thompson*, 36 S. Car. 38.

<sup>4</sup> *Pearce v. Rickard*, 18 R. I. 142; 19 L. R. A. 472; *Hodges v. Phelps*, 65 Vt. 303; 26 Atl. 625.

<sup>5</sup> *Pearce v. Rickard*, 18 R. I. 142; 19 L. R. A. 472.

<sup>6</sup> *Wright v. Bell*, 18 Ont. App. 25; *Kilgore v. Kilgore*, 127 Ind. 276; *Hills v. Barnard*, 152 Mass. 67; 9 L. R. A. 211; *Lott v. Thompson*, 36 S. Car. 38.

distributions, since testator has in this respect full and ample power to direct the descent of his property.<sup>7</sup> What intention is expressed by the words used is the practical question, then, under this subject, and one which is best answered by discussing the effect of the common phrases used in wills.

A direction in a will that property is to be divided among the members of a specified class "equally," is held to call for a distribution *per capita*.<sup>8</sup> And this rule is not altered by the fact that the income is to be divided *per stirpes* until the time when the "equal" division of the property is to be made.<sup>9</sup>

By the terms of a will one person may be balanced against a class. Thus a provision that an income should be "equally divided" between the widow of testator and the heirs of testator's mother, was held to mean that the widow should receive half the income.<sup>10</sup>

The devisees take *per capita* and not *per stirpes* under a will directing an equal division "between" the testator's brothers and sisters and his wife's brothers and sisters.<sup>11</sup>

A direction for the division of certain specified property

<sup>7</sup> Howard v. Howard, 30 Ala. 391; McCartney v. Osburn, 118 Ill. 404; West v. Rassman, 135 Ind. 278; McQueen v. Lilly, 131 Mo. 9; Bodin v. Brown, 154 N. Y. 778.

<sup>8</sup> *In re Stone* (C. A.), (1895), 2 Ch. 196; Houghton v. Bell, 23 Can. S. C. 498; West v. Rassman, 135 Ind. 278. ("The children of these parties above named, without any regard to numbers, shall be counted as one family and equally divided among them all.") *In re Bates*, 159 Mass. 252; McQueen v. Lilly, 131 Mo. 9 ("equal interests" given to several); Johnson v. Knight, 117 N. Car. 122; Freeman v. Knight, 2 Ired. Eq. 72; Tuttle v. Puitt, 68 N. Car. 543; Bodin v. Brown, 154 N. Y. 778; McKelvey v. McKelvey, 43 O. S. 213; Chafee v. Maker, 17 R. I. 739; Walker v. Webster, 95 Va. 377.

<sup>9</sup> *In re Stone* (C. A.), (1895), 2 Ch. 196; 12 Rep. 415.

<sup>10</sup> Perkins v. Stearns, 163 Mass. 247.

*Contra*, Hick's Estate, 134 Pa. St. 507, where a provision that testator's property should be "equally divided between" his wife and his two daughters, was held to give one-third of his property to each. So *In re Holder*, 21 R. I. 48.

<sup>11</sup> Kling v. Schnellbecker, 107 Io. 636 (distinguishing Fissel's Appeal, 27 Pa. St. 55; Young's Appeal, 83 Pa. 59; Bassett v. Granger, 100 Mass. 348; Holbrook v. Harrington, 16 Gray, 102; Congreve v. Palmer, 16 Beav. 435; Crow v. Crow, 1 Leigh, 74; Hoxton v. Griffith, 18 Gratt. 574.

between the members of a group "share and share alike" is construed as a direction to distribute *per capita*.<sup>12</sup> So a direction to distribute an estate share and share alike, directing that testator's sister should receive a share, his stepdaughter to receive one share, and then "to each of my nephews and nieces then living, one share," is a direction for a *per capita* distribution in which the nephews share individually and not as a class.<sup>13</sup>

**§555. Per stirpes.—Substitution specifically directed.**

A devise to members of a class, containing the express provision that if any member of such class shall die, the "issue" or "heirs" of such decedent, or his "descendants," shall take his share, is held to direct a distribution *per stirpes*.<sup>14</sup> So a devise to testator's nephews and nieces named, "in equal shares by right of representation," calls for a division *per stirpes*.<sup>15</sup>

**§556. Per stirpes.—"Heirs."**

A devise to the "heirs" of a named person, whether the testator or another is, ordinarily, in the absence of any expression showing a contrary intention, taken as a direction for a distribution *per stirpes*.<sup>16</sup>

<sup>12</sup> Copeland v. Copeland, 64 Ill. App. 100; McFatrige v. Holtzclaw, 94 Ky. 352; 22 S. W. 439; Shattuck v. Balcom, 170 Mass. 245; Culp v. Lee, 109 N. C. 675; Budd v. Haines, 52 N. J. Eq. 488; 29 Atl. 170; Bisson v. R. R. 143 N. Y. 125; Scott's Estate, 163 Pa. St. 165; Dukes v. Faulk, 37 S. C. 255.

<sup>13</sup> Penney's Estate, 159 Pa. St. 346.

<sup>14</sup> Geery v. Skelding, 62 Conn. 499 ("issue" of decedent); Jackson v. Alsop, 67 Conn. 249; Johnson v. Bodine, 108 Io. 594; Fields v. Fields, (1893), — Ky. —; 20 S. W. 1042 ("issue" of decedent); Cummings v. Cummings, 146 Mass. 501; Niles v. Almy, 161 Mass. 29

("issue" of decedent); Dawson v. Schaefer, 52 N. J. Eq. 341 (to "heir or heirs" of decedent); Woodward v. James, 115 N. Y. 346, Patrick's Estate, 162 Pa. St. 175 ("descendants" of decedent); Rhode Island Hospital Trust Company v. Harris, 20 R. I. 408.

<sup>15</sup> Siders v. Siders, 169 Mass. 523. So Merrill v. Curtis (N. H.) 39 Atl. 973.

<sup>16</sup> Conklin v. Davis, 63 Conn. 377; Healy v. Healy, 70 Conn. 467 (to "legal heirs"); Jackson v. Alsop, 67 Conn. 249; Richey v. Johnson, 30 O. S. 288; Ashburner's Estate, 159 Pa. St. 545; Rowland's Estate, 151 Pa. St. 25; Forrest v. Porch, 100 Tenn. 391.

And a devise to "children and heirs" of two persons named, to be divided among them "equally," was held to call for a distribution *per stirpes*, since the word "heirs" so strongly implies representation that it overcomes the force of the word "children" and "equally," both of which call for a distribution *per capita*.<sup>17</sup>

But where the word "heirs" is used as descriptive of persons otherwise indicated, it does not call for a distribution *per stirpes*. Thus a devise to "my nephews and nieces, they being my lawful heirs," was held to indicate a distribution *per capita*.<sup>18</sup>

### §557. Ambiguous gifts.

Whether the testator, in directing a division, combines an expression which indicates a division *per capita* with one which indicates a division *per stirpes*, a more difficult question arises.

"*Equally*" to "*Heirs*."—Thus, a devise to the "heirs" of a designated person or persons "equally" has been held in some jurisdictions to call for a division *per stirpes*.<sup>19</sup> In other jurisdictions such a form of expression is construed to call for distribution *per capita*.<sup>20</sup> And a devise to be divided among the "heirs" of a designated person "share and share alike" is held to call for a division *per capita*.<sup>21</sup>

<sup>17</sup> Ashburner's Estate, 159 Pa. St. 545.

<sup>18</sup> Post v. Jackson, 70 Conn. 283.

<sup>19</sup> Hoch's Estate, 154 Pa. St. 417 ("to be divided in equal shares to" the legal heirs of testator); Taylor v. Fauver (Va.), (1898), 28 S. E. 317 ("to my sisters or their heirs equal to all").

<sup>20</sup> Best v. Farris, 21 Ill. App. 49 ("equally divided among my heirs"); Kelley v. Vidas, 112 Ill. 242; 54 Am. Rep. 235; Brittain v. Carson, 46 Md. 186; Maguire v. Moore, 108 Mo. 267; Lockart v.

Lockart, 3 Jones Eq. 205; Johnston v. Knight, 117 N. Car. 122; McKelvey v. McKelvey, 43 O. S. 213; Ramsey v. Stephenson (Or.), 57 Pac. 195; 56 Pac. 520.

<sup>21</sup> McFatridge v. Holtzclaw, 94 Ky. 352; 22 S. W. 439; Bisson v. R. R. 143 N. Y. 125; Scott's Estate, 163 Pa. St. 165; Dukes v. Faulk, 37 S. Car. 255. So a gift to be divided "between the heirs" of A calls for a division *per capita*. Record v. Fields (Mo.) 55 S. W. 1021.

### §558. Gift to children of two or more persons.

When testator devises property to the "children" of two or more persons who are not intermarried with each other, the general rule is said to be that this calls for a distribution *per capita*, in the absence of distributive words, or other form of expression showing a different intent.<sup>22</sup> Thus, a gift to the two married daughters of testatrix for life, and at their death to their children share and share alike, was held to be a gift *per capita*.<sup>23</sup> Where testatrix gave a certain fund to two granddaughters for life, and provided that upon their decease the same should "be divided and distributed equally to their children *per capita*," two of whom were then in being, such a devise is a gift to the great-grandchildren as a class; vesting in point of right, at death of testatrix, in the then two members constituting the class, and in those after-born as soon as born.<sup>24</sup>

But this rule is not unyielding. The form of the devise may show an intention to give *per stirpes*, and such expressed intention will be given full force and effect. This intention is often expressed by the use of distributive words.<sup>25</sup>

A gift "to the families of my brother A's four children and to the five children of my sister B" was held to be a gift to the children of A and of B *per stirpes*.<sup>26</sup> When testatrix directs the residuum of her property to be equally divided

<sup>22</sup> *Bethea v. Bethea*, 116 Ala. 265; *Wells v. Hutton*, 77 Mich. 129; *Budd v. Haines*, 52 N. J. Eq. 488.

<sup>23</sup> *Budd v. Haines*, 52 N. J. Eq. 488.

<sup>24</sup> *Johnson v. Webber*, 65 Conn. 501.

<sup>25</sup> *Bethea v. Bethea*, 116 Ala. 265 (a devise to the children that "each" of testator's sons may have surviving him); *White v. Holland*, 92 Ga. 216; 18 S. E. 17 (evidence of relationship of beneficiaries to testator admitted).

*Henry v. Thomas*, 118 Ind. 23; *Balcom v. Haynes*, 14 All. 204; *Record v. Fields* (Mo.), 55 S. W. 1021. (Gift to be divided "between" the heirs of testator's two brothers); *Ihrle's Estate*, 162 Pa. St. 369 (devise to be divided "between" the children of a person named and the grandchildren of her husband); *Ashburner's Estate*, 159 Pa. St. 545 (to be divided between the "children and heirs" of testator's sons).  
<sup>26</sup> *Allen's Succession*, 48 La. Ann. 1036.

"between her heirs and her husband's heirs" it should be divided into two equal parts, giving to her heirs one half and to her husband's heirs one-half *per stirpes*, and not *per capita*, since they do not all stand in the same relation to testatrix.<sup>27</sup> So where it is to be divided "between" the relatives of testator and those of his wife.<sup>28</sup>

#### §559. Gift to pass as in intestacy.

A devise to pass according to the intestate law calls for a distribution among the persons and in the proportions which the law prescribes in case of intestacy.<sup>29</sup> Thus, if the widow is one of the beneficiaries, she is to receive the year's allowance and the personal property which she would receive in case of intestacy.<sup>30</sup> Where the will provides that certain property should pass "in equal parts" to the persons who would be entitled to it under the statute of descents and distributions, it is held that the statute must be followed to ascertain who the beneficiaries are, but that a division among them must be made *per capita*.<sup>31</sup>

<sup>27</sup> Bassett v. Granger, 100 Mass. 348; Ross's Ex'r v. Kiger, 42 W. Va. 402.

<sup>28</sup> Young's Appeal, 83 Pa. St. 59.

<sup>29</sup> Schwartz's Estate, 168 Pa. St. 204.

<sup>30</sup> Wilson v. Morris, 94 Tenn. 547.

<sup>31</sup> Walker v. Webster, 95 Va. 377, citing Freeman v. Knight, 2 Ired. Eq. 72; Tuttle v. Puitt, 68 N. Car. 543.



## CHAPTER XXV.

### NATURE OF ESTATE GIVEN BY WILL.

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#### §560. Fee simple.—General common law rule.

At the common law the heir was especially favored in the construction of a will, and could be disinherited only by words which disposed of testator's entire estate.<sup>32</sup> This general rule is still stated in this form by many courts, but in several important matters its application has been entirely changed. In none is it more marked than in the rules determining what kind of an estate as to duration passes by a devise. At common law it was well settled that a devise to one, it not appearing from the will whether the devise meant to pass a life estate or an estate of inheritance, passed a life estate only.<sup>33</sup>

#### §561. Examples of words passing a fee simple at common law.

But it has always been a recognized principle of the law construction that wills were to be construed more liberally than deeds in order that the intention of testator might be carried into effect.<sup>34</sup> In order to pass a fee, therefore,

<sup>32</sup> See Sec. 467; *Robinson v. Ostendorff*, 38 S. Car. 66.

<sup>33</sup> *Robinson v. Randolph*, 21 Fla. 629; *Mulvane v. Rude*, 146 Ind. 476; 45 N. E. 659; *Korf v. Ger-*

*ichs*, 145 Ind. 134; *Roy v. Rowe*, 90 Ind. 54; *Varney v. Stevens*, 22 Me. 331.

<sup>34</sup> *Cleveland v. Spilman*, 25 Ind. 95; *Roy v. Rowe*, 90 Ind. 54.

it was not absolutely necessary to use the technical word "heirs," though, of course, a grant to A and his heirs was the most appropriate and unmistakable method of devising a fee simple to A.<sup>35</sup> Thus a devise to one "forever" was held to pass a fee,<sup>36</sup> as was a devise to A "and his children forever,"<sup>37</sup> so a gift to A and "her heirs on her father's side" passes a fee,<sup>38</sup> so is a devise "to hold the same absolute";<sup>39</sup> or a devise providing "this property is entirely hers and at her disposal."<sup>40</sup>

A devise whereby some personal charge was imposed upon the devisee, as a devise subject to the payment of specified sums to other beneficiaries, was held to show testator's intention to pass a fee to such devisee, since otherwise the devise might not prove a beneficial interest.<sup>41</sup> So where real property was devised to one for life and then to another, it was generally held to pass a fee to such other, especially where the taker of the life estate was younger than the person to whom the devise over was made.<sup>42</sup> So a devise to A of certain realty for life, remainder in part of such realty to B and C, and the residue of such realty to A to dispose of as she thinks fit at her death, gives A a fee in that part of the realty not disposed of to B and C.<sup>43</sup>

<sup>35</sup> Georgia, etc., Co. v. Archer, 87 Ga. 237; Wolfer v. Hemmer, 144 Ill. 554; Young v. Kinkead, 101 Ky. 252 (1897), 40 S. W. 776; McCauley v. Buckner, 87 Ky. 191; Stafford v. Martin, — Md. —, 1892; 23 Atl. 734; *In re Allen*, 151 N. Y. 243; Darlington v. Darlington, 160 Pa. St. 65.

<sup>36</sup> Toman v. Dunlop, 18 Pa. St. 72.

<sup>37</sup> Hood v. Dawson, 98 Ky. 285.

<sup>38</sup> Johnson v. Whiton, 159 Mass. 424.

<sup>39</sup> Anders v. Gerhard, 140 Pa. St. 153.

<sup>40</sup> Dills v. Adams (Ky.), 43 S.W. 680.

<sup>41</sup> Ross v. Ross, 135 Ind. 367; Korf v. Gerichs, 145 Ind. 134; Donohue v. Donohue, 54 Kan. 136; McLellan v. Turner, 15 Me. 436;

Wait v. Belding, 24 Pick. (Mass.) 129; Fuller v. Fuller, 84 Me. 475; Snyder v. Nesbitt, 77 Md. 576; Brooks v. Kip, 54 N. J. Eq. 462; Jackson v. Bull, 10 Johns. (N. Y.) 148. But not where the gift was expressly limited to a life estate. Koff v. Herrman, 82 Md. 339; Henry v. Pittsburg Clay Mfg. Co., 80 Fed. 485.

<sup>42</sup> Mills v. Franklin, 128 Ind. 444; Backus v. Baltimore Pres. Assoc., 77 Md. 50; Kuykendall v. Devecmon, 78 Md. 573; Flickinger v. Saum, 40 O. S. 591; Boutelle v. Bank, 17 R. I. 781; Stead v. Mantion, 18 R. I. 163. (But not where there was a devise over after the second life estate. Smathers v. Moody, 112 N. Car. 791; Goodrich v. Pearce, 83 Ga. 781.

<sup>43</sup> Byrne v. Weller, 61 Ark. 366.

A gift of all of testator's "estate," "property," or some such word, when used to describe the nature of the estate granted, passed a fee simple.<sup>44</sup> But when used merely as words of description of the property devised, without any reference to the estate created, such words did not pass a fee.<sup>45</sup> So a gift to several of certain realty, followed by a clause revoking such devise as to all but one of the devisees, was held to give such devisee a fee in the property devised.<sup>46</sup> A devise of the "proceeds" of testator's real estate passes the real estate itself in fee.<sup>47</sup> So a devise of the "rents and profits" of certain real estate, without any limitation, devises such real estate itself in fee.<sup>48</sup>

A question sometimes arising in determining whether a fee simple passes or not is whether such phrases as "to A and his children," "heirs" and the like, give A a fee simple, or give A a life estate only, with remainder over to the children. This question is sometimes stated as being whether the words "children" and the like are words of limitation; that is, are words which are used to show the nature of the estate given to A, or are words of purchase; that is, words which are used to show that a beneficial interest is devised to the "children."

Testator's intention, which must, of course, be deduced from his entire will,<sup>49</sup> determines the nature of the estate devised to the first taker, A. Unless modified by the context, the word "heirs" in a gift to A "his heirs or assigns forever" is a word of limitation.<sup>50</sup>

<sup>44</sup> *Dewey v. Morgan*, 18 Pick. 295; *Den v. Schenck*, 8 N. J. L. 29; *Morehouse v. Cotheal*, 22 N. J. L. 430; *Piatt v. Sinton*, 37 O. S. 353; *Niles v. Gray*, 12 O. S. 320; *Hart v. White*, 26 Vt. 260.

<sup>45</sup> *Hill v. Brown* (1894), App. Cas. 125.

<sup>46</sup> *Marion v. Williams*, 20 D. C. 20; 19 Wash. L. Rep. 532.

<sup>47</sup> *Isherwood v. Isherwood*, 8 Ohio C. D. 409; 16 Ohio C. C. 279; affirmed in 57 O. St. 660, citing *Bowen v. Swander*, 121 Ind. 175; *Crain v. Wright*, 114 N. Y. 307; *Carlyle*

*v. Cannon*, 3 Rawle, 489 (Pa.); *Drusadon v. Wilde*, 63 Pa. St. 170; *Bennett v. Robinson*, 10 Watts, 348 (Pa.); *Davis v. Williams*, 85 Tenn. 646.

<sup>48</sup> *Baines v. Dixon*, 1 Ves. 42; *Baker v. Scott*, 62 Ill. 86; *Earl v. Rowe*, 35 Me. 414; *Traphagen v. Levy*, 45 N. J. Eq. 448; *France's Estate*, 75 Pa. St. 220. See Sec. 491.

<sup>49</sup> See Sec. 462.

<sup>50</sup> *Jackson v. Alsop*, 67 Conn. 249; *Bryson v. Holbrook*, 159 Mass. 280.

The context may show that even such a word as "heirs" is used as a word of purchase.\* Thus a gift to A and B for life, the remainder "to go to their heirs forever," shows that the word "heirs" is used as a word of purchase.<sup>51</sup> Where the word heirs is used as a direction for a substitution as a gift to A and B "or their heirs," it is clearly intended as a word of purchase.<sup>52</sup>

In the case of other words, such as "children" the presumption is in favor of their being used as words of purchase.<sup>53</sup> This presumption determines the construction even in cases which seem at best ambiguous. Thus, a gift to A "and her children after her" was held to pass an estate to the children as purchasers.<sup>54</sup> The context, however, taken together with the form of dispositive words employed, may show testator's intention to use the word "children" or other similar word as a word of limitation. Thus, in a gift to A and "his children forever," "children" is used as a word of limitation, practically synonymous with "heirs";<sup>55</sup> and "lineage" in a gift to A and "her lineage" is similarly used.<sup>56</sup> The effect upon the words "heir," "children" and the like, produced by the rules known as the Rule in Shelley's Case and the rule in Wild's Case, are considered later.<sup>57</sup>

### §562. Modern statutory rule.

The common law rule that only a life estate in real property would pass, operated in many cases to defeat the inten-

\* *Campbell v. Noble*, — (Ala.), (1896); 19 So. 28; *Leake v. Watson*, 60 Conn. 498; *Ruggles v. Randall*, 70 Conn. 44; *Kellett v. Shepard*, 139 Ill. 433; 28 N. E. 751; *Fur- enes v. Severtson* (Ia.), (1898); 71 N. W. 196; *Lee v. Welch*, 163 Mass. 312; *Lawrence v. Crane*, 158 Mass. 392; *O'Rourke v. Beard*, 151 Mass. 9; *Lincoln v. Perry*, 149 Mass. 368; *Platt v. Mickle*, 137 N. Y. 106; *Gilmor's Estate*, 154 Pa. St. 523.

<sup>51</sup> *Leake v. Watson*, 60 Conn. 498. *So Campbell v. Noble* (Ala.), (1896), 19 So. 28.

<sup>52</sup> *Gilmor's Estate*, 154 Pa. St. 523.

<sup>53</sup> *Johnson v. Webber*, 63 Conn. 501; *Ridgeway v. Lanphear*, 99 Ind. 251; *Anderson v. Anderson*, 164 Pa. St. 338; *Williams v. Knight*, 18 R. I. 333.

<sup>54</sup> *Williams v. Knight*, 18 R. I. 333.

<sup>55</sup> *Hood v. Dawson*, 98 Ky. 235.

<sup>56</sup> *Lockett v. Lockett*, 94 Ky. 289.

<sup>57</sup> See Secs. 564 and 565 for the Rule in Shelley's Case. See Sec. 567 for the Rule in Wild's Case.

tion of the testator, since there is no question that most testators intend that a gift of a specified piece of property should carry their entire interest in it. This confusion is increased by the fact that a set of words which would carry absolute ownership, if applied to personal property alone, would carry only a life estate when applied to real property alone. Accordingly, in most states, the common law rule that a devise is presumed to be for life only has been abrogated by statute, and it is commonly provided in analogy to the rule applying to personal property that a devise of lands should be construed to convey the entire estate of the testator in such lands, as far as he can lawfully dispose of the same, unless it clearly appears from the will that the testator meant to dispose of a smaller interest.<sup>58</sup>

A devise to testator's wife providing that "she may will

<sup>58</sup> *Bowey v. Ardill*, 21 Ont. 361; *Potter v. Couch*, 141 U. S. 296; *Whorton v. Morgane*, 62 Ala. 201; *White v. White*, 52 Conn. 518; *Georgia, etc., Co. v. Archer*, 87 Ga. 237; *Rickner v. Kessler*, 138 Ill. 636; *Wolfer v. Hemmer*, 144 Ill. 554; *Korf v. Gerichs*, 145 Ind. 134; *Ross v. Ross*, 135 Ind. 367; *Mulvane v. Rude*, 146 Ind. 476; 46 N. E. 659; *Miller v. Tilton* (Ky.) (1899), 49 S. W. 967; *Bedford v. Bedford*, 99 Ky. 273; *Calmes v. Eubank*, — Ky. — (1897); 40 S. W. 669; *Young v. Kinkead*, 101 Ky. 252 (1897); 40 S. W. 776; *Mudd v. Mullican* (Ky.) (1890), 12 S. W. 263; *Fuller v. Fuller*, 84 Me. 475; *Kuykendall v. Devecman*, 78 Md. 537; *Backus v. Baltimore Pres. Assoc.* 77 Md. 50; *Reid v. Walbach*, 75 Md. 205; *Johnston v. Safe Deposit & Trust Co.*, 79 Md. 18; *Bentz v. Maryland Bible Soc.* 86 Md. 102; *Foster v. Smith*, 156 Mass. 379; *Simonds v. Simonds*, 168 Mass. 144; 46 N. E. 421; *Joslin v. Rhoades*, 150 Mass.

301; *Goodwin v. McDonald*, 153 Mass. 481; *Robinson v. Finch*, 116 Mich. 180; *Schult v. Moll*, 132 N. Y. 122; *Kinkele v. Wilson*, 151 N. Y. 269; *Moushand v. Rodetsky*, 5 O. N. P. 256; 7 O. D. 225; *Smith v. Berry*, 8 Ohio, 365; *Niles v. Gray*, 12 O. S. 320; *Piatt v. Sinton*, 37 O. S. 353; *Flickinger v. Saum*, 40 O. S. 591; *Ahl v. Bosler*, 175 Pa. St. 526; *Wilkinson v. Chambers*, 181 Pa. St. 437; *Snyder v. Baer*, 144 Pa. St. 278; 13 L. R. A. 259; *Fisher v. Wister*, 154 Pa. St. 65; *Hart v. Stoyer*, 164 Pa. St. 523; *Seitz v. Pier*, 154 Pa. St. 467; *Sugden v. McKenna*, 147 Pa. St. 55; *White v. Commonwealth*, 110 Pa. St. 90; *Harris v. Dyer*, 18 R. I. 540, 1894; 28 Atl. 971; *Johnston v. Johnston*, 92 Tenn. 559; 22 L. R. A. 179; *May v. San Antonio*, 83 Tex. 502; *Gaskins v. Hunton*, 92 Va. 528; 23 S. E. 885; *Dew v. Kuehn*, 64 Wis. 293. This statute has no application where the will uses such technical language as "heirs and assigns." *Wolfer v. Hemmer*, 144 Ill. 554.

it, I mean the old homestead, to any of my children at her own discretion" does not under this statute show an intention to give less than a fee;<sup>60</sup> nor does a devise to testator's son with a provision that at testator's death such son "shall have and own in his own name" the realty devised.<sup>61</sup> So where testator devised to a woman who was not his lawful wife, but who had lived with him as his wife, one-third of his real estate, describing it as "one-third, that is to say, her dower right of my estate," it was held that the reference to dower was not sufficient to show his intention to pass only a life estate, and hence the devisee took a fee;<sup>62</sup> nor does a provision attempting to prevent the devisee from selling the property out of the family, and providing that on the death of the devisee, intestate and without direct heirs, his part should pass to his sister, operate to reduce a devise to a life estate.<sup>63</sup>

Where, in a will, several devises are made to certain devisees "and their heirs forever," a later devise to one, omitting the words "his heirs forever," is, nevertheless, held under the statutory rule given to pass a fee simple;<sup>64</sup> and, on the other hand, a devise is not reduced to a life estate by the fact that a former devise to the same devisee was for life only.<sup>65</sup>

### §563. Defeasible fees.

Like other estates, a fee may be given defeasible upon condition subsequent. Such an estate is a fee with all the incidents thereof, subject to be divested upon the happening of the condition subsequent.<sup>66</sup>

<sup>60</sup> *Ahl v. Bosler*, 175 Pa. St. 526.

<sup>61</sup> *Korf v. Gerichs*, 145 Ind. 134.

<sup>62</sup> *Shult v. Moll*, 132 N. Y. 122;  
so *Dilworthy v. Gusky*, 131 Pa. St. 343; *White v. Commonwealth*, 110 Pa. St. 90.

<sup>63</sup> *Fisher v. Wister*, 154 Pa. St. 65 (in this case apart from the possible invalidity of the restraint on alienation no attempt was made to prevent devisee from disposing of his property by will) *Gillmer v.*

*Daix*, 141 Pa. St. 505; *Pierce v. Simmons*, 16 R. I. 689.

<sup>64</sup> *Bedford v. Bedford*, 99 Ky. 273; *Miller v. Carlisle*, — Ky. —, 1890; 14 S. W. 75.

<sup>65</sup> *Reid v. Walbach*, 75 Md. 205. So *Boston Safe Deposit & Trust Company v. Stich*, 61 Kan. 474; 59 Pac. 1082.

<sup>66</sup> *Thorington v. Thorington*, — (Ala.) —, 1896; 20 So. 407; *Pate v. French*, 122 Ind. 10; *Malona v.*

### §564. The Rule in Shelley's Case.—Common Law.

The rule of law which has become famous under the name of the Rule in Shelley's Case, though it was, no doubt, recognized and established long before that decision, provided in effect that where an instrument gave a man a freehold estate, and in the same instrument the remainder was given to his "heirs," the first taker had a fee simple if the remainder was to his heirs generally, and a fee tail if the remainder was to the heirs of his body.<sup>67</sup>

This rule was merely the logical outgrowth of certain fixed and technical ideas of the common law. It was well settled in instruments other than wills that no word except "heirs" could create an estate of inheritance, and, conversely, that the word "heirs" created an estate of inheritance, in both cases the intention of grantor was ignored. It was inevitable, then, that a gift to one for life only, with a remainder over to his heirs, should be held to create a fee simple irrespective of the intention of the testator. The origin of the rule, however, is deeper than this, for eventually, after some fluctuation in judicial decision,<sup>68</sup> it was held to apply to wills as well as deeds, though technical words have always been of less imperative effect in wills than in deeds. Further, in wills the Rule has been applied to cases where the technical word "heirs" was not employed; as, for instance, where "dying without issue" was held to import an indefinite failure of issue.<sup>69</sup>

The Rule in Shelley's Case is an example of the tendency of the law which finds manifestation in so many different

Schwing (Ky.), 39 S. W. 523; Harper v. Baird (Ky.), 35 S. W. 638; Crozier v. Cundall (Ky.), 35 S. W. 546; Redding v. Rice, 171 Pa. St. 301; Gaskins v. Hunton, 92 Va. 528; 23 S. E. 885.

<sup>67</sup> Shelley's Case, 1 Rep. 93; Doe v. Smith, 7 T. R. 531; Allen v. Craft, 109 Ind. 476; 58 Am. Rep. 425; McFeely v. Moore, 5 Ohio, 464; Anders v. Gerhard, 140 Pa. St. 153; Guthrie's Appeal, 37

Pa. St. 9; Doeblers Appeal, 64 Pa. St. 9; Steiner v. Kolb, 57 Pa. St. 123; Sims v. Buist, 52 S. Car. 554.

<sup>68</sup> Perrin v. Blake, 4 Burr. 2579. "Whensoever the ancestor takes an estate for life, and after a limitation is made to his right heirs, the right heirs shall not be purchasers." Coke on Littleton, Sec. 19. To the same effect, 22 (b), is Sec. 578, same author.

<sup>69</sup> See Sec. 593.

forms, to treat the first estate as a fee and the interests of subsequent takers, if such interests ever accrue, as by descent rather than by purchase.

Various and inconsistent reasons have been suggested for the Rule. It has been declared that the Rule originated in the desire of the law to make the transfer of land easy and free from such restraints as would necessarily exist if the owner held a life estate only. The Rule, as it first appears, is so well settled that it must date back to a time when the law cared but little for ease in conveying realty. It is more probable that the underlying reason of the Rule was that if the "heirs" took by descent the incidents of the feudal system, such as wardship, *primer seisin* and the like attached to the great benefit of the superior lord, an advantage which he would lose if the "heirs" took by purchase.

The Rule in Shelley's Case was not a rule of construction at common law. After a vain effort to treat it as merely a rule of construction,<sup>70</sup> the courts abandoned that view, and treated it thenceforth as a rule of property. In its subsequent application and enforcement it had, as has been repeated again and again by the courts, nothing to do with the discovery of the intention of testator. This intention is to be ascertained and determined by the recognized rules of construction.<sup>71</sup>

When, by the exercise of these rules of construction, it is determined that testator's intention was to create a life estate in A, with the remainder to the heirs of A, the rule in Shel-

<sup>70</sup> *Perrin v. Blake*, 4 Burr. 2579.

<sup>71</sup> *Ewing v. Barnes*, 156 Ill. 61; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; *Seeger v. Leakin*, 76 Md. 500; *Turley v. Turley*, 11 O. S. 173; *Sheeley v. Neidhammer*, 182 Pa. St. 163; *Sims v. Buist*, 52 S. Car. 554.

"It is only after the intention has been discovered that the Rule in Shelley's Case can be applied; it can not be used as a means of

discovering the intention." *List v. Rodney*, 83 Pa. St. 483. So *Sheeley v. Neidhammer*, 182 Pa. St. 163; *King v. Beck*, 15 Ohio, 559. Hence where the word "heirs" is evidently used as meaning "children" and is a word of purchase, a devise to A for life, and on his death to his "heirs" if any, if not, to another, was held to give A a life estate only. *King v. Beck*, *supra*.



ley's case then applies, whether testator intended that it should or not, as a rule of property, and fixes A's estate as a fee.<sup>72</sup>

Where the Rule in Shelley's Case is in force, a devise to A for life, and at his death "to be equally divided between the heirs of her body" gives A a fee.<sup>73</sup> Where the rule is not in force such a devise gives A a life estate only.<sup>74</sup> And by analogy this rule has been applied to a bequest of a leasehold estate to A for life, and remainder to A's "bodily heirs."<sup>75</sup> The Rule in Shelley's Case applies to equitable estates as well as to legal.<sup>76</sup> The Rule in Shelley's Case never had the effect of converting a fee tail into a fee simple.<sup>77</sup>

### §565. The Rule in Shelley's Case.—Modern statutes.

The tendency of modern law in respect to the Rule in Shelley's Case is clearly to treat it, wherever possible, as a rule of construction, and not a rule of property. This change has been brought about in some states by statutes which either abolish the rule altogether or provide that it shall not apply to wills in defiance of the clear intention of the testator.<sup>78</sup>

<sup>72</sup> Georgia, etc., *Co. v. Archer*, 87 Ga. 237; *Wolfer v. Hemmer*, 144 Ill. 554; *Ewing v. Barnes*, 156 Ill. 61; *Hughes v. Clark*, Ky. (1894), 16 Ky. L. Reps. 41; 26 S. W. 187; *Young v. Kinkead*, 101 Ky. 252; 40 S. W. 776; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; *Warner v. Sprigg*, 62 Md. 14; *Crockett v. Robinson*, 46 N. H. 454; *Chamblee v. Broughton*, 120 N. C. 170; *In re Allen*, 151 N. Y. 243; *Grimes v. Shirk*, 169 Pa. St. 74; *Sheeley v. Neidhammer*, 182 Pa. St. 163; *Serfass v. Serfass*, 190 Pa. St. 484; *Cowing v. Dodge*, 19 R. I. 605; 35 Atl. 309; *Simms v. Buist*, 52 S. C. 554.

<sup>73</sup> *Holt v. Pickett*, -- Ala. --, 1896; 20 So. 432; *Silva v. Hopkinson*, 158 Ill. 386 ("to be equally di-

vided share and share alike and to their lawful heirs").

<sup>74</sup> *De Vaughn v. De Vaughn*, 3 App. D. C. 50.

<sup>75</sup> *Seeger v. Leakin*, 76 Md. 500. For the application of the Rule in Shelley's Case to gifts of personalty, see Sec. 595.

<sup>76</sup> *Armstrong v. Zane*, 12 Ohio, 287.

<sup>77</sup> *Pollock v. Speidel*, 27 O. S. 86. This result, if produced at all, was caused by special statute (see Sec. 568). At Common Law, if the devise were to A and his heirs, A's estate was a fee simple; if to A and the heirs of his body, A's estate was a fee-tail.

<sup>78</sup> *King v. Evans*, 24 Can. S. C. 356; *Evans v. King*, 21 Ont. App. 519; *Healey v. Healey*, 70 Conn. 467; *Leake v. Watson*, 60 Conn.

In other states the same result has been obtained by judicial decision, the courts taking the position that only so much of the English law as was applicable to the condition of affairs in this country was to be adopted by our courts, and that, as a rule of property, the Rule in Shelley's Case was suited to a feudal system of land ownership, and was, therefore, unsuitable for our system.<sup>79</sup>

Under this rule a devise to A for life, and on his death to the "heirs of his body by him begotten" does not give A a fee, but a life estate only, and his heirs take by purchase.<sup>80</sup>

This statute has no application where the intention of testator is in accord with the Rule in Shelley's Case.<sup>81</sup>

#### §566. Fee tail.—General rule.

A fee tail, that is, an estate of inheritance descending on the death of the owner to the heirs of his body, and not to his heirs generally, can be, of course, created as well by will as by deed. The technical words "and the heirs of his body," are, of course, sufficient to pass an estate tail by will.<sup>82</sup> These technical words are not, however, indispensable to create an estate-tail, any words which especially show testator's intention to create such an estate being sufficient. Thus, a devise

498; *Trumbull v. Trumbull*, 149 Mass. 200; *Defreese v. Lake*, 109 Mich. 415; *Bird v. Gilliam*, 121 N. C. 326; *Crawford v. Wearn*, 115 N. C. 540; *Archer v. Brockschmidt*, 5 Ohio N. P. 349; *Sanborn v. Sanborn*, 62 N. H. 631; *Gilpin v. Williams*, 25 O. S. 283; *Bunnell v. Evans*, 26 O. S. 409; *Bucklin v. Creighton*, 18 R. I. 325; *Wood v. Wood*, 45 S. Car. 590; 23 S. E. 950 (to A for life and at her death "to such issue of her body" as shall then be living).

<sup>79</sup> *De Vaughn v. Hutchinson*, 165 U. S. 566; *Granger v. Granger*, 147 Ind. 95; 36 L. R. A. 186; *Westcott v. Binford*, 104 Io. 645; *Kiene v. Ginehle*, 85 Io. 312; 52 N. W. 232;

*Zavitz v. Preston*, 96 Io. 52; 64 N. W. 668.

<sup>80</sup> *Granger v. Granger*, 147 Ind. 95; 36 L. R. A. 186.

<sup>81</sup> *Carter v. Reddish*, 32 O. S. 1.

In this case testator devised his real estate to certain named children "to have and to hold the same during their natural lives and to their heirs." No further provision was made of the remainder after the death of the children named as beneficiaries; and it was accordingly held that they took a fee, even under the statute.

<sup>82</sup> *Pearsol v. Maxwell*, 76 Fed. 428, affirming 68 Fed. 513; *Ralston v. Truesdell*, 178 Pa. St. 429; *Du Pont v. Du Bose*, 52 S. C. 244.

to A, his heirs and assigns, providing that, if he should die leaving no heirs, it should go to another, is held to create an estate-tail.<sup>83</sup> A devise to A "and her issue and their heirs" pass an estate-tail to A.<sup>84</sup> So where words are used showing an intention to devise an estate of inheritance, but limited by gift over in case of dying without issue, and the phrase "without issue" is so used as to import an indefinite failure of issue, this was held to pass an estate-tail.<sup>85</sup> So, a gift to A and his "issue," or words of similar import, has uniformly been held to pass an estate-tail, where the context does not show an effective intent to give A a life estate only.<sup>86</sup> The law, however, prefers to construe a will so as to create an estate in fee instead of an estate in fee-tail, where the language used in the will is ambiguous.<sup>87</sup>

### §567. The Rule in Wild's Case.

An old and well-recognized rule, which takes its name from one of the early English cases in which it was recognized and applied (Wild's Case, 6 Rep. 17), is that a devise to A and his children, A at that time having no children, is equivalent in effect to a devise to A and to the heirs of his body.<sup>88</sup> Such a form of devise, accordingly, created an estate-tail.

<sup>83</sup> Chesebro v. Palmer, 68 Conn. 207.

<sup>84</sup> Harkness v. Corning, 24 O. S. 416.

<sup>85</sup> Barber v. Pittsburg, etc., Ry. Co. 166 U. S. 83; Barber v. Pittsburg, etc., Ry. Co. 69 Fed. 501; St. John v. Dann, 66 Conn. 402; Turrill v. Northrop, 51 Conn. 33; Gonzales v. Barton, 45 Ind. 295; Fisk v. Keene, 35 Me. 349; Simons v. Simons, 112 Mass. 157; Brown v. Hospital, 155 Mass. 323; Patterson v. Madden, 54 N. J. 714; 33 Atl. 51; Lawrence v. Lawrence, 105 Pa. St. 335; Sheeley v. Neidhammer, 182 Pa. St. 163; Palethorp v. Palethorp, 194 Pa. St. 408; Bailey v.

Hawkins, 18 R. I. 573; Holden v. Wells, 18 R. I. 802.

<sup>86</sup> Slater v. Dangerfield, 15 M. & W. 263; Hockley v. Mawbry, 1 Ves. Jr. 143; O'Byrne v. Feeley, 61 Ga. 77; Jackson v. Jackson, 153 Mass. 374; King v. Savage, 121 Mass. 303; Patterson v. Madden, 54 N. J. Eq. 714; Wistar v. Scott, 105 Pa. St. 200.

<sup>87</sup> Collins v. Collins, 40 O. S. 353.

<sup>88</sup> Tate v. Clark, 1 Beav. 100; Hood v. Dawson, 98 Ky. 285; Bentz v. Maryland Bible Soc. 86 Md. 102; Crawford v. Forest Oil Co. 77 Fed. 534; Silliman v. Whitaker, 119 N. C. 89; Cote v. Von Bonnhorst, 41

**§568. Modern statutory rules.—Fee-tail changed to fee-simple.**

The policy of modern legislation, being opposed to restraint upon alienation generally,<sup>89</sup> has in most states greatly changed the nature of an estate-tail, or, to speak more exactly, has provided that words, which at common law would create an estate-tail, would henceforth create other and different estates therein specified. The statutes are not unanimous as to what estate these words shall create, however. In some states the first taker takes a fee-simple which he may bar by a deed. Under these statutes a deed by the first taker conveying the property has practically the effect of a common recovery at the common law.<sup>90</sup>

**§569. Modern statutory rules.—Fee-tail in first taker. Fee-simple in remainderman.**

In other states the first taker takes a life estate only, with a remainder in fee-simple to the person who would take at his decease.<sup>91</sup> In other states the first taker takes an estate-tail; that is, an estate of inheritance subject to dower and curtesy, but an estate whose disposition he can not control beyond his own life by deed or will,<sup>92</sup> with remainder in fee-simple to those who would take under the gift at his death.

**§570. Life estates in realty.—Created by express words.**

Under common law a devise was *prima facie* a devise for the life of the devisee, unless a contrary intention appeared in the will.<sup>93</sup> This rule has been changed in most jurisdic-

Pa. St. 243; Blair v. Miller, 30 W. N. C. 486.

<sup>89</sup> See Sec. —.

<sup>90</sup> Slayton v. Blount, 93 Ala. 575; Granger v. Granger, 147 Ind. 95; 36 L. R. A. 186; Leathers v. Gray, 101 N. Car. 162; Silliman v. Whitaker, 119 N. Car. 89; Bodine v. Arthur, 91 Ky. 53; 34 Am. St. Rep. 162; Robinson's Estate, 149 Pa. St. 418; Sheeley v. Neidhammer, 182 Pa. St. 163.

<sup>91</sup> St. John v. Dann, 66 Conn. 401; Welliver v. Jones, 166 Ill. 80; Wood v. Kice, 103 Mo. 329; Kelso's Estate, 69 Vt. 272; 37 Atl. 747.

<sup>92</sup> Pollock v. Speidel, 17 O. S. 439; Harkness v. Corning, 24 O. S. 416; Pollock v. Speidel, 27 O. S. 86; Phillips v. Herron, 55 O. S. 478. See Sec. 560.

<sup>93</sup> McAleer v. Schneider, 2 App. D. C. 461.

tions, and a devise is now *prima facie* a devise of the entire interest of testator in the property devised, unless a contrary intention appears in the will.<sup>94</sup> This contrary intention may be manifested in many different ways. A devise to one to hold "during his life" or "for the full term of his natural life," or by any similar expression, will pass a life estate only, unless modified by some other provision of the will.<sup>95</sup> So a devise to one "for his life and the life of his heir" gives him a life estate, followed by an estate to the person who should be determined to be his heir at the time of his death.<sup>96</sup> So a devise to A "and to his children" has been held to be an estate to A for life, remainder to his children.<sup>97</sup> So, where the Rule in Shelley's Case is not in force, a life estate is created by a gift to one for life, with remainder to his heirs.<sup>98</sup> An estate may also be created to last during the lifetime of some one other than the tenant. In wills this estate *pur auter vie*, is usually created by a gift to members of a class for the life of one member.<sup>99</sup> Such estate may be expressly created by a gift to A for the life of B.<sup>100</sup>

Where testator's intention to pass a freehold is clear from the context, the use of the word "loan" instead of "give" or

<sup>94</sup> See Sec. 562.

<sup>95</sup> *Smith v. Runnels*, 97 Io. 55; 65 N. W. 1002; *Stivers v. Gardner*, 88 Io. 307; *Everett v. Croskrey*, 92 Io. 333; *Perry v. Bowman*, 151 Ill. 25; *McGraw v. Minor* (Ky.), 15 S. W. 6; *McConnell v. Wilcox*, — Ky. — (1890); 12 S. W. 469; *Louisville Trust Co. v. Todd*, — Ky. —; 22 S. W. 438; *Young v. Morehead*, 94 Ky. 608; *Lindemeier v. Lindemeier*, 91 Ky. 264; *Cousino v. Cousino*, 86 Mich. 322; *Sillocks v. Sillocks*, 50 N. J. Eq. 25; *Brook's Will* (N. Car.), (1899), 34 S. E. 265; *Hull v. Hull*, 16 Ohio C. C. App. 688; 9 Ohio C. D. 19; *Swartz v. Gehring*, 11 Ohio C. C. 625; *Hugh's Estate*, 136 Pa. St. 222, 236; *Reynold's Estate*, 175 Pa. St.

257; *Howe v. Gregg*, 52 S. C. 88; *Harrison v. Foote*, 9 Tex. Civ. App. 576.

<sup>96</sup> *In re Amos* (1891), 3 Ch. 159.

<sup>97</sup> *Crawford v. Forest Oil Co.* 77 Fed. 534.

<sup>98</sup> *King v. Evans*, 24 Can. S. C. R. 356; *Rosenau v. Childers*, 111 Ala. 214; 20 So. 95; *Thomas v. Miller*, 161 Ill. 60; *Zavitz v. Preston*, 96 Io. 52; 64 N. W. 668; *Rice v. Moyer*, 97 Io. 96; 66 N. W. 94; *Defreese v. Lake*, 109 Mich. 415; *Wood v. Wood*, 45 S. Car. 590; 23 S. E. 950.

<sup>99</sup> *Madison v. Larmon*, 170 Ill. 65; *Comly's Estate*, 136 Pa. St. 153.

<sup>100</sup> *Stevenson v. Stevenson*, 91 Ky. 50.

“devise” does not cut the estate given to any less estate.<sup>101</sup> A gift to A expressly for life is not cut down to an estate for the life of another by a direction to the life tenant to support such other.<sup>102</sup>

### §571. Estates for widowhood.

A life estate may also be created by a devise to the widow of testator “during her widowhood” or “during the time she lives a widow” or some similar expression.<sup>103</sup> The interest conveyed by such a devise is a conditional one, since restraint upon second marriages are enforced, and terminates either with the death or remarriage of the devisee.<sup>104</sup> A similar estate is created by a devise to a husband with a devise over upon his death or remarriage.<sup>105</sup>

### §572. Life estate created by gifts over.

A life estate may also be created by a gift to the first taker with remainder over to others upon his death, where such will does not clearly bestow a fee in the first. As the persons to whom the remainder over is given are usually the heirs or issue of the first tenant, the rule must be modified in such cases by limiting it to jurisdictions where the Rule in Shelley’s Case is not in force, or to such states where the Rule in Shelley’s Case is in force as have treated a failure of issue as definite rather than indefinite.<sup>106</sup>

<sup>101</sup> Woodley v. Findlay, 9 Ala. 716; Ewing v. Standefer, 18 Ala. 400; Lloyd v. Rambo, 35 Ala. 709; Holt v. Pickett, 111 Ala. 362; Britt v. Rawlings, 87 Ga. 146; Robertson v. Hardy, — Va. —, 1896; 23 S. E. 766.

<sup>102</sup> Rigelow v. Barr, 4 Ohio, 358.

<sup>103</sup> Evan’s App. 51 Conn. 435; Rose v. Hale, 185 Ill. 378; Siddons v. Cockrell, 131 Ill. 653; Roberts v. Roberts, 140 Ill. 345; 29 N. E. 886; Levensgood v. Hoople, 124 Ind. 27; Fuller v. Wilbur, 170 Mass. 506; Mansfield v. Mansfield, 75 Me.

509; Nash v. Simpson, 78 Me. 142; Beddard v. Harrington, 124 N. C. 51; Cooper v. Cooper, 56 N. J. Eq. 48; Miller v. Gilbert, 144 N. Y. 68; Brotzman’s App. 133 Pa. St. 478; Cooper v. Pogue, 92 Pa. St. 254.

<sup>104</sup> See cases cited in preceding note. See Sec. 681.

<sup>105</sup> Stivers v. Gardner, 88 Io. 307.

<sup>106</sup> Terrell v. Reeves, 103 Ala. 264; Rosenau v. Childers, 111 Ala. 214; Healey v. Eastlake, 152 Ill. 424; Turner v. Wilson, 55 Ill. App. 543;

No set rule can be laid down for determining whether testator's intention, in making a devise over after the death of the devisee to whom an estate in fee has already been given, is to restrict the interest of the first taker to a life estate or to create a fee which lacks certain necessary incidents. This intention must be gathered from the whole will. It seems well settled, however, that a devise of any "unexpended part," or a devise of "whatever is left," shows that testator intended the first taker to have a fee, since power of absolute alienation is recognized, although not expressly conferred.<sup>107</sup>

### §573. Life estate created by directions to support, etc.

In cases of doubt the purpose and object of testator in making a devise may be of importance, although, of course, where an intention is clearly to give a certain estate, the court will not ignore the will and create a different estate merely because the court may think some other disposition better suited to the accomplishment of the purpose of testator than the one actually made.<sup>108</sup> Accordingly, where an estate is given to one in such terms as to make its duration doubtful, a provision showing that the devise was intended for the support

Eubank v. Smiley, 130 Ind. 393 ("to do with and dispose of after my decease as she thinks best"; at her death the real estate to be "equally divided among my heirs"); Williams v. Duncan, — Ky. —; 17 S. W. 330; Adams v. Adams, Ky. (1898); 47 S. W. 335; Hopkins v. Keazer, 89 Me. 347; Rodney v. Landau, 104 Mo. 251; Hull v. Hull, 16 Ohio C. C. App. 688; 9 Ohio C. D. 19; Wood v. Wood, 45 S. Car. 590; Downes v. Long, 79 Md. 382; Eldred v. Shaw, 112 Mich. 237; Schorr v. Carter, 120 Mo. 409; Dunning v. Burden, 114 N. C. 33; Lewis v. Bryce, 187 Pa. St.

362; Anderson v. Anderson, 164 Pa. St. 338; Peirce v. Hubbard, 152 Pa. St. 18; Nes v. Ramsey, 155 Pa. St. 628; O'Rourke v. Sherwin, 156 Pa. St. 285; Gadsden v. Desportes, 39 S. C. 131; Dwight v. Eastman, 62 Vt. 398; Robinson v. Robinson, 89 Va. 916; Allen v. Boomer, 82 Wis. 364; Jones v. Jones, 66 Wis. 310; Littlewood's Will, 96 Wis. 608; 71 N. W. 1047.

<sup>107</sup> Howard v. Carusi, 109 U. S. 725; Burleigh v. Clough, 52 N. H. 267; Bentz v. Fabian, 54 N. J. Eq. 615; Wolfer v. Hemmer, 144 Ill. 554.

<sup>108</sup> See Sec. 460.

of the beneficiary during his life may determine that the estate given was only a life interest.<sup>109</sup>

On the other hand, a gift to testator's widow, with power to manage the property so as to educate the children during her lifetime or widowhood, gives her an estate for life or widowhood, without reference to the time at which the children come of age.<sup>110</sup> So, where testator provided in his will that certain land should be "loaned" to his wife in lieu of dower, it was held that such expression clearly showed that he intended her to have only a life interest.<sup>111</sup> The intention to create a life estate only is especially clear where there is a gift over to another upon the death of the person for whose support the property is said in the will to be devised. Such form of devise is always held to pass a life estate only.<sup>112</sup>

#### §574. Language restricting a fee to a life estate.

Since a will is to be construed as a whole, and effect given to every part of it where possible, and in case of irreconcilable conflict the last clause is to prevail, it follows that it is possible, by subsequent words in a will, to reduce a fee previously given to a life estate.<sup>113</sup> Thus a provision "I devise and bequeath to my wife certain property; at her death it goes to her daughter" shows that testator's wife is to receive only a life-estate.<sup>114</sup> So a gift to A, apparently in fee, followed

<sup>109</sup> *Fields v. Bush*, 94 Ga. 664; *Perkins v. Stearns*, 163 Mass. 247; *Smathers v. Moody*, 112 N. C. 791; *Hays v. Davis*, 105 N. C. 482; *Taylor v. Bell*, 158 Pa. St. 651; *Patton v. Church*, 168 Pa. St. 321 ("for a family home during widowhood").

<sup>110</sup> *Fields v. Bush*, 94 Ga. 664.

<sup>111</sup> *Britt v. Rawlings*, 87 Ga. 146.

<sup>112</sup> *Weaver v. Weaver*, — Ky. — (1892); 18 S. W. 228; *Brand v. Rhodes*, — Ky. — (1895); 30 S. W. 597; *Frank v. Unz*, 91 Ky. 621; *Ladd v. Chase*, 155 Mass. 417; *Rose v. Eaton*, 77 Mich. 247; *Barnes v. Marshall*, 102 Mich. 248; *Smathers v. Moody*, 112 N. C. 791; *Mazu-*

*rie's App.* 132 Pa. St. 157; *Pres. Board of Foreign Missions v. Culp*, 151 Pa. St. 467; *Taylor v. Bell*, 158 Pa. St. 651; *Patton v. Church*, 168 Pa. St. 321.

<sup>113</sup> *Imas v. Neidt*, 101 Io. 348; *Wolfer v. Hemmer*, 144 Ill. 554; 28 N. E. 806; *Lomax v. Shinn*, 162 Ill. 124; *Sheet's Estate*, 52 Pa. St. 257; *Pennock's Estate*, 20 Pa. St. 268; *Gaskins v. Hunton*, 92 Va. 528; *Stark v. Lipscomb*, 29 Gratt. (Va.) 322; *Haymond v. Jones*, 33 Gratt. (Va.), 317.

<sup>114</sup> *Rice v. Moyer*, 97 Io. 96; 66 N. W. 94.



by a gift to A which can apply only to the same property, of such property for life, cuts A's interest down to a life estate.<sup>115</sup>

A gift to A of certain property "in fee-simple forever, that is to say that A shall have all the benefits therefrom until the expiration of her life, at which time my son Anton shall be the only heir of real and personal estate what may be left," was held to cut down the fee to a life estate.<sup>116</sup>

An estate in fee given to testator's widow is reduced to a life estate with a possibility of a merger in a fee, in case the widow survives her son, by a subsequent provision that upon the death of either the son or the widow the survivor should have the entire property.<sup>117</sup>

However, language which cuts down an estate in fee to a less estate must be as clear and decisive as the words by which the estate in fee was given in the first instance.<sup>118</sup> Thus a devise in fee is not reduced to a life estate by a subsequent provision that only a life estate shall pass in "my personal estate and whatever belonging to me at my death whatsoever and wheresoever of what nature, kind and quality, soever may be,"<sup>119</sup> nor is a fee cut down to a life estate by a provision that the devisee shall have "the sole control" of the property devised during his lifetime.<sup>120</sup> And a devise to one, and in the event of her death to other named devisees, was held to pass a fee and not a life estate where the evidence disclosed that the first beneficiary was at the point of death at the time the will was executed. In such a case the devise over was held to

<sup>115</sup> *Lomax v. Shinn*, 162 Ill. 124.

<sup>116</sup> *Siegwald v. Siegwald*, 37 Ill. 430.

<sup>117</sup> *Littlewood's Will*, 96 Wis. 608; *Gaskins v. Hunton*, 92 Va. 528.

<sup>118</sup> *Pratt v. Shepard, etc.*, Hospital, 88 Md. 610; *Jones v. Bacon*, 68 Me. 34; 28 Am. Rep. 1; *Gifford v. Choate*, 100 Mass. 343; *Carter v. Gray* (N. J.), 43 Atl. 711; *Banzer v. Banzer*, 156 N. Y. 429; *Collins v. Collins*, 40 O. S. 353; *Pendleton v. Bowler*, 27 Weekly Law

Bull. 313; *Hoeverler v. Hume*, 138 Pa. St. 442; *Keating v. McAdoo*, 180 Pa. St. 5; *Oyster v. Orris*, 191 Pa. St. 606; *Kimball's Will*, 20 R. I. 619; 20 R. I. (Part 3), 224; *Teese v. Kyle*, 96 Va. 387; *Stowell v. Hastings*, 59 Vt. 494; 59 Am. Rep. 748; *Haymond v. Jones*, 33 Gratt. (Va.) 317.

<sup>119</sup> *Banzer v. Banzer* 156 N. Y. 429.

<sup>120</sup> *Snyder v. Baer*, 144 Pa. St. 278; 13 L. R. A. 359.

be conditioned upon the death of the beneficiary during the lifetime of testator.<sup>121</sup>

Where testator devises realty to one, with suggestions as to its ultimate disposition by devisee, which do not amount to a precatory trust, the devisee takes a fee-simple.<sup>122</sup> So a provision that certain real estate devised to A "shall be for their use and support during their natural lives, and at their death shall descend to their children, if any; if no children, then to descend to the brothers and sisters and their children," was held to give a fee.<sup>123</sup>

So a gift to A "in fee," followed by a provision that if A should die without issue "the estate . . . . above given for life shall go to such persons as it would go by law if they had an estate in fee and should die intestate," gives A a fee.<sup>124</sup> Where the words are mandatory and not precatory, however, the estate given may be cut down to a life estate.<sup>125</sup>

### §575. Effect of conferring power to dispose of property.

It not infrequently happens that testator confers either special or limited powers of disposing of property upon one who has an estate in such property. Some interesting questions are presented as to what effect conferring such power has upon duration of the estate given by the will. Where the estate given by the will is clearly a fee, this estate is not cut down to a life estate or any less interest by the fact that

<sup>121</sup> *Green's Estate*, 140 Pa. St. 253.

<sup>122</sup> *Rogers v. Winklepleck*, 143 Ind. 373 (a gift of property to A "subject to a division among aforesaid heirs, at her death, in accordance with their obedience to her, as she shall deem proper," held a fee). *Taylor v. Brown*, 88 Me. 56 (a devise to A, "at her decease what remains I wish to be equally divided" between certain persons). *Beilas's Estate*, 176 Pa. St. 122; *Heck's Estate*, 170 Pa. St. 232.

<sup>123</sup> *Potts v. Kline*, 174 Pa. St. 513. So *Hilger v. Dolle*, — Ky. —, 1896; 37 S. W. 492.

<sup>124</sup> *Briscoe v. Briscoe*, — Ky. —, 1896; 32 S. W. 212.

<sup>125</sup> *Nunn v. O'Brien*, 83 Md. 198 (a gift to A followed by a direction that he "shall arrange his affairs that at his death whatever remains of said residue shall go to my son.") *Bates v. Zinsmeister*, 26 O. S. 461.

testator, out of abundant caution, has thought it necessary to give specific power of disposition to the tenant.<sup>126</sup>

And where the testator's intention to give a fee clearly appears upon the will, his attempt to direct the course of descent upon the death of the first taker is repugnant to the nature of the estate and void.<sup>127</sup>

Where a will is so drawn as to leave it doubtful whether a life estate or a fee simple was intended to be conveyed, the addition of powers of alienation and disposition of the property devised may be very useful in determining testator's intent. It is not safe, however, to lay down the general rule that the addition of these powers is always conclusive that the estate created is a fee. If the will shows that the testator, in enumerating the powers, was describing the estate, and if the powers thus enumerated constitute substantially the incidents of absolute ownership, the estate will be held to be a fee.<sup>128</sup> So a gift of an ambiguous estate, coupled with a power of absolute disposal, passes the fee.<sup>129</sup>

On the other hand, if the will is drawn so as to show that testator intended, in his enumeration of powers, to add to the

<sup>126</sup> *New Eng. Mortgage Security Co. v. Buice*, 98 Ga. 795; *Veeder v. Meader*, 157 Mass. 413; *Forbes v. Darling*, 94 Mich. 621; *Cressler's Estate*, 161 Pa. St. 427; *Good v. Fichthorn*, 144 Pa. St. 287; *Bradley v. Carnes*, 94 Tenn. 27.

<sup>127</sup> *Bradley v. Carnes*, 94 Tenn. 27. See Sec. 576: Such as was an attempt by testator to compel the devisee in fee, to make a specific disposition of the property devised, by such devisee's will. *Good v. Fichthorn*, 144 Pa. St. 287.

<sup>128</sup> *Brandt v. Virginia Coal Co.* 93 U. S. 326; *Elyton Land Co. v. McElrath*, 53 Fed. 763; *Peckham v. Lego*, 57 Conn. 553; *Glover v. Stillson*, 56 Conn. 316; *Welsh v. Wood-*

*bury*, 144 Mass. 542; *Pratt v. Douglass*, 38 N. J. Eq. 516; *Rodenfels v. Schumann*, 45 N. J. Eq. 383; *McClellan v. Larchar*, 45 N. J. Eq. 17; *Dodson v. Sevans*, 52 N. J. Eq. 611; *Contine v. Brown*, 17 Vr. 599; *Borden v. Downey*, 6 Vr. 74; 7 Vr. 460; *Dutch Church v. Snock*, Sax. 148; *Annin v. Vandoren*, 14 N. J. Eq. 135; *Sharp v. Humphreys*, 1 Harr. 25; *Armstrong v. Kent*, 1 Zab. 509; 2 Hal. Ch. 559.

<sup>129</sup> *Snyder v. Baer*, 144 Pa. St. 278; 13 L. R. A. 359 (a gift to A with "power to dispose of the same by bequeath, or as she directs"); *Kieffel v. Keppler*, 173 Pa. St. 181.

estate already devised, and if the exercise of all these powers is necessary to absolute ownership, it will then be held that he did not intend to pass a fee simple.<sup>130</sup>

**§576. Gift of life estate with power to dispose of remainder.—**  
**When held life estate.**

If testator devises an estate which is clearly a life estate, and adds to such devise limited powers of disposition and alienation, the authorities are nearly unanimous in holding that such a power of disposition does not enlarge the life estate into a fee, but that the estate created is exactly what it purports to be; that is to say, a life interest with power to testator under certain conditions and in certain methods to dispose of the fee.<sup>131</sup>

The limitation upon the power of disposition, in most of the cases cited in the preceding note, consists in a restriction

<sup>130</sup> *Pellizzaro v. Reppert*, 83 Ia. 497; *Robeson v. Shotwell*, 55 N. J. Eq. 318; *Stableton v. Ellison*, 21 O. S. 527.

<sup>131</sup> *Mansfield v. Shelton*, 67 Conn. 390; *Hull v. Holloway*, 58 Conn. 210; *Peckham v. Lego*, 57 Conn. 553; 7 L. R. A. 419; *Wetter v. Walker*, 62 Ga. 142; *Rusk v. Zuck*, 147 Ind. 388; *Rowley v. Sanns*, 141 Ind. 179; *Proctor's Estate*, 95 Io. 172; *Stumpenhousen's Estate*, 108 Io. 555; *Jones v. Jones*, 93 Ky. 532; *McCallister v. Bethel* (Ky.), 29 S. W. 745; 16 Ky. L. Rep. 774; *Mills v. Bailey*, 88 Md. 320; *Collins v. Wickwire*, 162 Mass. 143; *Chase v. Ladd*, 153 Mass. 126; *Glover v. Reid*, 80 Mich. 228; *Gadd v. Stoner*, 113 Mich. 689; *Jones v. Deming*, 91 Mich. 481; *Greffet v. Willman*, 114 Mo. 106; *Jackson v. Robins*, 16 Johns (N. Y.), 537 (one of the leading American cases on this subject); *McClure's Will*, 136 N. Y. 238; *Swarthout v. Ranier*, 143 N.

Y. 499; *Langley v. Tilton*, 67 N. H. 88; *Corey v. Corey*, 37 N. J. Eq. 198; *Stephens v. Flower*, 46 N. J. Eq. 340; *Bradway v. Holmes*, 50 N. J. Eq. 311; *Hensler v. Senfert*, 52 N. J. Eq. 754; *Robeson v. Shotwell*, 55 N. J. Eq. 318, affirmed 55 N. J. Eq. 824; *Borden v. Downey*, 6 Vr. (N. J.), 74; 7 Vr. (N. J.), 460; *Wooster v. Cooper*, 53 N. J. Eq. 682; 33 Atl. 1050; *Donley v. Shields*, 14 Ohio, 359; *Stableton v. Ellison*, 21 O. S. 527 *Hinkle's Appeal*, 116 Pa. St. 490; *Machemer's Estate*, 140 Pa. St. 544; *Yetter's Estate*, 160 Pa. St. 506; *Rhode Island, etc., Trust Co. v. Commercial National Bank*, 14 R. I. 625; *In re Tilton* (R. I.), 44 Atl. 223; *Bradley v. Westcott*, 13 Ves. 452; *Parks v. American, etc., Miss. Soc.* 62 Vt. 19; *Miller v. Potterfield*, 86 Va. 876; *Cresap v. Cresap*, 34 W. Va. 310; *Derse v. Derse*, 103 Wis. 113.

to sell only so much of the property devised as may be necessary for the support and maintenance of the life tenant.<sup>132</sup> Under such a devise the life tenant can not dispose of the property by will unless this power is especially conferred upon him and at his death it will not descend to his heirs.<sup>133</sup> He can use only so much of such property as is necessary for his reasonable support and maintenance, and he will not be allowed to waste or squander the estate.<sup>134</sup> And if the life tenant should deed the property fraudulently and gratuitously the persons entitled under the will to what is left of the estate at the death of the life tenant may maintain a suit to compel a conveyance of the property from the grantee to themselves.<sup>135</sup>

A power of sale intended to be exercised for the support of the widow and children does not authorize the donee of the power to transfer the property to some of the children to the exclusion of others.<sup>136</sup>

The power of appointment can not extend a life estate into a fee if limited in any other manner,<sup>137</sup> as where the right to sell is limited to a right to sell with the consent of some other person;<sup>138</sup> or where power to sell is given in order to provide for reinvestment of the proceeds.<sup>139</sup>

Where the testator devises land for life, and confers upon the life tenant an absolute and unlimited power of disposition of the property thus devised, there is very serious conflict of

<sup>132</sup> Chase v. Ladd, 153 Mass. 126; Bradway v. Holmes, 50 N. J. Eq. 311; McGavock v. Pugsley, 12 Heiss. 689; Poole v. Poole, 10 Lea. 486; Downing v. Johnson, 5 Cold. 229; Parks v. American, etc., Miss. Soc. 62 Vt. 19; Cresap v. Cresap, 34 W. Va. 310, and other cases cited in the preceding note.

<sup>133</sup> See cases cited in preceding notes.

<sup>134</sup> Glover v. Reid, 80 Mich. 228.

<sup>135</sup> Johnston v. Johnston, 51 O. St. 446; Shible v. Ely, 2 Halst. (N. J. Eq.), 181.

<sup>136</sup> Huston v. Craighead, 23 O. S. 198; Cassidy v. Hynton, 44 O. S. 530; Johnson v. Johnson, 51 O. S. 446.

<sup>137</sup> Hensler v. Senfert, 52 N. J. Eq. 754.

<sup>138</sup> Greffet v. Willman, 114 Mo. 106; McClure's Will, 136 N. Y. 238; Deadrick v. Armour, 10 Hum. 588.

<sup>139</sup> Machemer's Estate, 140 Pa. St. 544.

authority, caused in part by peculiarities of statute law in some states, as to whether such a devise gives a life estate with power of disposition, or a fee-simple. There can be no question that the real intent of testator in such cases is merely to give a life interest, power of disposition being added, generally, to provide for the maintenance of life tenant, but no restriction of any sort being imposed upon the method of disposition. The weight of authority upon this point is that such a devise gives only a life estate.<sup>140</sup> If the life tenant does not exercise the power thus conferred by will it passes to the persons designated by the will as remaindermen after the life estate.<sup>141</sup> If the life tenant exercises his power of disposing of the property in the manner authorized

<sup>140</sup> *Smith v. Bell*, 6 Pet. U. S. 68; *Giles v. Little*, 104 U. S. 291; *Roberts v. Lewis*, 153 U. S. 367; *Douglass v. Sharp*, 52 Ark. 113; *Patty v. Goolsby*, 51 Ark. 61; *Morfew v. Ry. Co.*, 107 Cal. 587; *Mansfield v. Shelton*, 67 Conn. 390; *Wilson v. Wright*, 91 Ga. 774; *In re Proctor*, 95 Io. 172; *Lomax v. Shinn*, 162 Ill. 124; *Skinner v. McDowell*, 169 Ill. 365; *Wolfer v. Hemmer*, 144 Ill. 554; 28 N. E. 806; *Wiley v. Gregory*, 135 Ind. 647; *Jenkins v. Compton*, 123 Ind. 117; *Rusk v. Zuck*, 147 Ind. 388; 46 N. E. 674; *Bowser v. Matler*, 137 Ind. 649; 137 Ind. 653; *Crew v. Dickson*, 129 Ind. 85; *Green v. Hewitt*, 97 Ill. 113; *Ernst v. Foster*, 58 Kan. 438; *Graham v. Botner*, — Ky. — (1896); 37 S. W. 583; *Jones v. Jones*, 93 Ky. 532; *Payne v. Johnston*, 95 Ky. 175; *McCullough v. Anderson*, — Ky. — (1890); 7 L. R. A. 836; 13 S. W. 353; *Loeb v. Struck* (Ky.), 42 S. W. 401; *Degman v. Degman* (Ky.), 34 S. W. 523; *Sise v. Willard*, 164 Mass.

48; *Baker v. Thompson*, 162 Mass. 40; *Collins v. Wickwire*, 162 Mass. 143; *Kent v. Morrison*, 153 Mass. 137; 10 L. R. A. 756; *Small v. Thompson*, 92 Me. 539; *Lewis v. Pittman*, 101 Mo. 281; *Harbison v. James*, 90 Mo. 411; *Evans v. Folkes*, 135 Mo. 397; *McMillan v. Farrow*, 141 Mo. 55; *Little v. Giles*, 25 Neb. 313; *Rhyne v. Torrence*, 109 N. C. 652; *Long v. Waldraven*, 113 N. C. 337; *Robeson v. Shotwell*, 55 N. J. Eq. 318, affirmed 55 N. J. Eq. 824; *Wooster v. Cooper*, 53 N. J. Eq. 683; *Benz v. Fabian*, 54 N. J. Eq. 615; *Leggett v. Firth*, 132 N. Y. 7; *Shmid's Estate*, 182 Pa. St. 267; *Kennedy v. Kennedy*, 159 Pa. St. 327; *Dye v. Beaver Creek Church*, 48 S. C. 444; *Sires v. Sires*, 43 S. C. 266; *Young v. Mut. Life Ins. Co.* 101 Tenn. 311; *Davis v. Kirksey*, — Tex. — (1896); 37 S. W. 994; *Smythe v. Smythe*, 90 Va. 638; *Thrall v. Spear*, 63 Vt. 266.

<sup>141</sup> See cases cited in preceding note.

by will, it is generally held, on the fair interpretation of the will, that a fee passes to the devisee under the power.<sup>142</sup>

In some cases, however, this power of disposition has been limited to a disposition for the life of the life tenant. Thus, under a devise to testator's wife for life "and to dispose of according to her own free will and judgment, provided that she never marries the second time," it was held that she could not transfer any greater interest than one for her own life.<sup>143</sup>

Where the life tenant is also executor, and a power of sale in the land devised to him as tenant is conferred upon him in his capacity as executor for the benefit of the estate only, the life estate is, of course, not enlarged into a fee;<sup>144</sup> nor is it where the power is conferred upon him as trustee.<sup>145</sup>

**§577. Gift of life estate with power to dispose of remainder.—  
When held fee.**

A life estate with absolute power of disposition of the remainder gives to the life tenant no interest in the remainder which can be reached by his creditors in any way, and yet gives him an opportunity to dispose of this remainder at any time for his own use. Accordingly, it is held in some jurisdictions that such devise vests a fee-simple in the first taker. This holding is generally, however, based upon special statutes, which were intended to enable the creditors of the first taker to reach his interest in the remainder.<sup>146</sup>

<sup>142</sup> *Roberts v. Lewis*, 153 U. S. 367; *Skinner v. McDowell*, 169 Ill. 365; *Bowser v. Matler*, 137 Ind. 649; 137 Ind. 653; *Ernst v. Foster*, 58 Kan. 438; *Hemhauser v. Decker*, 38 N. J. Eq. 426; *Yetzer v. Brisse*, 190 Pa. St. 346; *Dye v. Beaver Creek Church*, 48 S. C. 444; 26 S. E. 717. So he may consume all the personal property if necessary for his support. *Howe v. Fuller*, 19 Ohio, 51.

<sup>143</sup> *Douglass v. Sharp*, 52 Ark. 113; *Patty v. Goolsby*, 51 Ark. 61.

<sup>144</sup> *Robertson v. Robertson*, 120 Ind. 333.

<sup>145</sup> *Neeley v. Boyce*, 128 Ind. 1; *Cook v. Dyer*, 17 R. I. 90.

<sup>146</sup> *Hood v. Bramlett*, 105 Ala. 660; *Adams v. Mason*, 85 Ala. 452; *Alford v. Alford*, 56 Ala. 350 (so at common law as to creditors); *In re Jones* (1898), 1 Ch. 438; 67 L. J. Ch. N. S.; 78 Law Times Reps. 474; *Martin v. Fort*, 83 Fed. Rep. page 19; *Pellizzarro v. Reppert*, 83 Io. 497; *Halliday v. Strickler*, 78 Io. 388; *Hershey v. Meeker County Bank*, 71 Minn. 255; *In re Moer-*

In states taking this view of such a devise, the devisee is regarded as owner of the fee, and may confer upon another the power of disposing of the same;<sup>147</sup> and a limitation over after a devise for life with absolute power of alienation, is repugnant to the nature of the estate and void.<sup>148</sup> In some states, by statute, such a devise is treated as a fee only when there is no remainder over.<sup>149</sup> It is very generally held in these jurisdictions that in order to create a fee, the power must be exclusively for the benefit of the life-tenant. If for the benefit of another or for the benefit of the first taker and others, the estate is not a fee.<sup>150</sup>

A devise to A for life with power to dispose of one-half of the property by will gives A a fee in one-half of the property.<sup>151</sup> A power to dispose of realty by will is absolute power of disposition so as to give the first taker a fee where this rule is in force.<sup>152</sup>

#### §578. Remainders and executory devises.—Definition.

An estate in remainder is an estate created by the same instrument by which a prior estate in the same property is created, to take effect upon the determination of the prior estate.<sup>153</sup>

hing, 154 N. Y. 423; Lepley v. Smith, 13 O. C. C. 189 (an obiter, as the case is decided upon another point); Davis v. Richardson, 10 Yer. 290; Bean v. Myers, 1 Cold. 226; Bradley v. Carnes, 94 Tenn. 27; Turner v. Durham, 12 Lea. 316; Bowman v. Bowman, 87 Va. 354; Farish v. Wayman, 91 Va. 430; Hall v. Palmer, 87 Va. 354; May v. Joynes, 20 Gratt. 692; Carr v. Effinger, 78 Va. 197; Cole v. Cole, 79 Va. 251; Dillard v. Dillard, 78 Va. 208; 21 S. E. 669.

<sup>147</sup> Dillard v. Dillard, 78 Va. 208; 21 S. E. 669.

<sup>148</sup> Pellizzarro v. Reppert, 83 Io. 497; Farish v. Wayman, 91 Va. 430; May v. Joynes, 20 Gratt. 692; Bowen v. Bowen, 87 Va. 438; Hall v. Palmer, 87 Va. 354.

<sup>149</sup> Hood v. Bramlett, 105 Ala. 660.

<sup>150</sup> Johns v. Johns, 86 Va. 333; Miller v. Potterfield, 86 Va. 876.

<sup>151</sup> Hood v. Bramlett, 105 Ala. 660; Adams v. Mason, 85 Ala. 452.

<sup>152</sup> Hood v. Bramlett, 105 Ala. 660; Hershey v. Meeker County Bank, 71 Minn. 255; Jackson v. Edwards, 7 Paige (N. Y.) 386; Freeborn v. Wagner, 49 Barb. (N. Y.), 43; Leonard v. Am. Baptist Miss. Society, 35 Hun (N. Y.), 290; Hume v. Randall, 141 N. Y. 499; Cutting v. Cutting, 86 N. Y. 522; Brown v. Farmers' Loan Co. 51 Hun, 386.

<sup>153</sup> Fleming v. Ray, 86 Ga. 533; Barclay v. Platt, 170 Ill. 384; Rudy's Estate, 185 Pa. St. 359.



An executory devise is an estate created by will to take effect at some time in the future after the death of testator without any reference to the existence or continuance of an intermediate estate.<sup>154</sup> While it is a general rule that a power of disposition in the first taker, by which he might defeat a subsequent estate, prevents the gift of such subsequent estate from operating as a valid executory devise,<sup>155</sup> still a power to the first taker to dispose of the property in some specified manner so as to destroy the ultimate estate, as where a power to devise was impliedly given by making the gift over conditional upon the death of the first taker intestate<sup>156</sup> does not invalidate the executory devise.<sup>157</sup>

### §579. Remainder.—How created.

No particular form of words is necessary in a will to create a remainder. Any expression which shows testator's intent that the prior estate shall cease at the end of a certain time, or upon the happening of a certain event, and that a subsequent estate shall vest in others, creates a remainder.<sup>158</sup> Thus

<sup>154</sup> *Dean v. Dean* (1891), 3 Ch. 150 *In re Thomas*, 30 Ont. Rep. 49; *St. John v. Dann*, 66 Conn. 401; *Glover v. Condell*, 163 Ill. 566; *Bank's Will*, 87 Md. 425; *Fisher v. Wister*, 154 Pa. St. 65; *Selman v. Robertson*, 46 S. Car. 262.

"As applied to land, an executory devise is (such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyance at common law). 2 Washburn on Real Property, 5th Ed. Marg. p. 341." *Glover v. Condell*, 163 Ill. 566.

<sup>155</sup> *Ide v. Ide*, 5 Mass. 500; *Burbank v. Whitney*, 24 Pick. 146; *Burleigh v. Clough*, 52 N. H. 267; *Armstrong v. Kent*, 21 N. J. L. 509; *Jaureche v. Proctor*, 48 Pa. St. 466; *Gillmer v. Daix*, 141 Pa. St. 505.

<sup>156</sup> *Fisher v. Wister*, 154 Pa. St. 65.

<sup>157</sup> See Sec. 575, *et seq.*

<sup>158</sup> *In re Brooke* (1894), 1 Ch. 43; *Smith v Chadwick*, 111 Ala. 542 (1896), 436; *Marshall v. Augusta*, 5 App. D. C. 183 (a devise to be under the exclusive control of A for her life, and on her death to be distributed among her children); *Fleming V. Ray*, 86 Ga. 533; *Tindall v. Miller*, 143 Ind. 337; *Moore v. Hare*, 144 Ind. 573; 43 N. E. 870; *Furnish v. Rogers*, 154 Ill. 569; *Barelay v. Platt*, 170 Ill. 384 (a devise of property to be placed "in the hands of the administrators for the benefit of my daughter and my son, for them and their children should they have any") *Terry v. Bourne*, — Ky —

a devise to the daughters of testator, followed by the statement that it is the wish and desire of testator that at the death of these daughters the property shall descend from them to their children, was held to create a life estate in the daughters with remainder in the children.<sup>159</sup>

A gift to A, remainder to the lawful heirs of her body, and if she dies without lawful heirs, to B, gives B a remainder.<sup>160</sup> A devise to testator's wife for life, and at her death "absolutely to my daughter A, if she still survive. If she shall be deceased, it is my desire that the property do pass to her heirs," gives A a vested remainder at testator's death.<sup>161</sup> A freehold in trust for A for life, and then to A's children, as he should appoint, was held to give an equitable remainder to such children, which is not divested by A's failure to appoint.<sup>162</sup>

As in other cases of construction, testator's intention to determine a particular estate at a given contingency, must be gathered from the whole will and not from disjointed clauses.<sup>163</sup> Thus a remainder over of the shares of three beneficiaries to their children respectively, means upon the death of all of the beneficiaries, and not upon the death of each, where, in another clause of the will, the income from the entire fund is disposed of during the life of the survivor of these beneficiaries.<sup>164</sup>

(1896); 33 S. W. 403; *McQuire v. Moore*, 108 Mo. 267; *Bird v. Gilliam*, 121 N. Car. 326; *Brombacher v. Berking*, 56 N. J. Eq. 251; *Hensler v. Senfert*, 52 N. J. Eq. 754; *Duclos v. Benner*, 136 N. Y. 560; *Shadden v. Hembree*, 17 Or. 14; *Wallace v. Dening*, 152 Pa. St. 251; *Rudy's Estate*, 185 Pa. St. 359; *Simpson v. Cherry*, 34 S. C. 68; *Hurt v. Brooks*, 89 Va. 496.

<sup>159</sup> *Collins v. Williams*, 98 Tenn. 525. This is distinguishable from the cases given in Sec. 574. In those cases the intent was clearly to create a fee, but to direct its de-

scend from the first taker. In this case the intent of testator from the whole will was to create a life-estate only.

<sup>160</sup> *Bird v. Gilliam*, 121 N. Car. 326.

<sup>161</sup> *Tindall v. Miller*, 143 Ind. 337. A similar view of a similar devise is taken in *Moores v. Hare*, 144 Ind. 573; 43 N. E. 870.

<sup>162</sup> *In re Brooke* (1894), 1 Ch. 43.

<sup>163</sup> *Shadden v. Hembree*, 17 Or. 14.

<sup>164</sup> *In re Rubbins* (Ch.), 78 L. T. R. 218.

### §580. Remainder after fee-simple.

A remainder over after a gift of a fee simple, or upon an absolute gift of personal property is void at common law, and this rule is now in force except where specifically modified by statute.<sup>165</sup> The rule that the remainder over is void is applied, however, only where it clearly appears that the first beneficiary is to get an absolute interest. Where it is possible to reconcile the two gifts by construing the first as a life estate only, this will be done.<sup>166</sup>

### §581. Remainder after life estate with power of disposition of fee.

A remainder over after a life estate, in which the life tenant has a power of absolute disposition, is valid as to the property not disposed of, in jurisdictions where such a power does not enlarge the life estate into a fee.<sup>167</sup> Such a remainder is, of course, ended as to property transferred by virtue of the power of disposition;<sup>168</sup> but the proceeds of such sale, no matter how changed in form, pass to the remaindermen if undisposed of.<sup>169</sup>

<sup>165</sup> *Central M. E. Church v. Harris*, 62 Conn. 93; *Glover v. CondeU*, 163 Ill. 566; *Dodson v. Sevars*, 52 N. J. Eq. 611; *Fisher v. Wister*, 154 Pa. St. 65; *Bowen v. Bowen*, 87 Va. 438; *In re Lowman (C. A.)*, (1895), 2 Ch. 348 (where absolute estates are limited over to several in succession, the first of such persons surviving the testator has been held to take absolutely to the exclusion of those whose estates followed his, even though, had any of the beneficiaries in interest preceded survived the testator, he would have received nothing). So a gift over after an absolute gift of personalty is void. *Robertson v. Hardy*, — Va. —, 1896; 23 S. E. 766; *Wilmoth v. Wilmoth*, 34 W. Va. 426.

<sup>166</sup> *Stivers v. Gardner*, 88 Io. 307;

*Wilhelm v. Calder*, 102 Io. 342; *Collins v. Williams*, 98 Tenn. 525.

<sup>167</sup> *Coulson v. Alspaugh*, 163 Ill. 298; *Kenney v. Keplinger*, 172 Ill. 449; *Walker v. Pritchard*, 121 Ill. 221; *Kaufman v. Breckinridge*, 117 Ill. 305; *Hamlin v. U. S. Express Co.* 107 Ill. 443; *Keniston v. Mayhew*, 169 Mass. 166; *Crozier v. Bray*, 120 N. Y. 366.

<sup>168</sup> *Hovey v. Walbank*, 100 Cal. 192.

<sup>169</sup> *Keniston v. Mayhew*, 169 Mass. 166; *Redman v. Barger*, 118 Mo. 568 (and where the life tenant deposited the proceeds of such a sale in a savings bank in her own name in trust for another, it was held that this was not such a disposition of proceeds as to prevent them from passing to the remaindermen).

**§582. Remainder over on condition broken.**

A remainder may be created by a gift over upon condition broken, where the original estate was defeasible by condition subsequent. Thus, a remainder is created by a gift to A in fee, but if, at the time of his death, no issue survive him (or upon any similar contingency, importing a definite failure of issue) then to B.<sup>171</sup> This form of remainder is usually created by a gift to the members of a class, either as a class or individually by name, with a gift over, in case of the death of any one of the members without issue, to the remaining members.<sup>172</sup> In such a devise where A died without issue and his share passed to B and C, the other members of the class, and then B died without issue, it was held that his share received under the will directly, passed to C, but his interest in A's share passed to his heirs.<sup>173</sup>

**§583. Validity of remainder.**

A remainder over is void if it conflicts with the rule against perpetuities, or if it creates an unlawful restraint upon alienation in conflict with the statute of the state where the land is situated.<sup>174</sup> A remainder over may, furthermore, be void because the beneficiary is not sufficiently definite.<sup>175</sup> A remainder is not void because the remaindermen would have taken the property by descent in the absence of a will.<sup>176</sup>

<sup>171</sup> *Rosenau v. Childress*, 111 Ala. 214; *Holcomb v. Wright*, 5 App. D. C. 76; *Johnson v. Johnson*, 128 Ind. 93.

<sup>172</sup> *King v. Frost*, L. R. 15 App. Cas. 548; *Baxter v. Winn*, 87 Ga. 239; *Madison v. Larmon*, 170 Ill. 65; *Best v. Van Hook* (Ky.), 13 S. W. 119; 11 Ky. L. R. 753; *Louisville Driving, etc. Association v. Louisville Trust Co.* (Ky.), 29 S.

W. 866; 16 Ky. L. R. 689; *Davis v. Davis*, 118 N. Y. 411.

<sup>173</sup> *McGee v. Hall*, 26 S. C. 179; see Sec. 677.

<sup>174</sup> *Post v. Rohrbach*, 142 Ill. 600; see Sec. 625.

<sup>175</sup> *Keaney v. Keaney*, 72 Md. 41 (a devise over the death of testator's son "to the next heirs").

<sup>176</sup> *Rowley v. Sauns*, 141 Ind. 179.

#### §584. Waiver of remainder.

Where a remainder is clearly created by will, it is not waived by any conduct of the remainderman in recognition of the rights of the life tenant, not amounting to an estoppel.<sup>177</sup>

#### §585. What property passes in remainder.

The property passed in remainder must be ascertained from the provisions of the entire will.<sup>178</sup> Ordinarily, where a remainder is clearly created, a subsequent provision affecting the property in which the particular estate is created, will have the same effect upon the remainder.<sup>179</sup> And a specific provision for particular property supersedes general provisions not applying specifically to the property in question.<sup>180</sup>

#### §586. Power of life tenant to bind remaindermen.

Where specific pieces of property were devised to two or more for life, with direction to them to equalize their shares, remainder to their respective heirs, it was held that a partition between the life tenants bound the heirs.<sup>181</sup> Property devised to A for life, remainder to her children, may be sold upon the petition of A (who was testator's widow) and her children.<sup>182</sup>

#### §587. Distinctions between interests in severalty, interests in common and joint interests.

In determining the interests passed by will it is often important to ascertain whether testator intended to confer upon beneficiaries, interests in severalty, or in common, or joint

<sup>177</sup> *Durfee v. MacNeil*, 58 O. S. 238; *Semmig v. Mirrihew*, 67 Vt. 38. Pa. St. 501; *In re Lewis*, 17 R. I. 642.

<sup>178</sup> *Keaney v. Keaney*, 72 Md. 41. <sup>181</sup> *Hadley v. Hadley*, 100 Tenn. 446.

<sup>179</sup> *Lyon v. Clawson*, 56 N. J. Eq. 642; *Lyman v. Turner*, 62 Vt. 465. <sup>182</sup> *Ex parte, Yancey*, 124 N. Car. 151. (The objection was made to the sale and title thereunder that A might have other children who would take under the will.)

<sup>180</sup> *Ellis v. Throckmorton*, 52 N. J. Eq. 792; *Hiestand v. Meyer*, 150

interests. If an interest in severalty is created the beneficiary is vested with the only estate created in the property and has exclusive right of possession.

If the interest is one in common, beneficiary has not the exclusive right of possession, but his enjoyment of the property devised is limited by similar rights of others in the same property. The interest of the beneficiary, however, will descend just as a several interest of the same extent of duration would descend.<sup>183</sup>

A joint interest is one in which but one estate is created which vests in all the beneficiaries as one tenant. An incident of this estate and its distinguishing characteristic is the right of survivorship. On the death of a joint tenant, his joint interest survives to the remaining joint tenants, and does not descend as a similar estate held in severalty would descend. So where a joint estate was devised to two upon condition subsequent, which was broken as to one, the entire interest passed to the other.<sup>184</sup>

This statement of the differences between these classes of estates is imperfect, but still is sufficient to show the importance to the beneficiary of distinguishing between them.

**§588. Words creating an estate in common, as distinguished from an estate in severalty.**

Ordinarily testator's intention to create an estate in severalty is so plainly worded as to be easy of enforcement, and unmistakable. In such cases there will, of course, be few express precedents.

An estate in common is sometimes created where testator was attempting unsuccessfully to create an estate in severalty.<sup>185</sup> Thus, where testator owned a tract of land, on the front of which were several buildings, so built that they must be used together, some of which overhung others, and on the rear of which was a building used in connection with all the

<sup>183</sup> *Tompkin's Estate*, 154 N. Y. 634.

<sup>185</sup> *Heller v. Heller*, 147 Ill. 621; *Byrn v. Kleas*, 15 Tex. Civ. App.

<sup>184</sup> *Rockwell v. Swift*, 59 Conn. 289.

205.

buildings in the front of the lot, it was held that a devise of the various buildings by street numbers could not give interests in severalty.<sup>186</sup>

So a devise of a certain number of acres out of a tract, not setting it off by metes and bounds, or otherwise specifying it, gives such devisee an interest in common with the devisee of the residue of the tract.<sup>187</sup> So a gift of income, arising out of an entire tract of realty, may be held to be in common to those to whom the realty itself is devised in severalty. This principle applies with especial force to oil and gas leases.<sup>188</sup>

**§589. Distinction between joint tenancies and estates in common.—Common law rule.**

At common law a devise to two or more was presumed to be a devise to them jointly, unless testator's intention to create an estate in common appeared clearly upon the will. This rule is still in force in most jurisdictions where joint tenancies still exist.<sup>189</sup> Thus a devise to the wife of testator's son and her children was held, in the absence of anything in the will showing a contrary intention, to be a devise in joint tenancy,<sup>190</sup> and a devise to testator's surviving children is held to create a joint tenancy.<sup>191</sup> If testator's intention to create an interest not in its nature joint, appeared on the will, the estate devised to two or more was held to be an estate in common. Thus a devise to several "share and share alike,"<sup>192</sup> or

<sup>186</sup> *Heller v. Heller*, 147 Ill. 621.

<sup>187</sup> *McClure v. Taylor*, 109 N. Car. 641; *Sanderson v. Bigham*, 40 S. Car. 501; *Byrn v. Kleas*, 15 Tex. Civ. App. 205; *Midgett v. Midgett*, 117 N. Car. 8.

<sup>188</sup> Testator devised a tract of land, which was leased as an entirety to an oil company, to several, allotting specific tracts to each. It was held that although all the wells were upon the tract devised to one, the royalties reserved in the lease passing to the devisees in common,

and should be divided among them in proportion to the number of acres devised to each. *Wettengel v. Gormley*, 160 Pa. St. 559.

<sup>189</sup> *In re Yates* (1891), 3 Ch. 53; *In re Atkinson* (1892), 3 Ch. 52; *Binning v. Binning*, 13 Reports, 654; *O'Brien v. Dougherty*, 1 App. D. C. 148; *Noble v. Teeple*, 58 Kan. 398.

<sup>190</sup> *Noble v. Teeple*, 58 Kan. 398.

<sup>191</sup> *O'Brien v. Dougherty*, 1 App. D. C. 148.

<sup>192</sup> *In re Yates* (1891), 3 Ch. 53.

a devise of a remainder to the "respective" heirs of certain life tenants created estates in common. But a devise to "all and every" children did not create an estate in common.<sup>193</sup>

#### §590. Modern statutory rule.

The common law rule that a devise or grant to two or more is presumed to create a joint tenancy has been abolished in many jurisdictions, partly by change in judicial decision, but more generally by statute. In some states joint tenancies have been abolished, and in others it is provided that a devise or grant to two or more shall be presumed to create an estate in common.<sup>194</sup>

#### §591. Definite and indefinite failure of issue.—Distinction and definition.

Where the gift over, in the event of dying without issue, is not substitutional in its nature, and it appears that the death contemplated might take place after testator's death, the question presented for consideration is at what time this failure of issue is to exist. The will may be so worded as to show that the failure of issue spoken of was to occur at the death of a specified person, generally the first taker. Under such a construction the estate granted was a fee simple, conditioned upon the existence of issue of the first taker at the specific time indicated. This was known as a definite failure of issue.<sup>195</sup>

On the other hand, the will might be so worded as to show that testator did not contemplate the failure of issue at any specified time, but that he intended the limitation over to take effect only if the issue of the first taker should ever fail

<sup>193</sup> *Binning v. Binning*, 13 Rep. 654.

<sup>194</sup> *Humason v. Andrews* (Conn.), (1900), 45 Atl. 354; *Bonner v. Hastey*, 90 Ga. 208; *McCord v. Whitehead*, 98 Ga. 381; *Noble v. Teeple*, 58 Kan. 398; *Tompkin's*

*Estate*, 154 N. Y. 634; *Kimberly, in re*, 150 N. Y. 90; *Sturm v. Sawyer*, 2 Pa. Sup. Ct. 254; *Gilman v. Morrill*, 8 Vt. 74.

<sup>195</sup> *Glover v. Condell*, 163 Ill. 566; *Moorehead's Estate*, 180 Pa. St. 119.



at any time in the future. Under such a construction the estate granted was an estate-tail in the first taker with limitation over at the termination of such estate-tail.<sup>196</sup>

**§592. Construction of "dying without issue."—Gifts of personalty.**

The expression "dying without issue," when used with reference to a gift of personal property, has been held *prima facie* to mean issue living at the death of the first taker.<sup>197</sup> Another statement of this rule is that in bequests of personalty the courts seize "slight circumstances," as showing that testator intended an indefinite failure of issue.<sup>198</sup> Thus, a gift over on the death of A "without living issue" has been held to imply a definite failure of issue at the death of A.<sup>199</sup>

**§593. Construction of "dying without issue."—Devises of realty at common law.**

When the testator provides in his will for a devise over in the event of the first taker's "dying without issue," or "dying without heirs of his body," or some similar expression, the common law held quite uniformly, though apparently contrary to the ordinary meaning of the words, that the failure of issue thus indicated was an indefinite failure of issue; hence, under such gift of realty, the first taker took a fee-tail with limitation over to the person indicated; while a gift of personalty passed an absolute interest therein, the courts not recognizing any interest after a fee-tail of personal property.<sup>200</sup>

<sup>196</sup> Barber v. Pittsburg, etc. Ry. Co. 166 U. S. 83; Hoff's Estate, 147 Pa. St. 636; Selman v. Robertson, 46 S. C. 262; Mendenhall v. Mower, 16 S. C. 303; McCorkle v. Black, 17 Rich. Eq. 407; Terry v. Brunson, 1 Rich. Eq. 78; De Treville v. Elis, Bail. Eq. 40.

<sup>197</sup> Moorehead's Estate, 180 Pa. St. 119.

<sup>198</sup> Glover v. Condell, 163 Ill. 566; Ladd v. Harvey, 21 N. H. 514; Bedford's Appeal, 40 Pa. St. 18.

<sup>199</sup> Glover v. Condell, 163 Ill. 566; Smith v. Kimbell, 153 Ill. 368.

<sup>200</sup> Wilson v. Wilson, 46 N. J. Eq. 321; Morehouse v. Cotheal, 1 Zab. 480; Moore v. Rake, 2 Dutch. 574; Chetwood v. Winston, 11 Vr. 337; so "in case of his death . . . without issue"; Barber v. Pittsburg, etc. Ry. Co. 166 U. S. 83; Shearer v. Miller, 185 Pa. St. 149.

In jurisdictions which took the former view of the meaning of "dying without issue," the rule that it imported an indefinite failure of issue was only a *prima facie* rule, and might be rebutted by the context of the will.<sup>201</sup> Thus a provision that upon the death of the beneficiary without issue his share of the estate shall be divided among certain persons who survive him, the reference to survivors fixes the death of the first taker as to the time for determining the failure of issue.<sup>202</sup> So a gift to A, and if she "die without leaving any heir or heirs" to B, was held to import a definite failure of issue.<sup>203</sup>

In accordance with this principle of construction a gift over in case of the beneficiaries' "dying without offspring," was held to impart an indefinite failure of issue, "offspring" being regarded as synonymous with "issue."<sup>204</sup>

#### §594. Modern rule.

This common law construction was so contrary to the intention of the average testator drawing his will without legal advice that it was repudiated from the first by some American courts, and, unless the context of the will clearly called for a different construction, failure of issue was construed as meaning definite failure of issue.<sup>205</sup>

In other states this common law rule has been changed by statute, so that the rule today, in the majority of jurisdictions, is that the use of the words "dying without issue" after words which would give an estate in fee, simply created a fee conditioned upon the existence of issue of the first taker at the

<sup>201</sup> *Wilson v. Wilson*, 46 N. J. Eq. 321; *Moorehead's Estate*, 180 Pa. St. 119.

<sup>202</sup> *Moorehead's Estate*, 180 Pa. St. 119.

<sup>203</sup> *Fairchild v. Crane*, 2 Beav. 105; *Wilson v. Wilson*, 46 N. J. Eq. 321; *Groves v. Cox*, 11 Vr. 40.

<sup>204</sup> *Barber v. Ry.* 166 U. S. 83, citing *Young v. Davies*, 2 Dr. &

Sm. 167. A contrary view was taken of this phrase in the same will by the courts of Pennsylvania. *Mitchell v. Ry.* 165 Pa. St. 645.

<sup>205</sup> *Collins v. Thompson*, — Ky. —, 43 S. W. 227; *Parish v. Ferris*, 6 O. S. 563; *Niles v. Gray*, 12 O. S. 320; *Taylor v. Foster*, 17 O. S. 166; *Smith v. Hankins*, 27 O. S. 371; *Piatt v. Sinton*, 37 O. S. 353.

time designated, which is generally the death of the first taker.<sup>206</sup>

The time at which this failure of issue is to occur may also be the termination of the life estate in some one other than the first taker, as, for example, a grant to testator's wife for life, with remainder over to testator's children, but if they should die without issue, then to others designated.<sup>207</sup> So a gift to the daughter of testator in trust, to be held in trust until her majority when it was to be paid over to her, and in case of her death without lawful issue living, such property to go to certain specified devisees, it was held that the time fixed for the failure of issue was the termination of the minority of the daughter, and that by her "death without issue" was meant her death during her minority.<sup>208</sup>

**§595. Personal property.—Absolute ownership.—Rule in Shelley's Case.**

In bequests of personal property the rule was very different from that obtaining in devises of real estate. A gift of personal property by will was held, if nothing to the contrary appeared in the will, to pass the entire interest which the testator had in such property.<sup>209</sup> At common law, therefore, the question in bequests of personal property was whether

<sup>206</sup> *In re Edwards* (1894), 3 Ch. 644, 64 L. J. Ch. (N. S.), 179; *First National Bank v. De Pauw*, 75 Fed. 775; *St. John v. Dann*, 66 Conn. 401; *Lednum v. Cecil*, 76 Md. 149; *Anderson v. Brown*, 84 Md. 261; *Weybright v. Powell*, 86 Md. 573; *Welch v. Brimmer*, 169 Mass. 204; *Schmaunz v. Goss*, 132 Mass. 141; *Whitcomb v. Taylor*, 122 Mass. 243; *Brightman v. Brightman*, 100 Mass. 238; *Nightingale v. Burrell*, 15 Pickering, 104; *Nowland v. Welch*, 88 Md. 48; *Mullreed v. Clark*, 110 Mich. 229; 68 N. W. 138; *Dunlap v. Fant*, 74 Miss. 197; 20 So. 874; *Brokaw v. Peterson*, 15 N. J. Eq.

194; *Brooks v. Kipp*, 54 N. J. Eq. 462; *Fairchild v. Crane*, 13 N. J. Eq. 105; *Kelley v. Williams*, 113 N. C. 437; *Nes v. Ramsay*, 155 Pa. St. 628; *Shearer v. Miller*, 185 Pa. St. 149; *De Wolf v. Middleton*, 18 R. I. 810; *Bethea v. Bethea*, 48 S. Car. 440.

<sup>207</sup> *Corey v. Springer*, 138 Ind. 506; *Crozier v. Cundall*, 99 Ky. 202; *Dunlap v. Fant*, 74 Miss. 197; 20 So. 1828.

<sup>208</sup> *Colby v. Doty*, 158 N. Y. 323, affirming 92 Hun, 607.

<sup>209</sup> *Mulvane v. Rude*, 146 Ind. 476.

the context of the will showed an intention to giving anything less than the absolute ownership of such property, and, if no such intention appeared, the absolute ownership was held to pass.

This rule applies with even greater force under modern law, where the *prima facie* rule of construction is that testator is disposing of his entire estate. Accordingly, it was held that gifts of personal property are absolute gifts unless something appears in the will to the contrary.<sup>210</sup>

A gift of personalty to A for life, to be divided among her children at her death, with a power to her to give to any of her children anything that "she was able or thinks proper to give," was held to give A absolute ownership of such personalty.<sup>211</sup> The rule that a life estate only passes by a gift of a life estate with full power of disposition is said to apply to personalty as well as to realty.<sup>212</sup>

While the Rule in Shelley's Case could, from its terms, apply only to devises of real property, a corresponding rule was, by analogy, applied to personal property, and a gift of personal property to one for his life, with remainder over to his heirs, was held to pass an absolute interest in the first taker.<sup>213</sup>

The Rule in Shelley's Case was never, even at common law, as arbitrary in gifts of personalty as in devises of real estate. In bequests of personalty, the courts paid more attention to the actual wishes of the testator, and were more likely to treat the estate of the first taker as a life estate with a remainder over to his children or descendants than they were in devises of real property similarly expressed, if the law permitted life estates in such personalty.

Accordingly, it was well settled, even at common law, that

<sup>210</sup> *Browning v. Southworth*, 71 Conn. 224; *Loring v. Hayes*, 86 Me. 351; *Thomae v. Thomae*, — N. J. —; 18 Atl. 355; *Brombacher v. Berking*, 56 N. J. 251; *Washbon v. Cope*, 144 N. Y. 287; *McCune v. Baker*, 155 Pa. St. 503; *Cook v. Bucklin*, 18 R. I. 666; *Bailey v. Hawkins*, 18 R. I. 573.

<sup>211</sup> *Robertson v. Hardy*, — (Va.) — 1896; 23 S. E. 766.

<sup>212</sup> *Godshalk v. Akey*, 109 Mich. 350, 1896; 7 N. W. 336; *Wooster v. Cooper*, 53 N. J. Eq. 682.

<sup>213</sup> *Nealis v. Jack*, N. B. Eq. Cas. 426; *Smith v. McCormick*, 46 Ind. 135.

any gift of personal property, in terms which would pass a fee-simple in realty,<sup>214</sup> or a fee-tail,<sup>215</sup> would pass an absolute interest in personal property. So where the income in personalty is given to one, without limiting it to his life, it is held that absolute ownership of the property from which the income is derived passes to legatee.<sup>216</sup>

A life estate in personalty without any gift over is held in Delaware to pass an absolute interest.<sup>217</sup>

Since the abolition of the Rule in Shelley's Case, a bequest of the income of personal property with remainder over to the heirs and children of the first taker passes merely a life estate to the first taker and not an absolute interest.<sup>218</sup>

### §596. Life interests in personalty.—Possibility of creation.

While at one time it was questioned whether a life estate could be created in personalty, it is now well settled that, as a general rule, such estate may be created.<sup>219</sup>

There are still some exceptions to this general proposition. If the personalty is perishable in its nature, and of such sort that it can be used only by consuming it, a gift to the first taker for life passes the property absolutely.<sup>220</sup> A controlling reason for this view is that if testator wishes to prevent the life tenant from holding the perishable personalty as absolute owner, he may provide in the will for the sale of such property, and to invest the proceeds at interest, the income only to be paid to the first taker.<sup>221</sup>

<sup>214</sup> *Mason v. Pate*, 34 Ala. 379.

<sup>215</sup> *Hughes v. Nicklas*, 70 Md. 484; 14 Am. St. Rep. 377.

<sup>216</sup> *Wellford v. Snyder*, 137 U. S. 521; *Lorton v. Woodward*, 5 Del. Ch. 505; *Brombacher v. Berking*, 56 N. J. Eq. 251.

<sup>217</sup> *Derickson v. Garden*, 5 Del. Ch. 323; *Pepper v. Warrington*, 4 Harr. (Del.) 55.

<sup>218</sup> *Eichelberger's Estate*, 135 Pa. St. 160; *Clemens v. Heckscher*, 185 Pa. St. 476.

<sup>219</sup> *King v. Beck*, 15 Ohio, 559;

*Pruden v. Pruden*, 14 O. S. 251; *Keating v. Reynolds*, 1 Bay (S. Car.), 80; *Williamson v. Hall*, 10 Am. Law Reg. N. S. 466; see Sec. 597 and cases there cited.

<sup>220</sup> *Dunbar v. Woodcock*, 10 Leigh (Va.), 628; *Markley's Appeal*, 132 Pa. St. 352; *Drennan's Appeal*, 118 Pa. St. 176; *Bartlett v. Patton*, 33 W. Va. 71; 5 L. R. A. 523.

<sup>221</sup> In Pennsylvania it is held that a gift of personalty to testator's widow for life is an absolute gift if no trustee is inter-

In many jurisdictions another exception to the general rule exists when a life estate is given to the first taker with absolute power to dispose of the *corpus* of the property if he sees fit. Such a bequest is held to pass an absolute interest in the property to the first taker.<sup>222</sup>

A limited right of disposition as to use such part of the principal as is necessary for the support and maintenance of the first taker does not create an absolute interest in the property.<sup>223</sup> And in such case if the first taker wastes the *corpus* of the property or appropriates it unreasonably, he may be restrained by a court of equity upon complaint of the next taker.<sup>224</sup>

### §597. Life interests in personalty.—How created.

A life interest in personalty may, in most cases, be created by any form of words which expresses testator's intent to create such interest. Thus, after an absolute and unqualified bequest of personal property, a subsequent clause, showing testator's intent to pass but a life interest, will limit and qualify the absolute gift.<sup>225</sup>

The intention of testator to cut down a gift of personalty from an absolute estate to a life estate must be manifest by clear and unmistakable language. And such intention can not be inferred from the fact that the interest was to be a life interest in certain contingencies which did not exist;<sup>226</sup> nor

posed. *Drennan's Appeal*, 118 Pa. St. 176. But where the fund given is mingled personalty and realty a life-estate only in both is created even if no trustee is interposed. *Kane's Estate*, 185 Pa. St. 544.

<sup>222</sup> *Knight v. Knight*, 162 Mass. 460; *Markley's Appeal*, 118 Pa. St. 176; *Gold's Estate*, 133 Pa. St. 495; *Heppenstall's Estate*, 144 Pa. St. 259; *Meacham v. Graham*, 98 Tenn. 190 (1897); 39 S. W. 12.

<sup>223</sup> *Godshalk v. Akey*, 109 Mich.

350; *Tyson's Estate*, 191 Pa. St. 218; *Gross v. Strominger*, 178 Pa. St. 64.

<sup>224</sup> *Little v. Geer*, 69 Conn. 411; see Sec. 598.

<sup>225</sup> *Smith v. Bell*, 6 Pet. U. S. 68; *Hamlin v. United States Express Co.*, 107 Ill. 443; *Peirsol v. Roop*, 56 N. J. Eq. 739; *Gerhard's Estate*, 160 Pa. St. 253; *Byer's Estate*, 186 Pa. St., 186 Pa. St. 404.

<sup>226</sup> *Wellford v. Snyder*, 137 U. S. 521.

can such intention be inferred from an attempt to direct the methods in which the beneficiary shall use the same in his lifetime,<sup>227</sup> or shall dispose of the same at his death;<sup>228</sup> nor from a provision reducing the interest in other chattel property to a life interest.<sup>229</sup>

A life estate may be created by specific direction that the interest shall exist for life only; as for example, the income of a certain fund is to pass to one for his natural life.<sup>230</sup> And this direction may be implied from a direction to trustees to pay "the income only" to a certain person.<sup>231</sup>

A life estate in personal property may also be created by a gift of personal property which, expressly stated to be for life or not, gives the principal, on the death of the first taker, to other beneficiaries named. In order to give effect to every part of such a bequest, the interest of the first taker is construed as a life interest only.<sup>232</sup> Thus, a bequest of one-third of the income of a fund to testator's widow for life and two-thirds to the children for life, with the provision that upon the death of the widow her share of the income shall be payable to the children *pro rata*, and that, in the case of any child dying leaving issue, the *corpus* of the fund representing his share of the income should go to such issue, was held to pass a life estate only in the first taker.<sup>233</sup>

<sup>227</sup> *Holt v. Holt*, 114 N. C. 241.

<sup>228</sup> *Rozell v. Thomas*, Tenn. Ch. App. (1896); 39 S. W. 350.

<sup>229</sup> *Waring v. Boshier*, 91 Va. 286.

<sup>230</sup> *Chubbock v. Murray*, 30 N. S. 23; *Thieme v. Zumpe*, 152 Ind. 359; *Nevin's Estate*, 192 Pa. St. 258; *Ritter's Estate*, 148 Pa. St. 577.

<sup>231</sup> *Winn v. Bartlett*, 167 Mass. 295.

<sup>232</sup> *Gross v. Sheeler*, 7 Houst. Del. 280; 34 Atl. 812; *Holcomb v. Wright*, 5 App. D. C. 76; *Nading v. Elliott*, 137 Ind. 261; *Bedford v. Bedford*, 99 Ky. 273; *Hollyday*

*v. Hollyday*, 74 Md. 458; *Robinson v. Finch*, 116 Mich. 180; *Peirsol v. Roop*, 56 N. J. Eq. 739; *Brombacher v. Berking*, 56 N. J. Eq. 251; *Hooker v. Montague*, 123 N. C. 154; *Howland v. Clendenin*, 134 N. Y. 305; *Noble's Estate*, 182 Pa. St. 188; *Neeley's Estate*, 155 Pa. St. 133; *Gerhard's Estate*, 160 Pa. St. 253; *Byers's Estate*, 186 Pa. St. 404; *Tingley v. Harris*, 20 R. I. 517; *Covar v. Cantelou*, 25 S. C. 35.  
<sup>233</sup> *Brombacher v. Berking*, 56 N. J. Eq. 251; *Howland v. Clendenin*, 134 N. Y. 305.

§598. Life interests in personalty.—Protection of remainderman.

Where personal property is bequeathed to one for life only with remainder over, it sometimes becomes an important question whether the first taker is entitled to the possession and control of the *corpus* of the property, and, if so, whether the first taker must give bond for the repayment of the same at the expiration of the life estate.

Where the property is bequeathed in this way in trust, the first taker has no right to the possession of the *corpus* of the property.<sup>234</sup>

Where the property is given for life, and no trust is created, the beneficiary has a right to the possession of the *corpus* of the property without the intervention of a trustee.<sup>235</sup>

Where a trustee is appointed by will during the minority of the life tenant, the tenant is entitled to the possession of the property on coming of age.<sup>236</sup>

Where personal property is given one for life, without the intervention of a trustee, it is held in some jurisdictions that the life tenant may be required, if he wishes to assume possession of the *corpus* of the property, to give bond for its safe keeping and repayment.<sup>237</sup>

In other jurisdictions it is held that the life tenant is entitled to the possession of the personal property without giving any bond for the repayment of the same, unless some special showing is made which will induce the court in its discretion to require such.<sup>238</sup> In New Jersey it seems to be

<sup>234</sup> LaBar's Estate, 181 Pa. St. 1; Reynold's Estate, 175 Pa. St. 257.

<sup>235</sup> Fox v. Senter, 83 Me. 295; Kuykendall v. Devecmon, 78 Md. 537; White v. Massachusetts Institute of Technology, 171 Mass. 84; Henderson v. Kinard, 29 S. Car. 15.

<sup>236</sup> Kuykendall v. Devecmon, 78 Md. 537.

<sup>237</sup> Pendleton v. Kinney, 65 Conn. 222; Little v. Geer, 69 Conn. 411; Fuller v. Fuller, 84 Me. 475; *In re*

McDougall, 141 N. Y. 21; Meis v. Meis, — (N. J. Eq.) — 1896; 35 Atl. 369. (So by statute, to protect contingent interests.) Allen v. Boomer, 82 Wis. 364.

<sup>238</sup> Hunter v. Green, 22 Ala. 329; Lynde v. Estabrook, 7 Allen, 68; Bethea v. Bethea, 116 Ala. 265; Garrity's Estate, 108 Cal. 463; Godwin v. Watford, 107 N. Car. 168; Weeks v. Jewett, 45 N. H. 540; Hitchcock v. Peaslee, 145 N. Y. 547; Martin v. Martin, 69 Miss. 315; Bierce v. Bierce, 41 O. S. 241;



held that at his option the executor may surrender the personalty to the life tenant without bond,<sup>239</sup> or may exact bond.<sup>240</sup>

Where life tenant has power to dispose of the *corpus* as he sees fit, his right to the possession of the property without giving bond is generally recognized.<sup>241</sup>

Under the Connecticut statutes, bond in this case is held necessary.<sup>242</sup>

Posegate v. South, 46 O. S. 391;  
Lapham v. Martin, 33 O. S. 99;  
Martin v. Lapham, 38 O. S. 538;  
Ratliff v. Warner, 32 O. S. 334.

<sup>239</sup> Rowe v. White, 1 C. E. Gr. 411.

<sup>240</sup> *In re* Ryerson, 11 C. E. Gr. 43.

<sup>241</sup> Langley v. Farmington, 66 N. H. 431; Posegate v. South, 46 O. S. 391.

<sup>242</sup> Security Company v. Pratt, 65 Conn. 161.

This doctrine has been applied even where the life-tenant is a non-resident and is financially irresponsible, it being held that security can be required only upon a showing that the life tenant intends to squander the corpus. Martin v. Lapham, 38 O. S. 538.

## CHAPTER XXVI.

### GIFTS OF INCOME, AND ANNUITIES.

#### §599. Gifts of income in general.

Within the limits of the rule against perpetuities the law recognizes the right of the testator to dispose of the income of his property by will, and gifts of this sort are constantly upheld.<sup>1</sup> And where testator manifests a clear intention, he may give the income separate and apart from the principal, so that the beneficiary has no interest whatever in the property from which the income is derived.<sup>2</sup>

The intention to separate the income from the principal is generally manifested either by creating an express trust or by limiting the interest to a life interest in the income only.<sup>3</sup>

An absolute gift of income is not diminished by subsequent power to use the principal if necessary,<sup>4</sup> nor by the

<sup>1</sup> *Beers v. Narramore*, 61 Conn. 13; *Security Company v. Cone*, 64 Conn. 579; *Pitkin v. Peet*, 87 Io. 268; *Morse v. Morrell*, 82 Me. 80; *Smith v. Greeley*, 67 N. H. 377; *Cain v. Hooper* (N. J. Ch.), 29 Atl. 327; *In re Fisher*, 19 R. I. 53; *Maxwell v. Sargent*, 90 Wis. 352.

<sup>2</sup> *Mackay v. Mackay*, 107 Cal. 303; *Dehaven v. Sherman*, 131 Ill. 115; 6 L. R. A. 745; *Bigelow v. Cady*,

171 Ill. 229; *Nelson v. Nelson*, 57 N. J. Eq. 118; 36 Atl. 280; *Harbster's Estate*, 133 Pa. St. 351; *Eichelberger's Estate*, 135 Pa. St. 160; *Walker v. Gibson*, 164 Pa. St. 512; *Beirne v. Beirne*, 33 W. Va. 663.

<sup>3</sup> See cases cited in preceding note.

<sup>4</sup> *Cowles v. Henry*, 61 Minn. 459.

fact that the beneficiary is given sufficient property for his support by other provisions of the will.<sup>5</sup>

Where by arrangement between testatrix and her husband she directed that the support of certain children should be paid one-half out of her estate and one-half out of that of her husband's, it was held that if the husband should refuse to pay, the entire support of the children should be paid out of the wife's property, drawing upon the principal if necessary.<sup>6</sup>

### §600. For what time income is payable.

Within the limits of the rule against perpetuities, the payment of the income is to extend for as long a period as testator shall designate in his will.<sup>7</sup> The only question involved is that of the intention of testator. Thus, a gift to A absolutely for the life of B, does not terminate with A's death, but the income must be paid to A's administrator.<sup>8</sup>

A gift of income to testator's grandchildren until the youngest comes of age "and as long as one or either of them shall live," was held, in view of the context of the will, to mean "or as long as one or either of them shall live"; and the income was accordingly payable only till the surviving child became of age.<sup>9</sup>

The duration of the time for paying the income may be otherwise modified by the context. Thus a gift of testator's homestead, furniture, and all his residuary property, to A for one year after testator's death, and as much longer as testator should choose to stay and use the same was modified by a subsequent provision of the will that upon the settlement of the estate A was to receive a certain bequest out

<sup>5</sup> Hills v. Putnam, 152 Mass. 123.

<sup>6</sup> Allen v. Boomer, 82 Wis. 364.

<sup>7</sup> *In re Holford* (C. A.) (1894), 3 Ch. 30; Morris v. Bolles, 65 Conn. 45; Angell v. Springfield Home for Aged Women, 157 Mass. 241; New England Trust Company v. Pitkin, 163 Mass. 506; Backus v. Balti-

more Presbyterian Association, 77 Md. 50; Shimer v. Shimer, 50 N. J. Eq. 300; McBride's Estate, 152 Pa. St. 192; Engle's Estate, 166 Pa. St. 280.

<sup>8</sup> Morris v. Bolles, 65 Conn. 45.

<sup>9</sup> Shimer v. Shimer, 50 N. J. Eq. 300.

of the residuary clause, so that the right to use the residuary property under the first clause was held to last only till the estate was settled.<sup>10</sup>

Where testator had provided for the investment of his property so as to produce an income, and then provided for the payment "out of said net income 'of' the sum of \$260 to my father for the term of his natural life," it was held to mean an annual payment.<sup>11</sup>

#### §601. Time from which income is to be estimated.

Where the income given to beneficiary arises from certain securities, the income or dividends upon which are not collected by the trustees or executors until some time after testator's decease, the question arises whether the income should be estimated from testator's death or from the time that the dividends or interest is received by the executor. This is entirely a question of testator's intention. Where he absolutely gives the beneficiary a given income and merely indicates in his will the source from which it is to be obtained, the general rule is that the income in such cases is to be estimated from the death of testator, enough of the capital, if necessary, being retained to pay the income during the period in which the fund is non-productive.<sup>12</sup> This rule holds good even where the first payment is to be made only when "sufficient funds for that purpose shall come" into the hands of the trustee.<sup>13</sup>

But where the bequest is only of the income to be obtained from a certain specified fund, for instance, one to be raised by converting realty into money, it is held that the beneficiary can receive only the actual income when received from such fund.<sup>14</sup>

<sup>10</sup> Angell v. Springfield Home for Aged Women, 157 Mass. 241.

<sup>11</sup> Jenkins v. Guaranty Trust Company, 53 N. J. Eq. 194; 30 Atl. 339.

<sup>12</sup> Griggs v. Veghte, 47 N. J. Eq. 179; Stanfield's Estate, 135 N. Y. 292.

<sup>13</sup> Crew v. Pratt, 119 Cal. 131.

<sup>14</sup> Hite v. Hite, 93 Ky. 257; 40 Am. St. Rep. 189; 19 L. R. A. 173. This is only a special application of the question whether the gift is limited to the income of the fund, or included the right to use the principal if necessary to the comfort of the life-tenant. See Sec. 607.

## §602. Rules for ascertaining income.

A gift of the income generally means a gift of the net income after deducting taxes and other expenses necessary to the preservation of the property from which the income is derived.<sup>15</sup> The testator can, of course, charge the expenses upon some other fund, giving a named beneficiary the gross income;<sup>16</sup> and in such case if the estate is to be distributed before the life estate terminates, sufficient property should be retained to pay the taxes and other expenses during the continuance of the life estate.<sup>17</sup>

So where the education of minors is charged upon testator's estate, the estate may be distributed upon withholding a sum adequate for such education.<sup>18</sup>

The intention of testator to give to the beneficiary the entire income of a given fund must be given full effect. Thus where testator directed that the fund be so invested as to produce 4%, giving authority to trustees to retain any securities they might see fit, without converting them, and the trustees retained some securities which paid 6%, it was held that the beneficiaries were entitled to the entire income, and not merely of 4% upon the par value of the securities.<sup>19</sup>

But a direction to invest a fund so as to produce a certain net income can not impose upon trustee the duty of paying taxes out of his own means.<sup>20</sup>

Where testator bequeathed one-half of the gross income of certain property to his widow and the other half to the heir, charged with taxes and current expenses, it was held that if the taxes and expenses exceeded the heirs's part of the income they must be charged upon that given to the widow.<sup>21</sup>

<sup>15</sup> *Duke of Cleaveland's Estate* (1894 1 Ch. 164); *Heard v. Read*, 169 Mass. 216; *Morse v. Monell*, 82 Me. 80; *Dickinson v. Henderson* (Mich.) (1900), 81 N. W. 583; *Dewey's Estate*, 153 N. Y. 63; *Boggs v. Taylor*, 29 O. S. 172.

<sup>16</sup> *Wordin's Estate*, 64 Conn. 40; *Woodward v. James*, 115 N. Y. 346; *Starr v. Starr*, 132 N. Y. 154.

<sup>17</sup> *Wordin's Estate*, 64 Conn. 40; *In re Fisher*, 19 R. I. 53.

<sup>18</sup> *Neff v. Neff*, 3 Weekly Law Gaz. 67.

<sup>19</sup> *In re Thomas* (1891), 3 Ch. 482.

<sup>20</sup> *Thiebaud v. Tait*, — Ind. (1894) 36 N. E. 525.

<sup>21</sup> *Woodward v. James*, 115 N. Y. 346.

A bequest of an income from a certain business carries with it the profits arising from the sale of property dedicated to such business before testator's death, or entitles beneficiary to the benefit of the consumption of such property, where it is property which is consumed in using.<sup>22</sup>

So a gift of the income of testator's estate for life carries with it the profits of a partnership in which funds of the estate were to be invested.<sup>23</sup>

The appreciation or depreciation of securities in which the funds are invested is usually held to be a risk which must be borne by the parties entitled to the securities subject to the rights of the beneficiary to receive the income for a certain time.<sup>24</sup>

Where the income of a specific fund of \$5,000 was bequeathed to A for life and it was provided that on A's death "the five thousand dollars of which A receives the interest" for life should go to B, it was held that B took the fund as invested and hence any appreciation in the value of the investment enured to B's benefit.<sup>25</sup>

So where executors invest in bonds at the premium, they can not retain the income in order to make the premium pay for such bonds.<sup>26</sup>

But in some states it is held that profit arising from a change of form of investment must be apportioned where by reason of such change there has been a loss or diminution of income. Thus where the fund is invested in a mortgage upon which a foreclosure suit is brought, it has been held that any profit thus made should be apportioned between life tenant and remainderman in the proportion that the principal in-

<sup>22</sup> Allen's Succession, 48 La. Ann. 1036. (A gift of the income of a sugar plantation gave legatee the right to have coal which was stored upon the plantation for use in making sugar, used in such business without paying the estate its value.)

<sup>23</sup> Buckingham v. Morrison, 136 Ill. 437.

<sup>24</sup> Hite v. Hite, 93 Ky. 257; 40

Am. St. Rep. 189; 19 L. R. A. 173; Monson v. New York Security & Trust Company, 140 N. Y. 498; Boyer's Estate, 174 Pa. St. 16.

<sup>25</sup> Boyer's Estate, 174 Pa. St. 16.

<sup>26</sup> Hite v. Hite, 93 Ky. 257. But where executors have by mistake paid the entire income of certain property to A instead of only paying the balance thereof after deducting some annuities, it is held that

vested bears to the arrearages of interest.<sup>27</sup> The same rule is said to apply if there is a deficiency.<sup>28</sup>

But where the fund is invested in more than one security, it is held that profit on one security should be set off against loss on another, and may be withheld for that purpose.<sup>29</sup>

Where the realty, the income of which is bequeathed, is operated for oil, the oil is income and belongs absolutely to the life tenant.<sup>30</sup>

Courts are decidedly at variance upon the question whether stock dividends are to be treated as income or capital. In some states they are treated as merely another form of capital of the corporation; and hence the income only goes to the life tenant, and the stock issued as a dividend goes to the remainderman irrespective of when the dividend is earned.<sup>31</sup>

Where, instead of issuing a stock dividend the right is given to stockholders to subscribe for the new stock at a certain figure, and this right is a valuable one which may be sold, it is held that if the new issue of stock will increase the capital stock of the corporation in which the stock is held, and thereby diminishes the par value of each share, the value of

executors may retain sufficient income to replace the amount thus erroneously paid to the wrong beneficiary. *Hammond v. Hammond*, 169 Mass. 82.

<sup>27</sup> *Parker v. Seeley*, 56 N. J. Eq. 110.

<sup>28</sup> *Hagan v. Platt*, 48 N. J. Eq. 206; *Tuttle's Case*, 49 N. J. Eq. 259.

<sup>29</sup> *Parker v. Johnson*, 37 N. J. Eq. 366.

<sup>30</sup> *Woodburn's Estate*, 138 Pa. St. 606.

It is held, however, that where the realty covered by one oil-lease is devised in severalty and the lease is held to pass to such devisees in common, the devisee of a portion of the land is entitled to have the damage done to the rental value

of his realty for ordinary purposes deducted from the royalties paid by the lessees under the oil-lease before such royalties are distributed among the devisees; but the cost of repairing the permanent injuries to the freehold should be postponed until the termination of the lease. *Wettengel v. Gormley*, 184 Pa. St. 354, following the previous holding in the same case in 160 Pa. St. 559. In Ohio, on the other hand, royalties for the mining of coal are held to be principal. *Brooks v. Hanna*, 19 Ohio C. C. 216.

<sup>31</sup> *Minot v. Paine*, 99 Mass. 101; *Mills v. Britton*, 64 Conn. 4; *In re Brown*, 14 R. I. 371; *Greene v. Smith*, 17 R. I. 28.

this right to subscribe for stock must be charged as capital.<sup>32</sup> But where the right is given to the stockholders of one company to subscribe for stock in another company, and the increase of the capital stock of the second company does not decrease the value of the stock of the first, it is held that such right, even when of money value, is merely incidental, and is to be classed as income, not as principal.<sup>33</sup> In other jurisdictions a stock dividend is held to be income like a cash dividend.<sup>34</sup>

When the trust fund is invested in stocks, cash dividends are usually held to be income, whether ordinary dividends or special distributions.<sup>35</sup> Some courts, however, attempt to apportion the dividend, holding the part of it earned before testator's death to be principal and the part earned subsequently to be income.<sup>36</sup> In other jurisdictions an attempt is made to apportion stock dividends, giving the amount which represents the earnings up to testator's death to the remainderman and the rest to the life tenant.<sup>37</sup>

A gift of the net income of certain realty, which was to be managed in connection with other realty, gives the beneficiary the gross income less taxes, and a proportionate share of the repairs, wages of workmen and salary of agent necessary to keep up the entire realty.<sup>38</sup>

Where executors were directed to manage a plantation so as to pay "taxes and other charges," the rest of the income to be paid to A, it was held that the expenses incurred by testator for the crop standing at the time of his death can not be

<sup>32</sup> Eisner's Estate, 175 Pa. St. 143.

<sup>33</sup> Eisner's Estate, 175 Pa. St. 143; Wiltbank's Appeal, 64 Pa. St. 256.

<sup>34</sup> Hite v. Hite, 93 Ky. 257; 40 Am. St. 189; 19 L. R. A. 173.

<sup>35</sup> Hopkin's Trusts, L. R. 18 Eq. 696; Gibbons v. Mahon, 136 U. S. 549; Gilkey v. Paine, 80 Me. 319; Rand v. Hubbell, 115 Mass. 461;

*In re James*, 146 N. Y. 73: (even when derived from proceeds of the sale of real estate).

<sup>36</sup> Smith's Estate, 140 Pa. St. 344.

<sup>37</sup> Eisner's Appeal, 175 Pa. St. 143; Smith's Estate, 140 Pa. St. 344; Pritchitt v. Trust Co. 96 Tenn. 472.

<sup>38</sup> Duke of Cleveland's Estate (1894) 1 Ch. 164.



deducted from the price of such crop, but the price received less taxes and expenses, after testator's death must be paid to A.<sup>39</sup>

Assessments for sewers and street paving must be deducted from the income under a will providing that "all reasonable repairs and improvements" shall be deducted from the income.<sup>40</sup> But where "taxes" were made payable out of the income given to life tenant, it was held that sewer assessments could not be deducted from such income.<sup>41</sup>

A direction to pay over the income of certain stock after first paying the debts and funeral expenses, does not charge such income with the commissions of executor and the costs of administration in addition.<sup>42</sup>

### §603. Gift of income charged with support of others.

A gift of the income of a fund to A for "his use and benefit, and for the maintenance and education" of other persons named, or any similar form of expression, is generally held to give to A the income of the fund for life, but charged, however, with the duty of supporting and educating the persons designated.<sup>43</sup> In such a case A may sell his interest in the property devised, subject to the liability to support the other beneficiaries.<sup>44</sup>

Whether the court will inquire, in litigation, after the time which the beneficiaries are to be supported has expired, into the question of the sufficiency and adequacy of their support, is a question upon which the courts are not harmonious.<sup>45</sup>

<sup>39</sup> Allen's Succession, 49 La. Ann. 1096.

<sup>40</sup> Warren v. Warren, 148 Ill. 641.

<sup>41</sup> Chambers v. Chambers, 20 R. I. 370.

<sup>42</sup> Nash v. Ober, 2 App. D. C. 304; 22 Wash. L. Rep. 92.

<sup>43</sup> *In re Booth* (1894) 2 Ch. 282; *Hurd v. Shelton*, 64 Conn. 496; *Griffin v. Griffin* (Ky.) (1893), 21 S. W. 38; *Dixon v. Bentley*, 50 N. J. Eq. 486.

<sup>44</sup> *Dixon v. Bentley*, 50 N. J. Eq. 486.

<sup>45</sup> *Forbes v. Darling*, 94 Mich. 621.

(In this case it was held that, after the trust had been fully performed, no inquiry would be permitted into the sufficiency and adequacy of the maintenance and education where there was some sort of maintenance and education given.)

*New England Mortgage Security Co. v. Buice*, 98 Ga. 795. In

### §604. Beneficiaries.

A gift to be expended for the benefit of the family of a designated person does not ordinarily give him the right to control such income as his own property.<sup>46</sup> And unless such gift specifically excludes adult members of the family, they have a right to support out of the income.<sup>47</sup>

On the other hand a gift to testator's widow and children for support, gives the wife a right to support from the income as well as the children.

A gift of income to support testator's family at the homestead is ordinarily held to terminate when the family separate, and is not revived by the fact that some of the members, years after, live at the homestead once more.<sup>48</sup>

The direction to support the beneficiary may be conditioned on beneficiary's receiving the support at the designated place.<sup>49</sup> But such a condition is not to be inferred from an expression of the wish of testator that, if agreeable to all concerned, his parents and sisters were to live with his family after his death.<sup>50</sup>

Under rather peculiar circumstances, a provision that testator's aged and invalid sister and her daughter, who was acting as her nurse, should have a home in testator's house, and that the executors should attend to it, was held to imply a

this case the court held that the interest in remainder vested in the children subject to be divested on their receiving support from their mother; subsequently the mother deeded the property, and, in determining whether the entire interest passed, or whether the vested interest of the children still remained, it was held that the court might enquire into the sufficiency and adequacy of support and education furnished, in order to determine whether the will had been complied with or not). *Forbes v. Darling*, 94 Mich. 621 cites and fol-

lows *Leach v. Leach*, 13 Sim. 304; *Browne v. Paull*, 1 Sim. (N. S.), 92; *Scott v. Key*, 35 Beav. 291.

<sup>46</sup> *Brooks v. Raynolds*, 59 Fed. Rep. 923; *Gaston v. Brokaw* (N. J. Ch.) (1893), 26 Atl. 906.

<sup>47</sup> *Barlow v. Barnard*, 51 N. J. Eq. 620.

<sup>48</sup> *Sheffield v. Parker*, 158 Mass. 330.

<sup>49</sup> *Hopkins v. Coleson*, 158 Mass. 407; (support to be furnished at an old ladies' home).

<sup>50</sup> *Ward v. Ward*, 95 Ala. 331; 10 So. 832; *Tope v. Tope*, 18 Ohio. 520.

direction to furnish at least the absolute necessities of life, including food and fire-wood but not clothing.<sup>51</sup>

A gift of income for the support and education of testator's children, or testator's family, or some similar expression, is ordinarily construed as a direction to keep the income together in one fund, out of which the family is to be supported and educated, unless a contrary intention clearly appears.<sup>52</sup>

#### §605. Whether income or support passes.

One of the interesting questions presented by gifts of income for support is whether the entire income of the fund passes, or only so much thereof as is sufficient for the support of the life tenant. This question becomes very important when there is a considerable excess of income over expenditure, and the question is presented whether it goes to the life tenant or passes as property of the testator. The general rule upon this subject is that, if the income is given absolutely, the fact that the purpose for which it was given is expressed as for the support and maintenance of testator's family does not cut down the gift of the entire income.<sup>53</sup> But where the gift is not of the income absolutely, but simply a gift of support and maintenance, or a gift of so much of the income as may be necessary for the support and maintenance, the beneficiaries have a right only to a reasonable and

<sup>51</sup> *In re Denfield*, 156 Mass. 265, citing *Gibson v. Taylor*, 6 Gray 310; *Willett v. Carroll*, 13 Md. 459.

*Contra*, *Nelson v. Nelson*, 19 Ohio, 282.

(In this case, however, the provision was that the daughters of testator should have a "home" upon the farm devised to his son while they were unmarried, and it appeared that the value of the support, if the provision included support and maintenance, was greater than the income from the farm.)

<sup>52</sup> *Bunch v. Ray* (Ky.), 49 S. W. 336; 20 Ky. L. P. 1373; *Gates v. Pond*, 12 O. C. C. 59; *Beard v.*

*Jones*, 45 S. C. 102; 22 S. E. 748; (this construction is especially favored when the income is adequate for the support of the family as a unit, but not for the support of the respective members.

<sup>53</sup> See cases cited in preceding note. A gift of the income of a trust fund or so much thereof as might be necessary to support and educate A till she reached the age of 18, when the net income was to be paid to her, was held to pass the accumulated income during minority. *Burt v. Gill*, 89 Md. 145.

proper support out of the income, and the accumulations, if any, belong to testator's estate.<sup>54</sup> Under such a gift of support the beneficiary has a right to the support and maintenance given even though he may be able ordinarily to support himself and even to save money.<sup>55</sup> An amount paid for support may be increased when, under change of circumstances, extra care and attention is necessary.<sup>56</sup>

When a life tenant does not expend the entire income of the estate in which he has an interest, a question is presented as to the proper disposition to make of such accumulation at his death. If he has a life estate, it was held that the income was his absolutely, and that any accumulations are the property of the life tenant, and at his death are to be distributed as part of his estate.<sup>57</sup> If, however, the first tenant has not a life estate, but is merely given a proper and suitable maintenance and support out of the estate for his life, the life tenant only has a right to so much of the income of the estate as is reasonably necessary and proper for his support, and the accumulations will pass either under a residuary clause or as property not disposed of by will.<sup>58</sup> And

<sup>54</sup> *Fearson v. Dunlop*, 21 D. C. 236; (a gift of income for support, or so much thereof as should be needed). *Brunson v. Martin*, 152 Ind. 111; *Thome v. Allen* (Ky.), 49 S. W. 1068; *So. Ky. L. R.* 1728; *Wentworth v. Fernald*, 92 Me. 282; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Cox v. Wills*, 49 N. J. Eq. 573. Thus a gift to testator's wife for life of the "use and maintenance" of certain realty, gives her only a right to support out of such property. *Jackson v. Jackson*, 56 S. Car. 346; *Esman v. Esman*, 18 Ohio C. C. 603; 10 Ohio C. D. 257.

<sup>55</sup> *Holden v. Strong*, 116 N. Y. 471.

*Contra*, that if beneficiary is a woman, her marriage at least to one who is financially able to support

her determines her right to support as long as such facts continue. *Taylor v. Elder*, 39 O. S. 535.

<sup>56</sup> *Schubart's Estate*, 154 Pa. St. 230; (in this case a stroke of paralysis greatly increased the care and trouble necessary to take care of the beneficiary).

<sup>57</sup> *Eldred v. Shaw*, 112 Mich. 237; *Swartz v. Gehring*, 7 O. C. C. 426; 2 O. D. 328; (in this case the will gave the life-tenant "the use of all my real and personal property during her life").

<sup>58</sup> *Little v. Geer*, 69 Conn. 411; *Wentworth v. Fernald*, 92 Me. 282; *Brady v. Brady*, 78 Md. 461; *Schehr v. Look*, 84 Mich. 263; *Bramell v. Cole*, 136 Mo. 201; *Steinmetz's Estate*, 168 Pa. St. 171.

under such a devise the devisee is not ordinarily entitled to the possession and control of the property devised unless this is especially given by the will; but his sole interest in the property consists in the right to so much of the income as is sufficient for his support and maintenance.<sup>59</sup>

Where beneficiary attempts to dispose of property by will, and the evidence makes it probable that the amount thus disposed of was received by her from sources other than the gift for her support, it will be presumed that she was disposing only of property of which she could make disposition.<sup>60</sup>

#### §606. Apportionment of income at death of beneficiary.

If the beneficiary dies between the periods for the payment of income, it is now held that the income should, in such case, be apportioned, provided it is an absolute gift of income and not a gift of support merely.<sup>61</sup> But where testator in his will especially provides that the income shall be paid semi-annually to such of the beneficiaries as shall be living at the time of the payment, the income can not be apportioned.<sup>62</sup>

#### §607. Annuities in general.

An annuity is a right to the payment of a specified sum of money at stated intervals, usually annually or at aliquot parts of a year.<sup>63</sup>

One of the chief points of difference between a gift of income and an annuity is, that a gift of income fails if the principal of the estate is not sufficient on investment to pay the income bequeathed;<sup>64</sup> while an annuity does not fail because the net income is insufficient to pay it in full, but is

<sup>59</sup> *Brady v. Brady*, 78 Md. 461; *Schehr v. Look*, 84 Mich. 263.

<sup>60</sup> *Mann v. Martin*, 172 Ill. 18, affirming 69 Ill. App. 501.

<sup>61</sup> *Shattuck v. Balcom*, 170 Mass. 245; *Brombacher v. Berking*, 56 N. J. Eq. 251.

<sup>62</sup> *Nading v. Elliott*, 137 Ind. 261;

*Hemenway v. Hemenway*, 171 Mass. 52.

<sup>63</sup> *Dewey's Estate*, 153 N. Y. 63; *Kearney v. Cruikshank*, 117 N. Y. 95. It need not be paid annually. *Cummings v. Cummings*, 146 Mass. 501; *Pierce's Estate*, 56 Wis. 560.

<sup>64</sup> *Dewey's Estate*, 153 N. Y. 63.

payable out of the principal.<sup>65</sup> Thus where an annuity is given to a beneficiary, and testator directs his estate to be so invested as to produce such annuity, it is held that in case the income of the estate is not sufficient to pay the annuity in full the principal should be used to pay it.<sup>66</sup> So where a testator directs that a certain fund be so invested as to produce a given annuity, it is held that in case of a deficiency of the income from the fund the principal may be drawn upon.<sup>67</sup> Where, however, the annuity is, in specific terms, made payable out of the income of the estate, the deficiency can not be made out of the principal.<sup>68</sup> Where it is doubtful whether testator intended to make a gift of income, or to create an annuity, the question is one of his intention, to be determined usually by finding from the will whether the gift was to be paid out of the principal in any event, or only the income of the principal was to pass.<sup>69</sup> Thus a gift of the income of a certain fund is not an annuity;<sup>70</sup> but a gift of "the whole interest and income" to a certain amount, with power to draw on the principal for deficiencies, was held to be an annuity.<sup>71</sup>

#### §608. Duration of annuities.

If testator specifies in his will the time for which such annuity is to be paid, full effect, of course, is given to such expression of intention.<sup>72</sup>

Thus, where testator provides that certain annuities shall be paid until his estate is settled, such direction must be fol-

<sup>65</sup> *Additon v. Smith*, 83 Me. 551; *Merritt v. Merritt*, 48 N. J. Eq. 1; *Whitson v. Whitson*, 53 N. Y. 479; *Curran v. Green*, 18 R. I. 329.

<sup>66</sup> *Additon v. Smith*, 83 Me. 551; *Merritt v. Merritt*, 48 N. J. Eq. 1; *Cooper's Estate*, 147 Pa. St. 322; *Curran v. Green*, 18 R. I. 329.

<sup>67</sup> *Boomhower v. Babbitt*, 67 Vt. 327.

<sup>68</sup> *Machray v. Higgins*, 8 Manitoba, 29; *Einbecker v. Einbecker*, 162

Ill. 267; (in this case the annuity was payable out of "the moneys so arising from the estate").

<sup>69</sup> *Dewey's Estate*, 153 N. Y. 63.

<sup>70</sup> *Bartlett v. Slater*, 53 Conn. 102; *Dewey's Estate*, 153 N. Y. 63. (Hence if testator's estate does not amount to the sum indicated, the income must abate proportionately.)

<sup>71</sup> *Cushing's Will*, 58 Vt. 393.

<sup>72</sup> *Bates v. Barry*, 125 Mass. 83; *Stephens v. Milnor*, 24 N. J. Eq. 358.

lowed, although the estate is held open for the collection of some outstanding claims.<sup>73</sup> If testator does not specify in his will the time for which the annuity is to be paid, it is then a question of the construction of the whole will for the purpose of determining testator's intention. The weight of authority and of sound reason is that, unless it appear otherwise from the context, the annuity is payable during the life of the beneficiary.<sup>74</sup>

But where testator did not specify the time for which an annuity is to last, but bequeathed a yearly income of \$4,000 to his wife, to be paid from his estate by his executors, it was held, in view of the facts that no trustee was appointed and that the property was valuable but unproductive, that testator intended the annuity to last only during administration.<sup>75</sup>

#### §609. Apportionment of annuities.

Common law and equity were opposed to apportionment of annuities where the annuitant died between the days of payment.<sup>76</sup> An exception was always made to this rule in jurisdictions when a widow who elected to take in lieu of dower was held to be a purchaser for value, in favor of annuities bequeathed in lieu of dower.<sup>77</sup>

By statute in most jurisdictions correcting the arbitrary rule of equity and common law an annuity is apportionable where the annuitant dies between the days of payment.<sup>78</sup>

A gift in trust, to pay to the divorced wife of testator an annuity is not revoked by her obtaining a judgment for alimony for the same amount.<sup>79</sup>

<sup>73</sup> Batchelor's Estate, 119 Mich. 239.

<sup>74</sup> Grove's Trusts, 5 Jur. (N. S.), 855; 1 Giff. 74; 7 W. R. 522; 28 L. J. Ch. 536; McDermott v. Wallace, 5 Beav. 142; 6 Jur. 547.

<sup>75</sup> Cleveland v. Cleveland, 89 Tex. 445; 35 S. W. 145.

<sup>76</sup> Wiggin v. Swett, 6 Met.

(Mass.), 194; 39 Am. Dec. 716; Kearney v. Cruikshank, 117 N. Y. 95.

<sup>77</sup> Cushing's Will, 58 Vt. 393.

<sup>78</sup> Parker v. Seeley, 56 N. J. Eq. 110.

<sup>79</sup> Maxwell v. Sawyer, 90 Wis. 352. (The alimony thus decreed ceased at testator's death.)

## CHAPTER XXVII.

## TESTAMENTARY TRUSTS OTHER THAN CHARITABLE.

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§610. Elements of a trust.

A trust is the general name for all the estates and property interest which are recognized and enforced by a court of equity but not by a court of law. In a testamentary trust, the legal title of the property devised or bequeathed passes to one who is known as the trustee; certain property rights in the property thus devised to a trustee are given to another who is known as the *cestui que trust*. The legal title during the continuance and existence of a trust is, therefore, separated from the equitable.

The ordinary classification of trusts into express and implied is of comparatively small importance in the law of wills, since, in almost every case, it is merely a question of the construction of testator's will and the determination of his intention thereto. "In order to constitute a valid trust, three things must concur: words sufficient to raise it, a certain subject and a definite object."<sup>1</sup> This proposition, often repeated in substantially the same language as here given, means, when applied to testamentary trusts:

First, that testator must, in his will, use the language as shows his intention to pass the legal estate to the trustee but

<sup>1</sup> Coulson v. Alpaugh, 163 Ill. 298; Hill v. Page, — Tenn. — (1896); Mills v. Newberry, 112 Ill. 123; 36 S. W. 735.



the equitable interest to the *cestui que trust*.<sup>2</sup> Thus if testator shows his intention that the trustee shall hold the property for his own benefit, no trust is created; for the legal title must be separated from the equitable interest in order to constitute a trust.<sup>3</sup>

Second, except in case of charitable trusts, which will be discussed hereafter,<sup>4</sup> testator must, by his will, indicate a beneficiary to whom the equitable interest is to pass in terms so definite and certain that he can thereby, with the aid of extrinsic evidence, be identified.

This rule is not peculiar to testamentary trustees, but applies equally to the indentification of legatees and devisees. It finds a special application, towever, in the law of testamentary trustees, since it is in the attempt to create trusts that testators most frequently fail to identify the beneficiary with sufficient certainty. Except in charitable trusts, if it is not possible, with the aid of admissible extrinsic evidence, to identify the beneficiary properly, it is, of course, impossible for a court of equity to enforce the trust, and the devise will, on that account, be void.<sup>5</sup>

Third, the remaining necessary element of a valid trust is that the property conveyed by the will must be described with such certainty as is necessary in other bequests;<sup>6</sup> and furthermore, that the purpose for which the trust is created be set forth in the will in such clear and definite language that a court of equity can enforce the wishes of the testator.<sup>7</sup>

Thus a gift in trust of "what remained" after a life tenant, with power of disposition of the fee to the extent neces-

<sup>2</sup> See Secs. 611 to 614 inclusive. *Hill v. Page*, — Tenn. — (1896; 36 S. W. 735.

<sup>3</sup> *In re Denfield*, 156 Mass. 265; *Rose v. Hatch*, 125 N. Y. 427; *Hopkins v. Kent*, 145 N. Y. 363; *Mimms v. Macklin*, 53 S. Car. 6.

<sup>4</sup> (See Secs. 639-655)

<sup>5</sup> *Wheelock v. American Tract Society*, 109 Mich. 141; *Tilden v. Green*, 130 N. Y. 29; 14 L. R. A. 29; *Fairchild v. Edson*, 154 N. Y.

199; *People v. Powers*, 147 N. Y. 104; *Johnson v. Johnson*, 92 Tenn. 559; 22 L. R. A. 179; 36 Am. St. Rep. 104; *Fifield v. Van Wyck*, 94 Va. 557.

<sup>6</sup> (See Secs. 48 and 822.)

<sup>7</sup> *Coulson v. Alpaugh*, 163 Ill. 298; *Tilden v. Green*, 130 N. Y. 29; 14 L. R. A.; *Beurhaus v. Watertown*, 94 Wis. 617; 69 N. W. 986.

sary for her support had exercised such power, is sufficiently definite;<sup>8</sup> as is a gift of a sum for several charitable purposes which does not apportion the amount to be used for each purpose, all being valid.<sup>9</sup>

If the purpose of the will does not appear with sufficient certainty, and it is impossible for a court of equity to determine whether it is complying with the will of testator or not, the trust will be declared void.<sup>10</sup>

It might be suggested that a fourth element to a valid trust is a competent trustee. In most cases, however, this, while it may be very desirable, is not essential. If the intention of testator to create a trust was present, and the other elements to a valid trust concur, and the trust thus created is not discretionary with the trustee, equity will not suffer the trust to fail for want of a trustee, but will appoint a trustee in order to prevent the failure of the trust.<sup>11</sup> If, however, the trust is one which can be carried into effect only by the exercise of the personal discretion of the trustee, this trust will, ordinarily, be held not to be exercised by any person other than the trustee named in the will; and, accordingly, if for any reason such trustee can not take, the trust must fail.<sup>12</sup>

A trust for an unlawful purpose will never be implied where the language of the will can be fairly construed to bear any other construction.<sup>13</sup> However, if testator's intention to create a trust is clear, full effect must be given to such intention; even if the trust thus created must be declared unlawful and ineffectual.<sup>14</sup>

Since the intention of the testator is to be deduced from the

<sup>8</sup> *Coulson v. Alpaugh*, 163 Ill. 298.

<sup>9</sup> *Beurhaus v. Watertown*, 94 Wis. 617; 69 N. W. 986.

<sup>10</sup> See Sec. 621.

<sup>11</sup> *Keith v. Scales*, 124 N. Car. 497; *John's Will*, 30 Ore. 494; 36 L. R. A. 242; *Frazier v. St. Luke's Church*, 147 Pa. St. 256. "The

court would not allow a trust to fail for want of a trustee." *Keith v. Scales*, 124 N. Car. 497.

<sup>12</sup> See Sec. 619.

<sup>13</sup> *Greene v. Greene*, 125 N. Y. 506; see Sec. 465.

<sup>14</sup> *Cottman v. Grace*, 112 N. Y. 299; *McHugh v. McCole*, 97 Wis. 166; 40 L. R. A. 724.

will as a whole, it follows that the use of the words "in trust" is not conclusive in determining whether a trust has been created.<sup>15</sup>

### §611. Precatory words not creating trust.

In determining the nature and existence of trust estates by will, the difficulties presented may be grouped roughly under two heads:

First, It is often difficult to ascertain whether the will gives the devisee or legatee an absolute interest, or whether the property is given in trust for the benefit of another.

Second, it is often equally difficult to determine whether the property given is given to the beneficiary absolutely, both legal and equitable title passing, or whether a trustee is interposed who is to take legal title.

In determining whether the testator intended to give the devisee or legatee named an absolute estate for his own benefit, or whether he intended to make the devisee or legatee a trustee, merely, for some designated beneficiary, the most serious difficulty is presented by the use of precatory words. Testators often add to a gift words which show their wishes and desires on the one hand or their suggestion and advice on the other as to the use which shall be made of the property given. In determining whether these words create a trust or not the intention of testator is always to be sought, an intention which is especially difficult to ascertain, because the testator often does not know exactly what sort of an estate he wishes to create. If the language used by him in the will shows that the beneficiary is left with discretion to make use of the advice given him or to disregard it, the precatory words are held not to create a trust.<sup>16</sup> Thus a suggestion or

<sup>15</sup> *Davis v. Boggs*, 20 O. S. 550. In this case a devise was made to testator's wife in trust. It appeared from the whole will that the beneficial interest was to pass to the wife, and the words "in trust" were accordingly rejected.

<sup>16</sup> *Lambe v. Eames*, L. R. 10 Eq. 267; *In re Hutchinson*, L. R. 8 Ch. Div. 540; *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321; *Parnall v. Parnall*, L. R. 9 Ch. Div. 96; *Eaton v. Watts*, L. R. 4 Eq. 151; *Meredith v. Heneage*, 1 Sim.

recommendation as to the disposition which the devisees shall make of their property upon their death which does not go to the extent of controlling their discretion, is held not to create a trust.<sup>17</sup> So where testator expresses a request or makes a suggestion as to the disposition at the death of the de-

542; *Sale v. Moore*, 1 Sim. 534; *Hoy v. Master*, 6 Sim. 568; *In re Adams*, L. R. 27 Ch. Div. 394; *In re Williams* (1897) 2 Ch. 12; *In re Hamilton* (1895) 2 Ch. 370; 12 Rep. 355; *Mills v. Newberry*, 112 Ill. 123; *Coulson v. Alpaugh*, 163 Ill. 298; *Randall v. Randall*, 135 Ill. 398; *Pellizzaro v. Reppart*, 83 Io. 497; *Mitchell v. Mitchell*, 143 Ind. 113; *Dravo v. Seebolt*, — Ky. — 1896; 33 S. W. 1106; *Pratt v. Sheppard, etc. Hospital*, 88 Md. 610; *Halsey v. Convention of P. E. Church*, 75 Md. 275; *Aldrich v. Aldrich*, 172 Mass. 101; *Durant v. Smith*, 159 Mass. 229; *Fairchild v. Edson*, 154 N. Y. 199; affirming 77 Hun, 298; rehearing refused, 154 N. Y. Appendix, 38; *Clay v. Wood*, 153 N. Y. 134; *Crane's Will* (N. Y.), 54 N. E. 1089; *Sturgis v. Paine*, 146 Mass. 354; *Davis v. Mailey*, 134 Mass. 588; *Barrett v. Marsh*, 126 Mass. 213; *Whelen's Estate*, 175 Pa. St. 23; *Warner's Estate*, 130 Pa. St. 359. (A clause that testator would prefer not to have a division made of his property by the heirs until a certain person should arrive at age, was held not to restrict their division.) *Good v. Fitchthron*, 144 Pa. St. 287; *Bowlby v. Thunder*, 105 Pa. St. 173; *Hopkins v. Glunt*, 111 Pa. St. 287; *Pennock's Estate*, 20 Pa. St. 268; *Hill v. Page*, — Tenn. — 1896; 36 S. W. 735.

"This was intended by the testator, it seems to us, to express his reason for the gift to his wife, and his confidence in her, and not

to cut down or affect the absolute character of the gift which he had previously made to her." *Aldrich v. Aldrich*, 172 Mass. 101; *Durant v. Smith*, 159 Mass. 229.

<sup>17</sup> *In re Hamilton* (1895), 2 Ch. 370; 12 Rep. 355, affirming (1895) 1 Ch., 373; 64 L. J. Ch. N. S., 365; (a trust not created by the words, "I wish them to bequeath the same equally between" certain families "in such mode as they shall consider right"). *Whitcomb's Estate*, 86 Cal. 265; (the word "recommend" held not to create a precatory trust). *Hill v. Page* — Tenn. — 1896; 36 S. W. 735; (a gift to A "believing she will do justice between her relatives and mine at her death" held not a trust). *Nunn v. O'Brien*, 83 Md. 198, 1896; 34 All. 244; *Aldrich v. Aldrich*, 172 Mass. 101; *Eberhardt v. Perolin*, 49 N. J. Eq. 570, reversing 48 N. J. Eq. 592; (to give A an amount "at her Plaisure if my wife feel dispose to do so, but it is not obligatory to increase the donation" to B, held optional as to A and B). *Tabor v. Tabor*, 85 Wis. 313. (An expression of testator's confidence that his wife, the devisee of his property, will have it distributed among their children in such proportion as would be just and right, and followed by a clause providing that this expression on his part should not be interpreted as limiting her right of ownership or power of distribution, held not to create a trust.)

visee of such property as the devisee does not dispose of during his lifetime, such words do not create a trust.<sup>18</sup>

A suggestion that devisee may, at his option, make gifts to certain designated persons or corporations, or increase gifts made by testator, does not create a precatory trust, where the direction is so as not to restrain the discretion of the beneficiary.<sup>19</sup>

### §612. Precatory words creating trust.

Where, however, the will shows that the intention of testator is that the provision to be made for the persons designated is not left to the discretion of the devisee, but is to be carried out at all events, the fact that he uses words milder than those of absolute command, such as "wish," "desire," or "in full confidence that" and the like, does not prevent the gift from being in trust, and the devisee will be held as a trustee for the purposes indicated.<sup>20</sup>

<sup>18</sup> *Toms v. Owen*, 52 Fed. Rep. 417. (A direction that the property undisposed of at the death of testator's wife, the devisee in the will, should be willed and devised to certain named persons, followed by a provision that if any cause makes it unwise in her judgment she need not carry out such wish, does not create a precatory wish.) *Bryan v. Milby*, 6 Del. Eq. 208; 13 L. R. A. 563; 24 Atl. 333; *Bills v. Bills*, 80 Io. 269; 8 L. R. A. 696; *Durant v. Smith*, 159 Mass. 229; (nor does a gift for life with power to expend the principal, and a remainder over to another, necessarily create a trust for the benefit of such other). *Merrill v. Hayden*, 86 Me. 133; *Edgar v. Edgar*, 26 Ore. 65.

<sup>19</sup> *Eberhardt v. Perolin*, 49 N. J. Eq. 570, reversing 48 N. J. Eq. 592; (a recommendation to testator's wife, the residuary devisee, to give a sum to a given church equal to an amount given in tes-

tator's will, providing, however, that it is "at her Plaisure if my wife feel dispose to do so, but it is not obligatory Also to increase the donation" to another beneficiary, was held not to impose the increase of either gift upon the wife). *Kelemen's Will*, 126 N. Y. 73; *Clark v. Hill*, 98 Tenn. 300; 39 S. W. 339; *Hunt v. Hunt*, 18 Wash. 14.

<sup>20</sup> *Abend v. Endowment Fund Commission*, 174 Ill. 96, affirming 74 Ill. App. 654; *Ingraham v. Ingraham*, 169 Ill. 432, 471, citing *Colton v. Colton*, 127 U. S. 300; *Bronson v. Strouse*, 57 Conn. 147; *Hunt v. Fowler*, 121 Ill. 269; *Johnson v. Billups*, 23 W. Va. 685; *Blanchard v. Chapman*, 22 Ill. App. 341; *Cox v. Wills*, 49 N. J. Eq. 130, 573; *Forster v. Winfield*, 142 N. Y. 327; *Ide v. Clark*, 5 O. C. C. 239; *Oyster v. Knull*, 137 Pa. St. 448.

Thus a bequest to A reciting that testator has entire confidence that A will distribute the property among certain persons, will create a trust for their benefit unless the context of the will shows that testator intends to leave it to A's discretion whether to make such distribution or not.<sup>21</sup> And where such a direction in the will is given, and the devisee does not make any provision for the person indicated, equity will make suitable provision out of the estate of testator.<sup>22</sup>

In a recent Connecticut case testator had given legacies to his wife to help her brothers and sisters as she might see fit, and the remainder of the property thus given to go, at her death, to A for the same purpose, unless the wife saw fit to dispose of the remainder by will, in which case it was provided that "then they go as she wills." It was held that this did not authorize the wife to defeat the trust, but merely gave her power to appoint some other person than A as her successor in the trust.<sup>23</sup>

Where the will shows an intention to provide for a certain son, the language will be construed, where possible, as creating a trust, even though, as punctuated, it may seem to leave the gift in the discretion of the trustee.<sup>24</sup>

### §613. Words showing the motive for the gift.

Words, while possibly not strictly precatory, but which should be considered in connection with precatory words, are those which explain testator's motive and purpose in making a gift. It is often difficult to determine whether these words

<sup>21</sup> *Blanchard v. Chapman*, 22 Ill. App. 341; *Cox v. Wills*, 49 N. J. Eq. 130, 573; *Forster v. Winfield*, 142 N. Y. 327.

<sup>22</sup> *Murphy v. Carlin*, 113 Mo. 112. (A wish was so expressed as to be obligatory that testator's wife should make a suitable provision for one raised a member of testator's family, if he should continue to be a dutiful child. Testator's wife died without making any such provision; it was held that equity

would make a suitable provision for him, and that a provision of \$10,000 out of an estate worth \$86,000 was not unreasonable.)

<sup>23</sup> *Dexter v. Evans*, 63 Conn. 58.

<sup>24</sup> *Black v. Herring*, 79 Md. 146. (A gift after paying a given devise to another, "should they (trustees) think proper so to do, to pay over from time to time" to the son, was held to create a trust for the son.)

create a trust or not. The test as laid down by the courts is a simple one, the application alone being difficult. If the will clearly shows that the use of the property indicated is merely the motive which leads testator to make the gift, and if the beneficiary is not limited in his discretion as to the use which he is to make of it, the gift does not impose a trust. Thus a gift to testator's wife to support herself and her children is generally held to give an absolute estate to the wife, free from any trust for the benefit of the children, this being merely testator's motive in making the gift.<sup>25</sup>

A devise to testator's widow of all his personal property, for her use and the maintenance of the minor children, gives her the personal property absolutely as legatee and not as executrix, though she is appointed executrix in the same will and given power as such administratrix to sell real estate.<sup>26</sup> So a devise to one for his own use during his lifetime is held to be an absolute gift and not a trust.<sup>27</sup>

Even where a gift to one for the support of himself and his family is held not to be a trust, it has been held that the children in the family who were to be supported by the beneficiary, though they can not assert any interest as against the beneficiary, may do so as against his creditors by having a reasonable part of the income set apart for their support.<sup>28</sup>

Where, however, the will shows clearly testator's intention to charge the property with the support and maintenance of the

<sup>25</sup> *Pellizzaro v. Reppart*, 83 Io. 497; *Zimmer v. Sennott*, 134 Ill. 505; *Randall v. Randall*, 135 Ill. 398; *Jones v. Jones*, 93 Ky. 532; *Lloyd v. Lloyd*, 173 Mass. 97; *Small v. Field*, 102 Mo. 104; *Elkinton v. Elkinton* (N. J. Eq.), 18 Atl. 587; *Cressler's Estate*, 161 Pa. St. 427; *Mazurie's Estate*, 132 Pa. St. 157; *Paisley's App.* 70 Pa. St. 153; *Citizens' Bank and Trust Company v. Bradt* (Tenn.), 50 S. W. 778; *Wilmoth v. Wilmoth*, 34 W. Va. 426; *Seamonds v. Hodge*, 36 W. Va. 304; (and of course a devise to a husband to provide for and edu-

cate the children is also construed as not creating a trust).

The case of *Forbes v. Darling*, 94 Mich. 621, is at variance with the cases cited in this note, in that the language showing testator's intention in making the gift was so strong as to create a trust. See Sec. 605.

<sup>26</sup> *Heppenstall's Estate*, 144 Pa. St. 259.

<sup>27</sup> *Justus' Succession*, 45 La. Ann. 190; *Roundtree v. Roundtree*, 26 S. C. 450.

<sup>28</sup> *Allen v. Furness*, 20 Ont. App. 34.

children and that the furnishing of such support was not left to the discretion of the devisee, a trust is held to be created.<sup>29</sup>

In a recent South Carolina case a gift to a parent, in order to enable him to furnish a home and support for his children, was said to be a "quasi trust."<sup>30</sup>

In an Illinois case a provision, "I now place the house in the hands of the administrators for the benefit of my daughter and my son for them and their children should they have any," was held to be a gift to the son and daughter for life, one-half to each, with remainder over to their children.<sup>31</sup>

A devise of the residue of testator's estate to the executors from which to pay testator's debts by sale, mortgage, collection of rents or in any other way that they may see fit, created a trust.<sup>32</sup>

#### §614. Words creating an express trust.

An express trust may be created in a will by any form of words which shows testator's intention to give the legal interest in the property devised, to one, and the equitable interest in the same property to another.<sup>33</sup>

<sup>29</sup> *Sneer v. Stutz*, 93 Io. 62; *Conover v. Fisher*, 48 N. J. Eq. 647; 36 Atl. 948; *Huber v. Free*, 12 O. C. C. 333; *Forbes v. Darling*, 94 Mich. 621.

A comparison of the cases in which no trust is held to be created, with this case in which a trust has been held to be created, will show that, while courts agree upon the general rule for determining the existence or non-existence of a trust, they do not agree in their construction of the words used in creating the gift.

<sup>30</sup> *Howe v. Gregg*, 52 S. C. 88.

<sup>31</sup> *Barclay v. Platt*, 170 Ill. 384.

<sup>32</sup> *Seitzinger's Estate*, 170 Pa. St. 531. (Hence, the creditors of the estate may enforce such trust after the time fixed by statute for col-

lecting debts from decedent's estate.)

<sup>33</sup> *Hull v. Holloway*, 58 Conn. 210; *Davenport v. Kirkland*, 156 Ill. 169; *Meek v. Briggs*, 87 Io. 610; *Fuller v. Fuller*, 84 Md. 475; *Black v. Herring*, 79 Me. 146; *Weller v. Noffsinger*, 57 Neb. 455; *Keith v. Scales*, 124 N. C. 497; *Traphagen v. Levy*, 45 N. J. Eq. 448; *Woodward v. James*, 115 N. Y. 346; *Handy's Estate*, 167 Pa. St. 552; *Boies' Estate*, 177 Pa. St. 190; *Muldoon v. Tröwhitt* (Tenn. Ch. App.), 38 S. W. 109. (Thus a devise of property to the daughter of testator, appointing trustees to take possession and control of the property and apply the income to her support and education, until, in their judgment, she is competent to



A gift of property in trust for a named beneficiary for his life, and at his death the remainder to go to persons designated, creates a trust only during the life estate, the legal and equitable interests passing together to the remaindermen.<sup>34</sup>

Where the income is given for life to a beneficiary and the executors are directed to deposit the principal with a security company for investment, unless they invest it themselves, a trust is created.<sup>35</sup>

A gift of the residue of testator's estate to certain named trustees to administer it for ten years and then account for it to the residuary legatees, creates a trust, and the legatees do not acquire any legal title except through trustee.<sup>36</sup> But where the only duty of the trustee was to receive the money, and pay it at once to the beneficiaries, it was held to be proper for the executor to pay the money to the beneficiaries, ignoring the trustee.<sup>37</sup>

control it, in which case they may surrender it to her, creates a trust. The legal title is, therefore, in trustees until they surrender it to the daughter.) *Meek v. Briggs*, 87 Io. 610.

(So a bequest in trust for the niece of testator, the income to be paid to her for life and the remainder over, with a direction that if she should desire her income to be increased by an annuity, the trustee could, at such request, invest part of the fund in such annuity, was held to create a trust, and not authorize the trustee to pay the trust fund directly to the niece.) *Lejee's Estate*, 181 Pa. St. 416.

(So where testator, in one clause of his will, bequeathed property to A, and in a subsequent clause directed that the property thus bequeathed be held by a trustee to invest it and pay the income to A during his life, and after his death the principal to be held "in trust to and for the only proper use and benefit of" A's children by his first

wife, it was held that A took merely an equitable life estate, in which his second wife had no interest whatever.) *Fetherman's Estate*, 181 Pa. St. 349.

(And where testator gave all his property by will to his son, and provided that the executor should invest this property and use the income for the son's support during his minority, it was held that a trust was thereby created, and that the executor in his trust capacity, and not the guardian of the minor, had a right to the possession of the trust funds.) *Chandler v. Mills* (N. J. Eq.) (1897), 37 Atl. 603.

<sup>34</sup> *Baxter v. Wolfe*, 93 Ga. 334; *Charleston, etc. Ry. Co. v. Hughes*, 105 Ga. 1; *Simms v. Buist*, 52 S. C. 554.

<sup>35</sup> *Pinney v. Newton*, 66 Conn. 141.

<sup>36</sup> *Simpson v. Molson's Bank* (1895), App. Cas. 270; 11 Rep. 427 P. C.

<sup>37</sup> *Hamlin v. Mansfield*, 88 Me. 131.

A provision that a certain firm of attorneys shall receive the rents and attend to the "minor details" does not create an express trust.<sup>38</sup>

A gift to one which in itself would be absolute is not treated as a trust, because in the same will other gifts in trust are made to the same beneficiary.<sup>39</sup>

A gift in terms absolute is not considered as a trust because of a direction as to the disposition of the income to the beneficiary.<sup>40</sup>

A gift of all of testator's property to A in trust for his children, the remainder of such estate to A for life, gives A a life estate in testator's property free from the trust.<sup>41</sup>

### §615. Dry trusts.

In states in which the statute of uses is in force, words which are intended to create a trust in which no duties of any kind are imposed upon the trustee can not be given the effect intended by testator. This form of trust is known as a passive trust, or sometimes a dry trust, and under the statute the legal title vests in the *cestui que trust*.<sup>42</sup> Thus a gift to A to be held in trust for the issue of his body gives A no beneficial interest and the trust is at once executed on the birth

<sup>38</sup> Toland v. Toland, 123 Cal. 140.

<sup>39</sup> Jackson v. Thompson, 84 Me. 44. (A direction to pay certain legacies to testator's daughter, to pay testator's son only the income of \$5,000 during his natural life, and if there should be a surplus left to divide the remainder among all of testator's children, was held to create a trust for the benefit of testator's son in the \$5,000, but to give him a share of the surplus absolutely.)

Rote v. Warner, 17 Ohio C. C. 342.

<sup>40</sup> Rhodes v. Rhodes, 88 Tenn. 637. (Thus a bequest of a bond to a church was held to be a direct gift,

though there was a provision that the interest should be paid to the church as it became due.)

Fox v. Fox, 102 Tenn. 77.

<sup>41</sup> Buck v. Smith, 70 Vt. 178. (In this case the two gifts are inconsistent, taken separately. The only possible method of reconciling them is to treat A's as an absolute life-interest with an equitable remainder to the children.)

<sup>42</sup> *In re Denfield*, 156 Mass. 265; *Hopkins v. Kent*, 145 N. Y. 363; *Robinson v. Ostendorff*, 38 S. Car. 66; *Mims v. Macklin*, 53 S. Car. 6; *Sims v. Sims*, 94 Va. 580 (1897); 27 S. E. 436; *Schinz v. Schinz*, 90 Wis. 236.

of issue.<sup>43</sup> But where certain active duties are imposed upon the trustee, as to take charge of the realty in certain contingencies, the trust is not a dry one.<sup>44</sup>

### §616. Effect of failure of trusts.

Where testator uses words which clearly show an intention to benefit the *cestui que trust*, and as a means to that end he attempts to create a trust which subsequently proves impossible of literal fulfillment, it is held that the intention of testator will be given effect by treating the gift as an absolute one, free from any trust.<sup>45</sup>

Testator by will created a trust for life of A, income payable to A for life, then to B, daughter of A. The will showed that the trust was created to protect B's interests. It was held that on B's conveying all her interests in the trust fund to A,

A was entitled to the possession of the *corpus* of the property, discharged from the trust.<sup>46</sup> This is a particular application of the doctrine of general and particular intent.<sup>47</sup>

In the cases cited the paramount intention of testator was to benefit the *cestui que trust*, hence the particular intent, that of accomplishing this result by means of a trust, was disregarded in order to enforce the paramount intent. Accordingly in other cases, where the purpose of the trust, as expressed in the will, fails for any reason, the devise as a whole fails or a resulting trust for testator's heirs or next of kin arises.

Where the event becomes impossible, the trust ordinarily terminates at once.<sup>48</sup> Thus a trust to last until the marriage of A, terminates upon the death of A;<sup>49</sup> and a trust to be ex-

<sup>43</sup> *Mims v. Macklin*, 53 S. Car. 6.

<sup>44</sup> *People's Loan & Exchange Bank v. Garlington*, 54 S. Car. 413; 71 Am. St. Rep. 800.

<sup>45</sup> *In re Bowes* (1896) 1 Ch., 507. (A gift of 5,000 pounds in trust to benefit the devisees of real property by planting trees upon the property, was treated as an absolute gift to the devisees, free from any

trust, where the property can not be planted to advantage.) *Neely v. Phelps*, 63 Conn. 251; *Mansfield v. Mix*, 71 Conn. 72.

<sup>46</sup> *Sharpless's Estate*, 151 Pa. St. 214.

<sup>47</sup> See Sec. 463.

<sup>48</sup> *Mansfield v. Mix*, 71 Conn. 72.

<sup>49</sup> *Toner v. Collins*, 67 Io. 369; *Baker v. McAden*, 118 N. Car. 740.

exercised in the personal discretion of a trustee terminates upon the death of such trustee.<sup>50</sup>

Where property is devised in trust during the minority of testator's son and afterwards if he should continue to use intoxicating liquors to excess, it was held that on testator's death after such son came of age the legal title to the property given passed to the son.<sup>51</sup>

### §617. Resulting trusts.

Where the testator creates a trust evidently not for the benefit of the trustees, but for the benefit of others, and does not designate the *cestui que trust*, the trust is held in such cases to be for the benefit of testator's heirs or next of kin.<sup>52</sup>

### §618. Duration of trusts.

Where testator indicates by his will a specific duration of the trust created in the will, his intention, if not in violation of the rule against perpetuities, will be given effect and the trust will continue for the time indicated.<sup>53</sup>

Where the trust is expressly given to continue for the life of the trustee, such effect will be given to it.<sup>54</sup>

Where testator does not specifically indicate the time for which the trust is to continue, his intention must, if possible, be deduced from the entire will. Where the evident purpose of a trust is the accomplishment of the particular

<sup>50</sup> Neeley v. Phelps, 63 Conn. 251; Hadley v. Hadley, 147 Ind. 423; Mobley v. Cummings, 35 S. Car. 101.

<sup>51</sup> Mansfield v. Mix, 71 Conn. 72. In some jurisdictions this doctrine does not apply in cases of charitable trust. See Sec. 655.

<sup>52</sup> *In re Brown*, 8 Manitoba, 391; Jacob v. Jacob, 78 Law T. Rep. 825, affirming 78 Law T. Rep. 451; Abell v. Abell, 75 Md. 44; Sears v.

Hardy, 120 Mass. 524; Heidenheimer v. Bauman, 84 Tex. 174; Sims v. Sims, 94 Va. 580.

<sup>53</sup> *Hamilton v. Rodgers*, 38 O. S. 242. (Hence, where the trust was to terminate with the termination of certain annuities, a provision for furnishing support to others does not extend the period for which the trust is to exist.)

<sup>54</sup> *In re Hudson*, 13 Rep. 546.

object, the trust continues, if possible, to exist until such object is accomplished.<sup>55</sup>

Thus where a trust is created for controlling property until testator's children reach a certain age, when the property is to be divided among the children, it is held that the trust does not terminate of itself upon the arrival of testator's children at such age; but continues until the trustees have exercised the power given them by dividing and distributing the property.<sup>56</sup>

On the other hand, the fact that a fee is given to trustees does not show testator's intention that the trust estate shall continue after the active duties connected with the trust have been accomplished.<sup>57</sup>

Where the purpose of the creation of the trust is to provide the support of one for life, the trust thus created will, *prima facie*, continue for the life of such beneficiary, and will not be terminated before that time by the death of the remaindermen.<sup>58</sup> On the death of such beneficiary the trust property will vest in the remaindermen.<sup>59</sup> Thus a trust, the income to be paid to certain named persons for life, or their descendants respectively, was held to create a trust for the lives of the original takers only, the gift to their descendants being merely substitutional.<sup>60</sup>

A trust for the benefit of certain named persons for their respective lives with remainder over terminates upon the death of any beneficiary, as to his share of the estate, and as to that alone.<sup>61</sup> While, if the trust is so created as to last during the life of several persons, or to the survivor of them, the death of any number of the persons indicated less than all does not affect the duration of the estate.<sup>62</sup>

<sup>55</sup> *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, affirming 70 Ill. App. 575; *Abell v. Abell*, 75 Md. 44; *Marshall's Estate*, 147 Pa. St. 77.

<sup>56</sup> *Potter v. Couch*, 141 U. S. 296; *Marshall's Estate*, 147 Pa. St. 77.

<sup>57</sup> *Abell v. Abell*, 75 Md. 44.

<sup>58</sup> *Asche v. Asche*, 113 N. Y. 232.

<sup>59</sup> *Baker v. McAden*, 118 N. Car.

740; *Hopkins v. Kent*, 145 N. Y. 363; *Pendleton v. Bowler*, 27 O. L. J. 313

<sup>60</sup> *In re Morgan (C. A.)* (1893), 3 Ch. 222.

<sup>61</sup> *Tarrant v. Backus*, 63 Conn. 277; *Smith v. Hall*, 20 R. I. 170.

<sup>62</sup> *Abell v. Abell*, 75 Md. 44; *Shattuck v. Balcum*, 170 Mass. 245; *Comly's Estate*, 136 Pa. St. 153.

A gift to certain designated persons to be held in trust until the happening of a certain event, becomes absolute upon the happening of such event.<sup>63</sup>

A gift in trust for A for life, and on his death to his children by his first wife, gives A an equitable life estate only, in which his second wife has no interest as widow or as executrix.<sup>64</sup>

When the will is not specific as to the exact duration of the estate given to the trustee, the law presumes that the testator intended to give the trustee an estate of such duration as would make it possible for him to execute the duties imposed upon him by the trust.<sup>65</sup> Thus a direction that the trustees sell certain property, and that, until such sale, they lease it and control it, vests the legal title of the property in the trustee until the accomplishment of the trust.<sup>66</sup>

So a trust which, by the terms of its creation, may amount to a fee simple, passes an estate of inheritance to the trustee.<sup>67</sup> On the other hand, a mere power of sale does not vest the legal title in the donee of the power as a trustee.<sup>68</sup>

It may be laid down as a general rule that a devise to trustees, even in general terms, will create no greater estate in such trustees than is necessary for the purposes of the trust.<sup>69</sup>

### §619. Discretionary power of trustees.

A trust may be so created by the terms of the will that the trustee, at his discretion, may give or withhold the trust funds

<sup>63</sup> *In re Bogle* (Ch.), 78 Law Times Rep. 457. (Property given in trust to become absolute if beneficiary should have two children who attain the age of twenty-one.) *Mackrell v. Walker*, 172 Pa. St. 154; *Fetherman's Estate*, 181 Pa. St. 349; *In re Clarke*, 19 R. I. 110; 33 Attl. 585 (a trust to last till majority of either child); *Meacham v. Graham*, 98 Tenn. 190 (1897), 39 S. W. 12; *Mason v. Broyles*, — Tenn. — (1896); 38 S. W. 92.

<sup>64</sup> *Fetterman's Estate*, 181 Pa. St. 349.

<sup>65</sup> *Meeks v. Briggs*, 87 Io. 610.

<sup>66</sup> *Crane v. Bolles*, 49 N. J. Eq. 373; *Webster v. Thorndyke*, 11 Wash. 390.

<sup>67</sup> *In re Townsend's Contracts* (1895), 1 Ch. 716.

<sup>68</sup> *Steinhardt v. Cunningham*, 130 N. Y. 292.

<sup>69</sup> *Tompkin's Estate*, 154 N. Y. 634.

in the performance of the trust. Such a trust is upheld in some jurisdictions.<sup>70</sup> The discretionary power given to the trustee will not, however, be so construed as to allow the trustee to ignore another and independent provision of the will,<sup>71</sup> nor can a discretion, to be exercised if circumstances should alter, be exercised where there was no change of circumstances.<sup>72</sup>

If the trust created by the will is dependent for its exercise upon the personal discretion of the trustee, it is generally held that such a trust must be terminated upon the death or resignation of the trustee, since the testator allowed the exercise of this discretion because of his reliance on the judgment and discretion of the trustee.<sup>73</sup> But where the intention of the testator is evidently that the trust shall continue, subject to modification at the discretion of the first trustee, it is held that upon his death the trust does not terminate, but only the discretionary right of modification.<sup>74</sup> But where a discretionary power is expressly vested in certain trustees and their successors, such discretion is not personal to the first named trustees.<sup>75</sup>

<sup>70</sup> *Gichrist v. Educational Trust* (1895), 1 Ch. 367; 66 L. J. Ch. N. S. 298; *In re Percy*, 65 L. J. Ch. N. S. 364; *In re Dudgeon* (Ch.), 74 Law T. Rep. 613; *Delmar's Charitable Trust* (1897), 2 Ch. 163; 66 L. J. Ch. N. S. 555; *Security Company v. Snow*, 70 Conn. 288; *Cresap v. Williams*, 145 Ill. 625, *Hadley v. Hadley*, 147 Ind. 423; *Rotch v. Emerson*, 105 Mass. 431; *Weber v. Bryant*, 161 Mass. 400; *Baker v. McAden*, 118 N. C. 740; *Goodale v. Mooney*, 60 N. H. 528; 49 Am. Rep. 334; *Murphy's Estate*, 184 Pa. St. 310; *Kinike's Estate*, 155 Pa. St. 101; *Sawtelle v. Witham*, 94 Wis. 412. The fact that the performance is left in the discretion of the trustees does not make the trust void for uncertainty. *Cresap v. Cresap*, 34 W. Va. 310. (A devise to A in trust for the sup-

port of B according to his condition in life, was held to be sufficiently certain.)

<sup>71</sup> *National Bank of Commerce v. Smith*, 17 R. I. 244.

<sup>72</sup> *Morgan v. Halsey*, 97 Ky. 789.

<sup>73</sup> *Hadley v. Hadley*, 147 Ind. 423; *Gambel v. Trippe*, 75 Md. 252; 15 L. R. A. 235; *Baker v. McAden*, 18 N. C. 740; *Young v. Young*, 97 N. C. 132.

<sup>74</sup> *Security Company v. Snow*, 70 Conn. 288. (Thus where testator made his wife a trustee to pay the income to testator's daughter as the wife should think best for the interest and welfare of the daughter, it was held that upon the death of the mother, the succeeding trustee had no discretion to withhold the daughter's share.)

<sup>75</sup> *Security Co. v. Cone*, 64 Conn. 579.

Where the duties of trustees are specifically indicated by the will, and no room is left for the exercise of discretion, the death of the first trustee does not terminate the trust; and on the failure of the trustees indicated by the will, equity will appoint a trustee to carry the provisions of the trust into execution.<sup>76</sup>

In other jurisdictions, however, the validity of a trust to be exercised at the discretion of the executor acting as trustee, or of a regularly named trustee, has been denied. The grounds given for this position have been twofold: first, that such a trust would be void for uncertainty since it could not be enforced or directed by a court of equity. Such a reason, of course, applies with somewhat less weight to charitable trusts than to other trusts, especially where the discretion of the trustee is to be exercised in the selection of the beneficiaries.<sup>77</sup>

The second ground of attack is that this form of devise really leaves it to trustee to make a will for the testator after testator's death. This objection seems inconsistent in view of the fact that the validity of powers created by will is unquestioned.<sup>78</sup> But whether strictly consistent or not, the courts in many states have on one or both of these grounds declared that trusts were void where the selection of the beneficiaries and the plan and execution of the main scheme was left in the discretion of the trustees.<sup>79</sup>

## §620. Parol trusts.

In some cases a devise is made absolute on its face, and it is sought, by evidence of an extrinsic oral agreement between the testator and the devisee, to hold the devisee as trustee for the beneficiary indicated by such agreement. To enforce such a trust is apparently to disregard both the Statute of Wills and the Statute of Frauds. And it is held in some cases

<sup>76</sup> Hemphill's Estate, 180 Pa. St. 95; see Sec. 610.

<sup>77</sup> See Sec. 643.

<sup>78</sup> See Sec. 689-698.

<sup>79</sup> Wheelock v. American Tract Society, 109 Mich. 141; Tilden v. Green, 130 N. Y. 29; 14 L. R. A.

29; Fairchild v. Edson, 154 N. Y. 199; People v. Powers, 147 N. Y. 104; Johnson v. Johnson, 92 Tenn. 559; 36 Am. St. Rep. 104; 22 L. R. A. 179; Fifield v. Van Wyck, 94 Va. 557.



that no attention can be paid to such arrangements, except in so far as the same appear upon the face of the will.<sup>80</sup> But such an arrangement is often made in order to evade some rule of law which would render the trust invalid if expressed upon the face of the will. Thus oral trusts have been used as a means of devising property to a corporation, where the circumstances were such that a direct devise would have been invalid,<sup>81</sup> or as a means of devising property to testator's illegitimate children, in excess of the amount which testator, by statute, might dispose of to the exclusion of his legitimate children.<sup>82</sup> Accordingly, in some states these trusts may be proved by parol, and if a direct gift would have been invalid, the secret trust can not be sustained; further, the nominal beneficiary is not allowed to hold the gift for his own use.<sup>83</sup>

A devise to testator's son for life will be reconciled with a subsequent devise of the same property in trust for his wife and children, by construing the will to give to the son the right to occupy such property together with his wife and children.<sup>84</sup>

### §621. Validity of trusts.

In order to be valid and enforceable a trust must, of course, possess the elements already indicated as essential to a trust.<sup>85</sup> In addition to these requirements, the trust must be so created as not to violate any settled rule of law or equity. Thus a trust violating the rule against perpetuities is invalid.\* So a trust created for the accomplishment of an unlawful purpose is invalid.

In some jurisdictions the purpose for which a trust may be created are sufficiently designated by statute. In such jurisdictions a trust can not be created for any other purpose.<sup>86</sup>

<sup>80</sup> *Sims v. Sims*, 94 Va. 580.

<sup>81</sup> *Trustees of Amherst College v. Ritch*, 151 N. Y. 282.

<sup>82</sup> *Gore v. Clark*, 37 S. C. 537; 20 L. R. A. 465.

<sup>83</sup> *Trustees of Amherst College v. Ritch*, 151 N. Y. 282; *Gore v. Clark*, 37 S. C. 537; 20 L. R. A. 465.

<sup>84</sup> *Brown v. Brown* (Ky.), 18 S. W. 521; 13 Ky. Law Reporter, 808.

<sup>85</sup> See Sec. 610.

\* See Chapter XXVIII.

<sup>86</sup> *Bennalack v. Richards*, 116 Cal. 405 (thus in California the

A bequest in trust for purposes which can not be carried out is, as we have seen, either regarded as invalid<sup>87</sup> or is considered as a resulting trust for testator's heirs and next of kin.<sup>88</sup>

## §622. Extent of interest of beneficiary.

The nature and extent of the interest given to a *cestui que trust* under a will are to be determined from the will itself, and can not be modified by the subsequent exercise of powers of conversion, except in accordance with the terms of the will.<sup>89</sup>

A gift in trust of all the property coming to one under a will includes not merely the property devised directly, but also property devised by way of remainder.<sup>90</sup> And a provision adding a certain amount to an estate already given in trust, gives the addition upon the same trusts.<sup>91</sup>

A devise to testator's children in trust for their children creates no beneficial interest in the children of testator, although subsequently he refers to one of these devisees in trust as a "child's portion."<sup>92</sup>

A gift in trust for the benefit of two or more legatees is ordinarily to be treated as a separate trust for the use of each beneficiary, and not a joint trust for the use of all;<sup>93</sup> especially where construing the trusts as one joint trust would violate the rule against perpetuities.<sup>94</sup>

statute), in enumerating the purposes for which a trust may be created, does not authorize a trust to sell property, and no such trust can be created in California).

<sup>87</sup> *Ingersoll's Will*, 131 N. Y. 573.

<sup>88</sup> *Trustees of Amherst College v. Ritch*, 151 N. Y. 282. See Sec. 617.

<sup>89</sup> *Wilson v. Wright*, 91 Ga. 774; *Reed v. Davis*, 95 Ga. 202.

<sup>90</sup> *Shaw v. Eckley*, 169 Mass. 119.

<sup>91</sup> *Lejee's Estate*, 181 Pa. St. 416.

<sup>92</sup> *Mims v. Macklin*, 53 S. C. 6.

<sup>93</sup> *Stein v. Stein*, 79 Md. 464; *Weston v. Massachusetts General Hospital*, 169 Mass. 76; 47 N. E. 444; *Dean v. Mumford*, 102 Mich. 510; *Morse v. Macrum*, 22 Or. 229.

<sup>94</sup> *Dcan v. Mumford*, 102 Mich. 510.

Where no restriction is imposed by will, a beneficiary of a trust may devise his estate,<sup>95</sup> or sell it.<sup>96</sup> The purchaser, however, takes no greater interest than the beneficiary from whom he bought. Accordingly if the will provides for reinvestment of the trust funds in the discretion of trustees, the purchaser can not prevent such reinvestment.<sup>97</sup>

### §623. Accumulations.

A trust for the accumulation of the income, which does not violate the rule against perpetuities, nor the local statute of accumulations, is valid.<sup>98</sup> Thus a gift of the income of \$20,000 to testator's son for life and of the remainder of personal property after the death of testator's widow to a trustee to hold in trust to be paid over at the death of the son to certain persons, was held to be a direction for accumulation of all the income arising from the property after the payment of the income of \$20,000.<sup>99</sup>

A gift in trust to apply the income to the payment of certain mortgages was held to last not merely until the mortgages were satisfied, but also until the amount which was taken from the principal of such gift was accumulated from the income, so that the principal should ultimately be untouched.<sup>100</sup>

### §624. Separate estates of married women.

In jurisdictions where a husband has still, by common law, certain property rights in his wife's realty and personalty, other than curtesy or dower, equity recognizes and protects property devised or granted to a married woman free from the control of her husband. This equitable estate is known as a married woman's separate estate.

<sup>95</sup> Boies's Estate, 177 Pa. St. 190.

<sup>96</sup> Kean v. Kean (Ky.), 18 S. W. 1032.

<sup>97</sup> Dickison v. Ogden, — Ky. — (1890); 12 S. W. 191.

<sup>98</sup> *In re Mason* (1891), 3 Ch. 467; *Brown v. Wright*, 168 Mass. 506

(1897); 47 N. E. 413; *Eldred v. Shaw*, 112 Mich. 237; see Sec. 638, *et seq.*

<sup>99</sup> *Brown v. Wright*, 168 Mass. 506 (1897); 47 N. E. 413.

<sup>100</sup> *Hart v. Allen*, 166 Mass. 78.

No set form of words is necessary in a will to create a separate estate. Any expression of testator's intention to free the property devised from the legal rights of the husband is given full effect by treating her estate in the property devised as her separate estate.<sup>101</sup>

The question whether a separate estate is created is one of testator's intention. Hence the use of the words "free from her husband's control," or other words of similar character, is not conclusive in determining the character of the estate.<sup>102</sup> Thus where testator's intention is solely to protect the interest of the beneficiary if she should marry, and during minority, it was held that she had an absolute estate on coming of age when unmarried.<sup>103</sup>

So where, in addition to words which by themselves might create a separate estate, the devise was expressly stated to be "absolutely and in fee simple," and testator's property was so invested in valuable unimproved realty that if a separate estate was created the devise would be of little or no value, it has been held that a fee simple and not a separate estate was created.<sup>104</sup>

Testator's intention to create a separate estate must appear on the face of the will. It can not be presumed from a devise to a woman and her children that a separate estate was intended.<sup>105</sup>

<sup>101</sup> *Rasberry v. Harville*, 90 Ga. 530 (a devise to a married woman "in her own right," and a devise to her "in her own right free from the debts and contracts of her present or any future husband," were both held to create separate estates).

*Lushy v. Taylor* (Ky.), 30 S. W. 396; 17 Ky. L. Rep. 65; *Small v. Field*, 102 Mo. 104 (to a married woman "for the sole use of herself and her children.") *Hays v. Leonard*, 155 Pa. St. 474 (a devise to a married woman "to her sole and separate use" held to create a sepa-

rate estate). *Dezendorf v. Humphreys*, 95 Va. 473 (a devise "to her sole and separate use," held to create a separate estate).

<sup>102</sup> *MacConnell v. Wright*, 150 Pa. St. 275; *Meacham v. Graham*, 98 Tenn. 190; 39 S. W. 12.

<sup>103</sup> *Meacham v. Graham*, 98 Tenn. 190 (1897); 39 S. W. 12.

<sup>104</sup> *MacConnell v. Wright*, 150 Pa. St. 275, distinguished in *Hays v. Leonard*, 155 Pa. St. 474, where the words *prima facie* creating a separate estate were not modified by the context.

<sup>105</sup> *Rixey v. Deitrick*, 85 Va. 42.

A devise to women "in their own rights" does not create an equitable separate estate.<sup>106</sup>

In some jurisdictions property given to a married woman as her separate estate becomes hers absolutely upon the termination of coverture.<sup>107</sup> In most jurisdictions it is provided by statute that a married woman shall retain her own property upon marriage (subject, of course, to her husband's right of curtesy or dower) as if she were unmarried.<sup>108</sup> Under such statutes a devise to one "for her sole use and comfort during her natural life and to her heirs and assigns forever" passes a fee.<sup>109</sup>

<sup>106</sup> *Merrill v. Bullock*, 105 Mass. 486; *Leete v. State Bank*, 141 Mo. 574; *Hart v. Leete*, 104 Mo. 315.

<sup>107</sup> *Martin v. Fort* (Tenn.), 83 Fed. 19; *Harding v. St. Louis Life Insurance Co.* 2 Tenn. Ch. 465.

<sup>108</sup> But a devise to a married

woman and her husband and the survivor of them was held not within that rule. *Phelps v. Simons*, 159 Mass. 415.

<sup>109</sup> *Kendall v. Clapp*, 163 Mass. 69; *Cressey v. Wallace*, 66 N. H. 566.

## CHAPTER XXVIII.

### THE RULE AGAINST PERPETUITIES, AND CHARITABLE TRUSTS.

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#### §625. Perpetuities.—General discussion.

Among the restraints upon testamentary power is a class of restrictions which apply to wills, deeds, powers and all other instruments by which estates in property may be created. This is the class of restrictions which is sometimes rather vaguely referred to as created by the rules against perpetuities. These rules ought, on the one hand, to be considered in connection with restraint upon testamentary powers, for they affect the validity of a great many wills and impose a very serious obstacle in many cases to the fulfillment of the wishes of the testator; but on the other, they are so involved with questions of construction that it seems better to discuss them at this point in connection with the rules controlling the nature of the estate created, and with trusts.

Under the restraints created by the rules against perpetuities are grouped three topics which must, for purposes of convenience, be discussed separately. These are: (1) Perpetuities in the technical sense, that is, unlawful postponements of the vesting of estates; (2) Perpetuities in the popular sense, that is, unlawful restraints on alienation; and (3) Unlawful accumulations of property.

The same devise of property is often a violation of the rules on more than one of these topics, and to this fact is due the

occasional confusion between these different subjects to which text-writers and courts have been liable.

These rules, furthermore, are not matters peculiar to the law of wills, but apply equally to all conveyances of property of whatever kind; and they are topics of such vast scope that a thorough discussion of them here would expand this work far beyond the limits assigned to it.

An elementary discussion of this subject will therefore be undertaken here; and for an exhaustive investigation the reader will be referred to the excellent special works upon that subject.

### §626. Perpetuities.—Definition and application.

As the term "perpetuity" is an ambiguous term in law, its different meanings must be distinguished carefully, in order to avoid confusion. In the technical sense a perpetuity is a grant of property "wherein the vesting of an estate or interest is unlawfully postponed; and they are called perpetuities not because the grant as written would make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title or its vesting."<sup>1</sup>

This technical meaning of Perpetuity will be considered first; and this meaning must be carefully distinguished from the rules against restraint of alienation.<sup>2</sup> The rule, in this sense, refers solely to the time when the estate under consideration is to vest, and has nothing at all to do with its termination.<sup>3</sup> So that if an estate is to vest at all within the time fixed by statute, the fact that it may last beyond the time fixed by statute does not avoid the estate under the rule against

<sup>1</sup> Johnston's Estate, 185 Pa. St. 179, quoting Philadelphia v. Girard's Heirs, 45 Pa. St. 9; Lawrence's Estate, 136 Pa. St. 354; 112 R. A. 85.

<sup>2</sup> Brooks v. Belfast, 90 Me. 318.

<sup>3</sup> Chamberlayne v. Brockett, L. R. 8 Ch. 206; Russell v. Allen, 107 U. S. 163; Ingraham v. Ingraham,

169 Ill. 432; 169 Ill. 472; Davenport v. Kirkland, 156 Ill. 169; Brooks v. Belfast, 90 Me. 318; Hill-  
yer v. Vandewater, 121 N. Y. 681; Johnston's Estate, 185 Pa. St. 179; Lawrence's Estate, 136 Pa. St. 354; 11 L. R. A. 85; Webster v. Wiggin, 19 R. I. 73; 28 L. R. A. 510.

perpetuities.<sup>4</sup> On the other hand, it does not concern itself with the time at which the estate granted is to take effect in possession, but solely with the time at which such estate vests.<sup>5</sup>

When the question of the validity of a will under the rules against perpetuities, or in restraint of alienation, is under consideration, the state of facts existing at testator's death controls, and not that existing at the date of the execution of the will.<sup>6</sup>

When a will creates a power, the question whether the estate created in pursuance of the power violates the rule against perpetuities is to be determined as of the date of the will, and not of the time when the power was executed.<sup>7</sup> And where a deed creates a power, which is exercised by a will, the question of the violation of the rule against perpetuities is to be solved by referring to the condition of affairs at the date of the deed.<sup>8</sup>

Where the devise is dependent on future governmental action, subsequent to testator's death, control of which is, of course, impossible, and such a devise will be in violation of the rule against perpetuities or restraints on alienation unless the government does so act, it is held void.<sup>9</sup>

### §627. Origin of rule.

Under the early common law there was practically nothing upon which the rule could operate, and the rule itself was therefore non-existent. A freehold estate could not be created to begin in the future without the intervention of some intermediate estate, the determination of which before the subsequent estate could take effect in possession would defeat such subsequent estate, and by means of collusive matters of

<sup>4</sup> *Howe v. Hodge*, 152 Ill. 252;

*Madison v. Larmon*, 170 Ill. 65;

*Lawrence v. Smith*, 163 Ill. 149.

<sup>5</sup> *Madison v. Larmon*, 170 Ill. 65;

*Rhodes's Estate*, 147 Pa. St. 227.

<sup>6</sup> *Whitney v. Dodge*, 105 Cal. 192;

*Mullreed v. Clark*, 110 Mich. 229;

*Fargo v. Squiers*, 154 N. Y. 250;

*Dana v. Murray*, 122 N. Y. 604.

<sup>7</sup> *Lawrence's Estate*, 136 Pa. St. 354; 11 L. R. A. 85.

<sup>8</sup> *Dana v. Murray*, 122 N. Y. 604.

<sup>9</sup> *People v. Simonson*, 126 N. Y. 299; *Fowler v. Ingersoll*, 127 N. Y. 472.

*Contra*, *Field v. Drew Theological Seminary*, 41 Fed. 371.



record, such as fines and recoveries, it was in the power of the particular tenant in tail to bar the reversion after his estate.

But when long terms of years began to be employed as affording a means of family settlements, and when trust estates and devises by will began to be employed for similar purposes, and estates were thereby created which were not dependent upon intermediate estates, the courts awoke to the fact that, unless some new restraints were imposed on alienations and devises, property would in a few generations be so encumbered and involved as to be practically inalienable thereafter. By judicial legislation, originally in the courts of chancery, and subsequently acted upon on analogy by the law courts, the rule against perpetuities was gradually evolved.

The old rule against a possibility upon a possibility, was an attempt to prevent perpetuities, and is practically enforced by the modern rule.<sup>10</sup>

### §628. Original rule and statutory modifications.

As finally settled upon by the courts, the rule against perpetuities was as follows: No interest subject to a condition precedent is good unless the condition is to be fulfilled, if at all, within twenty-one years after some life, or lives, in being at the creation of the estate.<sup>11</sup>

The number of lives upon which the vesting of the estate depends is immaterial if all the lives are in existence at the time the estate is created.<sup>12</sup> To this length of time is added the period of gestation, whenever gestation in fact exists, whether it is the gestation period of a person in *ventre sa mere*, who is the person in being whose life determines the

<sup>10</sup> *In re Frost*, L. R. 43 Ch. D. 240; *Whitby v. Mitchell*, C. A. L. R. 44 Ch. D. 85.

<sup>11</sup> *Madison v. Larmon*, 170 Ill. 65, quoting *Gray on Perpetuities*, Sec. 201; *Terrell v. Reeves*, 103 Ala. 264; 16 So. 54; *Leonard v. Ha-*

worth, 171 Mass. 496; *Whitby v. Mitchell* (C. A.), L. R. 44 Ch. D. 85; *In re Hargreaves* (C. A., L. R. 43 Ch. D. 401.

<sup>12</sup> *Madison v. Larmon*, 170 Ill. 65.

estate,<sup>13</sup> or the gestation period of the person whose minority is the twenty-one year period after a life in being.<sup>14</sup>

By the wording of the rule it can not apply to vested estates;<sup>15</sup> but it does apply to every sort of property right other than a vested interest, such as a contingent remainder;<sup>16</sup> or an executory devise;<sup>17</sup> and it includes both legal and equitable estates.<sup>18</sup>

### §629. Effect of violation of rule.—Examples.

A devise in violation of the rule against perpetuities is void, and the property passes to the residuary devisee or legatee, if there are such, or to the heir or personal representative if there are not, just as if testator had not included such provision in his will, or had died intestate as to such property.<sup>19</sup>

Where the devise is one which may or may not vest within the time limited, it is held to be a devise within the rule and void, even though it probably will vest within the time limited.<sup>20</sup>

In such case the fact that the person, to whose descendants the perpetuity is limited, is past the age of child-bearing, does not prevent the application of the rule against perpetuities.<sup>21</sup>

<sup>13</sup> Phillips v. Herron, 55 O. S. 478.

<sup>14</sup> Long v. Blackall, 7 T. R. 100; Golliver v. Mickett, 1 Wils. 105.

<sup>15</sup> Terrell v. Reeves, 103 Ala. 264; 16 So. 54; Johnson v. Webber, 65 Conn. 501; Lawrence v. Smith, 163 Ill. 149.

<sup>16</sup> Madison v. Larmon, 170 Ill. 65.

<sup>17</sup> Carney v. Kain, 40 W. Va. 758.

<sup>18</sup> Bigelow v. Cody, 171 Ill. 229; Booth v. Baptist Church, 126 N. Y. 215.

<sup>19</sup> *In re* Wood (1894), 3 Ch. 381; *In re* Daveron (1893), 3 Ch. 421; Walkerly's Estate, 108 Cal. 627; Morris v. Bolles, 65 Conn. 45; Bel-  
field v. Booth, 63 Conn. 299; Tin-

gier v. Chamberlain, 71 Conn. 466; Lawrence v. Smith, 163 Ill. 149; Hamlin v. Mansfield, 88 Me. 131; State v. Holmes, 115 Mich. 456; Johnston's Estate, 185 Pa. St. 179; Adams v. Farley (Miss.), 18 So. 390.

<sup>20</sup> *In re* Bowen (1893), 2 Ch. 491; Tingier v. Chamberlain, 71 Conn. 446; Landers v. Dell, 61 Conn. 189; 26 Atl. 103; Lawrence v. Smith, 163 Ill. 149; Palmer v. Union Bank, 17 R. I. 627.

*Contra*, *In re* Russell (1895), 2 Ch. 698.

<sup>21</sup> *In re* Powell (1898), 1 Ch. 227 (the mother was eighty years old). See *In re* Dawson (1888), 39 Ch. D. 155.

But where a time within the limit fixed by the rule is to intervene between the settlement of testator's estate and the vesting of the gift over, such gift is valid where a settlement of decedent's estate or a sale of realty may be had within such reasonable time as will bring the whole period within the time limited by the rule, as the presumption is that the executors or trustees will settle within such reasonable time.<sup>22</sup>

So a direction in a will that the executors shall sell the realty as soon after testator's death as can be done conveniently, does not create an unlawful perpetuity, as the sale must be had within a reasonable time.<sup>23</sup>

### §630. Partial violation of rule.

If a limitation in a will is to vest within the time allowed by the rule against perpetuities, it is not avoided by the fact that another or an alternative provision in the will is void as against perpetuities.<sup>24</sup>

Thus a gift to charity, to which the rule against perpetuities does not apply, is not avoided by a direction that in the event that testator's nephews and nieces become poor and needy the trustees shall support them out of the fund given to charity even if the second gift violates the rule.<sup>25</sup>

But where the void provision is so closely connected with the valid provision as to be inseparable from it, the whole gift is avoided. Thus a devise for different purposes, one valid and the rest void, is invalid as to all where the will provides that "a

<sup>22</sup> *In re* Lord Sudeley (1894), 1 Ch. 334; *Belfield v. Booth*, 63 Conn. 299; *Atwater v. Russell*, 49 Minn. 22 (to be sold as soon as trustees can get a reasonable price. and in any event in ten years).

<sup>23</sup> *Hope v. Brewer*, 136 N. Y. 126; 18 L. R. A. 458; *Cooper's Estate*, 150 Pa. St. 576.

<sup>24</sup> *In re* Lowman (C. A.), (1895), 2 Ch. 348; *Halsey v. Goddard*, 86 Fed. 25; *Perkins v. Fisher*, 59 Fed. 801; *Terrell v. Reeves*, 103 Ala. 264; 16 So. 54; *Johnson v. Ed-*

*mond*, 65 Conn. 492; *Howe v. Hodge*, 152 Ill. 252; *Ingraham v. Ingraham*, 169 Ill. 432; 169 Ill. 472; *In re Stickney's Will*, 85 Md. 79; 35 L. R. A. 693; *Hascall v. King*, 162 N. Y. 134; *Mears v. Mears*, 15 O. S. 90.

<sup>25</sup> *Ingraham v. Ingraham*, 169 Ill. 432; 169 Ill. 472 (this view was taken since the gift to the nephews and nieces was incidental to that of charity); *Mears v. Mears*, 15 O. S. 90.

part" of the property devised shall be devoted to the valid purpose, without saying what specific part was intended.<sup>26</sup>

When successive gifts are made, some of which are in violation of the rule against perpetuities and others of which are not, the question of the validity of the gifts which are not themselves in violation of the rule against perpetuities depends upon the closeness of the connection between the invalid gifts and the other gifts. If consistent with the general scheme of the will, the valid gifts can be separated from the invalid, this will be done, and the valid gifts will be sustained, while the gifts in violation of the rule will be defeated.<sup>27</sup> If, on the other hand, the valid and invalid gifts are so closely connected by will that it is evidently testator's intention that all shall stand or fall together, the invalidity of one gift will defeat the others.<sup>28</sup> Thus, where a devise in trust for seventy-five years is not within the rule, but is created simply as a means of effecting a gift over at the end of the seventy-five year period, the valid term will fail together with the invalid gift over.<sup>29</sup>

### §631. Examples of gifts not within the rule against perpetuities.

Bequests and devises which are to vest at the death of a person in being, are always held to be valid as far as this rule is concerned.<sup>30</sup>

<sup>26</sup> *Kelly v. Nichols*, 17 R. I. 306.

<sup>27</sup> *Perkins v. Fisher*, 59 Fed. 801;

*Beers v. Narramore*, 61 Conn. 13;

*Ketchum v. Corse*, 65 Conn. 85;

*Bullard v. Shirley*, 153 Mass. 559;

12 L. R. A. 110; *Underwood v.*

*Curtis*, 127 N. Y. 523; *Hatch v.*

*Hatch*, 31 W. L. B. 57; *Lawrence's*

*Estate*, 136 Pa. St. 354; 11 L. R.

A. 85.

<sup>28</sup> *Potter v. Couch*, 141 U. S. 296;

*Lockridge v. Mace*, 109 Mo. 162;

*Lockridge v. Mariner*, 109 Mo.

169; *Butterfield's Will*, 133 N. Y.

473; *Johnston's Estate*, 185 Pa. St. 179.

<sup>29</sup> *Johnston's Estate*, 185 Pa. St. 179.

<sup>30</sup> *In re Powell* (1898), 1 Ch.

227; *Hendy's Estate*, 118 Cal. 656;

*Healy v. Healy*, 70 Conn. 467;

*Johnson v. Webber*, 65 Conn. 501;

*St. John v. Dann*, 66 Conn. 401;

*Parker v. Churchill*, 104 Ga. 122;

*Wentworth v. Fernald*, 92 Me. 282;

*Schermerhorn v. Cotting*, 131 N. Y.

48; *Hillen v. Iselin*, 144 N. Y. 365;

*Stevenson v. Evans*, 10 O. S. 307;

So a bequest in trust, the income to go to testator's wife for life, then to her two children till they reached the age of twenty-five, was upheld, the children being in existence at testators' death, when the will took effect, as such bequest must vest during a life in being.<sup>31</sup>

And where a devise is limited to one for life, and over to his heirs as they come of age, the rule against perpetuities is not violated;<sup>32</sup> nor where a devise is to take effect after the death of the wife and daughter of testator and after twenty years after testator's death.<sup>33</sup> And a bequest in trust for A and "his family," until he shall pay certain specified debts and then the balance of the fund to him, is valid, as the word "family" is so construed as to exclude all but those in being or their children.<sup>34</sup>

And a devise after the death of the taker of the life estate to his "heirs" or "legal representatives," is upheld. The term "legal representatives" is construed as meaning "executors or administrators," and the estate passes by descent and not by purchase.<sup>35</sup>

Where a devise is made to one for life, and if he die "without issue," or "childless," or "without being heirs of their body," then over to another, the first question presented is one of construction. Is the devise one limited over if at the death of the person named as taking the first estate he has no living descendants, or is it a devise over if at any time thereafter the line of descendants of the first taker should fail? The first contingency is spoken of as a "definite fail-

Lennig's Estate, 154 Pa. St. 209; *Armstrong v. Douglass*, 89 Tenn. 219; 10 L. R. A. 85.

So a devise to A for life and then to his children or to the children lawfully begotten of the body of such children is valid, as the gift is to the class existing at the death of the life tenant. *Stevenson v. Evans*, 10 O. S. 307.

<sup>31</sup> *Hendy's Estate*, 118 Cal. 656; *Schermerhorn v. Cotting*, 131 N. Y. 48.

<sup>32</sup> *Earnshaw v. Daly*, 1 App. D. C. 218; *Siddall's Estate*, 180 Pa. St. 127; *Hughes v. Hughes*, 91 Wis. 138; *Otterback v. Bohrer*, 87 Va. 548.

<sup>33</sup> *Potter v. Couch*, 141 U. S. 296. <sup>34</sup> *St. John v. Dann*, 66 Conn. 401.

<sup>35</sup> *Tarrant v. Backus*, 63 Conn. 277; 63 Conn. 277; *Johnson v. Edmond*, 65 Conn. 492; *Healy v. Healy*, 70 Conn. 467.

ure of issue," the second as an "indefinite failure of issue."<sup>36</sup> If the devise is over on a definite failure of issue, it vests immediately on the death of a person in being, and is, therefore, not too remote.<sup>37</sup>

So a devise to trustees to pay to a charitable corporation the income of testator's estate after the death of his wife and all his children, until the aggregate of the payments is twenty thousand dollars, and then to another charitable corporation until the aggregate amount of these payments is twenty thousand dollars, does not violate the rule against perpetuities where the income from the estate is such that the entire sums will be paid within twenty-one years after the death of the last surviving member of testator's immediate family.<sup>38</sup>

But where the words "without issue" are held to mean an indefinite failure of issue, a devise over upon such failure is void, since it may not vest till after a life or lives in being and twenty-one years.<sup>39</sup>

The words "die without leaving issue" were, as we have seen, held at common law to mean *prima facie* an indefinite failure of issue.<sup>40</sup>

### §632. Examples of gifts within the rule against perpetuities.

Where the original rule against perpetuities is in force, and no estate can be so devised as to vest at a period more remote

<sup>36</sup> See Sec. 590, *et seq.*

<sup>37</sup> *In re Thomas*, 30 Ont. Rep. 49 (devise in fee to child, but if such child should die childless, then one-third to wife of such child); *Terrell v. Reeves*, 103 Ala. 264; 16 So. 54 (devise to surviving children and "descendants" of such as are dead; if none survive, then over); *Glover v. Condell*, 163 Ill. 566 (die "without living heirs of their body"); *Strain v. Sweeny*, 163 Ill. 603 (die "without issue of his body"); *Madison v. Larmon*, 170 Ill. 65; *Weinbrenner's Estate*, 173 Pa. St. 440 (die "without leaving issue"); *Morehead's Estate*, 180 Pa.

St. 119; *Boutelle v. City Savings Bank*, 17 R. I. 781; *Selman v. Robertson*, 46 S. Car. 262; *Chace v. Gregg* (Tex. Civ. App. 1895); 31 S. W. 76; *Well's Estate*, 69 Vt. 388 ("should I at any future time fail to have heirs by my body").

<sup>38</sup> *Lennig's Estate*, 154 Pa. St. 209.

<sup>39</sup> *Lurman v. Hubner*, 75 Md. 268; *Rea v. Bell*, 147 Pa. St. 118; *Hackney v. Tracy*, 137 Pa. St. 53.

<sup>40</sup> *Hackett v. Tracy*, 137 Pa. St. 53 (even when the limitation over was to one living, designating him by name); see Sec. 591.

than after a life or lives in being and twenty-one years, a devise to vest at the end of a fixed period of time, without regard to lives in being, is void under the rule, where the time fixed exceeds twenty-one years, even though the aggregate term will probably be less than a life in being and twenty-one years.<sup>41</sup>

A devise to vest when the children of persons in being (which children may not all be in being at the death of testator) are twenty-five, is too remote.<sup>42</sup> So a devise to children born or to be born, for their lives, is void, since it may extend past any life in being and twenty-one years.<sup>43</sup>

And a devise to take effect upon the happening of a future event which is not dependent on any life or lives in being, and which may or may not happen before the time limited by the rule against perpetuities, is void under the rule.<sup>44</sup>

Where a gift to the "wife" of some one other than testator is held to include a wife married after testator's death, it is held in some jurisdictions that such a gift violates the rule against perpetuities, since it is possible, but not probable, that such gift may not vest within a life or lives in being and twenty-one years.

<sup>41</sup> *In re Daveron* (1893), 3 Ch. 421 (after forty-nine years); *Walkerly's Estate*, 108 Cal. 627 (after twenty-five years); *Stephen's Succession*, 45 La. Ann. 962; *Johnston's Estate*, 185 Pa. St. 179 (after seventy-five years).

<sup>42</sup> *In re Mervin* (1891), 3 Ch. 197; *Lawrence v. Smith*, 163 Ill. 149; *Armstrong v. Douglass*, 89 Tenn. 219; 10 L. R. A. 85 (attempt to entail by settlement).

<sup>43</sup> *Thomas v. Gregg*, 76 Md. 169; *Dayton v. Phillips*, 28 W. L. B. 327.

<sup>44</sup> *In re Gyde*, 78 Law T. R. 449 (a bequest to vest when land should be given or obtained for a specified purpose); *In re Wood* (1894),

2 Ch. 381 (a devise to vest when certain gravel pits owned by testator in freehold should be exhausted); *In re Lord Stratheden and Campbell* (1894), 3 Ch. 265 (a bequest to a volunteer corps upon the appointment of the next lieutenant-colonel); *Hamlin v. Mansfield*, 88 Me. 131 (a devise to take effect on the cessation of a business, the business to be carried on as long as the son of testator or any of his children should wish to carry it on); *Dana v. Murray*, 122 N. Y. 604; *Palmer v. Union Bank*, 17 R. I. 627 (a devise over if trustees should omit to execute the trust for a year).

A devise to "a widow" of A is good if it means his present wife, and it is so construed,<sup>45</sup> but bad if it means any wife he may have thereafter.<sup>46</sup>

### §633. Statutory modifications of the rule against perpetuities.

In some states the common law rule has been modified by statutes, which provide that an estate can be devised only in a person in being at the time of making the will, or his immediate issue or descendants. A statute of this kind "supercedes inquiry as to the scope of the common law rule on the subject," and furnishes a rule complete in itself.<sup>47</sup>

The expression "time of making the will," is construed to mean the death of the testator.<sup>48</sup>

In Connecticut the "immediate issue or descendants" means the children of such as are in being; and a devise to "grandchildren," "heirs," and the like, is held too remote.<sup>49</sup> But in Ohio, though their statute is copied from that of Connecticut,<sup>50</sup> the words "immediate issue or descendants," is extended to include grandchildren of one in being where the parent of such grandchildren, who was the child of such person in being,

<sup>45</sup> *Beers v. Narramore*, 61 Conn. 13.

<sup>46</sup> So as to husband, *In re Frost*, L. R. 43 Ch. D. 246.

<sup>47</sup> *Phillips v. Herron*, 55 O. S. 478.

<sup>48</sup> *Johnson v. Webber*, 65 Conn. 504.

<sup>49</sup> *Allyn v. Mather*, 9 Conn. 114; *Jocelyn v. Nott*, 44 Conn. 55; *Leake v. Watson*, 60 Conn. 498; *Landers v. Dell*, 61 Conn. 189; 23 Atl. 1083 (to daughter, on her death to her children; the issue of any deceased child to take their parents' share); *Anthony v. Anthony*, 55 Conn. 256 (to the "heirs" of one in being); *Beers v. Narramore*, 61 Conn. 13 (to "heirs"); *Morris v. Bolles*, 65 Conn. 45 (to

children of testator in being; then to testator's "grandchildren and their heirs"); *Ketchum v. Corse*, 65 Conn. 85 (to the "heirs and legal representatives" of persons in being); *Johnson v. Webber*, 65 Conn. 501 (a devise to granddaughters in being for life, and on their death among their children is valid; but a devise on their death to the "then lineal descendants" of testatrix is invalid); *Security Company v. Snow*, 70 Conn. 288 (to the "lawful heirs" of one in being); *Tingier v. Chamberlain*, 71 Conn. 466 (to "those persons who are the natural heirs at law of my said son at the time of his decease").

<sup>50</sup> *Harkness v. Corning*, 24 O. S. 416.



dies before such person in being;<sup>51</sup> and a person *in ventre sa mere* is, of course, a person in being within the meaning of this statute.<sup>52</sup>

#### §634. Restraints on alienation.

The general rules of property law do not recognize such an anomaly as an estate of inheritance, or an absolute ownership of personalty, in which the owner is restrained from alienating such property. The whole history of the law of realty since the Norman Conquest is a succession of struggles to shake off restraints upon the free alienation of property imposed by the feudal system, and now that the restraints imposed by the military organization of society are done away with, the courts are very unwilling to allow the caprice of testators to reimpose similar limitations.

#### §635. Extension of rule against alienation to prevent perpetuities.

The rule against restraints upon alienation was an entirely different one from the rule against perpetuities. The latter referred to the time when the devise should be vested; the former to the power of the devisee over his devise after it had vested. The confusion between them arose from the fact that a provision in a will might be forbidden by both rules at the same time. Thus, a devise for a fixed space of time without a reference to a life in being, and to be devoted to a named purpose which would prevent alienation, and then over to a named beneficiary, would be a violation of both rules.

This confusion has been further increased by the statutory change in the rule against perpetuities which has been made in some states. The common law rule has been discarded, and in its stead a rule which with slight variations is substantially that the absolute power of alienation of a fee shall not be

<sup>51</sup> *McArthur v. Scott*, 113 U. S. 340; *Stevenson v. Evans*, 10 O. S. 307; *Turley v. Turley*, 11 O. S. 173.      <sup>52</sup> *Phillips v. Herron*, 55 O. S. 478.

suspended for a longer period than during the continuance of not more than two lives in being at the creation of the estate.<sup>53</sup>

In some states a period of minority, where minority exists, is added to the foregoing period; in others, the absolute period of twenty-one years may be added. The statutes are not always the same as to certain exceptions allowed to this rule, and personal property is included under some of these statutes,<sup>54</sup> while under others it is not included,<sup>55</sup> or alienation may be restrained for any number of lives in being at the death of the testator.<sup>56</sup> But with the exception of these matters of detail the general principles of these statutes are substantially uniform in the different states.

A recent California case illustrates the distinction between the common law rule and the statutory rule. In that case testator bequeathed bonds in trust to pay interest and dividends to his granddaughter for life, and on her death to her children until the youngest should reach his majority, when the fund was to be divided among these children equally. This bequest was void under the statutory rule in force in California, as the power of alienation was restrained for more than lives in being, but it was valid under the common law

<sup>53</sup> "Our statute is not, properly speaking, against perpetuities. It simply prohibits restraints on alienation. The declaration that a future estate is void in its creation, which thus suspends the power of alienation, is to the same end. It is void if by any possibility it may suspend the absolute power of alienation beyond the prescribed period. The doctrine of remoteness therefore has no materiality except as it affects alienability." *Estate of Cavalry*, 119 Cal. 406.

"The statute does not prohibit all limitations of estates by which the power of alienation is suspended, but permits a suspension of such power, with the restriction that the suspension shall not continue be-

yond the period of lives in being at the creation of the limitation, and in Section 716 defines this restriction as follows. 'Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.' Consequently, whenever there are persons in being by whom an absolute interest in possession in the land can be conveyed, the power of alienation is not suspended." *Toland v. Toland*, 123 Cal. 140.

<sup>54</sup> *Walkerley's Estate*, 108 Cal. 627.

<sup>55</sup> *Tower's Estate*, 49 Minn. 371.

<sup>56</sup> *Penfield v. Tower*, 1. N. D. 216.

rule. In this case testator was domiciled in Pennsylvania at the time of his death, and the property disposed of was personalty. It was held that the bequest was controlled by Pennsylvania law and was valid, even in California courts.<sup>57</sup> The same distinction is made in a case where the devise was in violation of the statute as to realty, but good at common law as to personalty and such realty as was to be converted into personalty.<sup>58</sup>

### §636. Illustrations of violations of statutory rule.

Under the rule against perpetuities, as modified by modern statutes, the question is not primarily one of the vesting of the estate, but of the length of time during which the alienation of the fee is necessarily prevented. Thus, a devise which is settled by trust or otherwise to last forever, is clearly forbidden by the statutory rule.<sup>59</sup> So is a devise for a fixed term of years without any reference to a life in being.<sup>60</sup> But where a suspension of the power of alienation might have been valid for infancy, a trust preventing alienation until the youngest child should reach the age of forty was held valid up to the age of twenty-one.<sup>61</sup>

And where a devise is measured by lives so as to exceed the number of two lives in being permitted by statute the devise

<sup>57</sup> *Whitney v. Dodge*, 105 Cal. 192.

<sup>58</sup> *Tower's Estate*, 49 Minn. 371.

<sup>59</sup> *Brown v. Esterhazy*, — (D. C.), 1897; 25 Wash. L. Rep. 478; *In re Bartlett*, 163 Mass. 509; *Beurhaus v. Cole*, 94 Wis. 617.

<sup>60</sup> *Cavarly's Estate*, 119 Cal. 406 (alienation prevented till youngest child should reach the age of 30); *Crew v. Pratt*, 119 Cal. 139 (alienation prevented for seven years); *Farrand v. Pettit*, 84 Mich. 671; *Fargo v. Squiers*, 154 N. Y. 250 (alienation prevented as to one-half the property till child

named should reach twenty-five, and other half till he should reach thirty); *Booth v. Baptist Church*, 126 N. Y. 215 (a bequest to a church to help pay its debts if the church should within two years raise enough to pay its debts; if not, then the bequest to lapse to the residuum of testator's estate); *Haynes v. Sherman*, 117 N. Y. 433 ("until our youngest child now living shall have arrived at the age of twenty-one years or would arrive at that age if living").

<sup>61</sup> *Edgerly v. Barker*, 66 N. H. 434; 28 L. R. A. 328.

is forbidden by the rule.<sup>62</sup> And where such a restraint is made, a provision allowing a sale if the supreme court shall consent, does not make the bequest valid, since the supreme court may not consent.<sup>63</sup>

A bequest of stock was made in a national bank in a non-charitable trust to last during the corporate existence of the bank "either under its present character or by virtue of any renewals or extension thereof." At the time of testator's death the charter of the bank was limited to expire in less than the period of twenty years, which the New Jersey statute allowed for the restraint of alienation, and no statute allowed a renewal. It was held that inasmuch as the will expressly provided for renewals of the charter, which were within the power of the government, the bequest might extend beyond the time limited, and was therefore void.<sup>64</sup> The view of the court in this case was possibly affected by the fact that after the death of testator a statute was passed providing for an extension of the bank's charter, which was acted upon by the bank.

And a devise of the use of the homestead to the widow for life, charging the taxes, repairs and annuity for the widow for her life upon the residue of the estate, restrains alienation for the widow's life; hence a limitation over for two additional lives is void as creating a perpetuity.<sup>65</sup>

A devise to the state after the death of testator's wife if the state shall formally accept it within five years after such death, for a public, educational or charitable use, and if the

<sup>62</sup> *Whitney v. Dodge*, 105 Cal. 192 (for life of devise and on her death till her youngest child reaches majority); *McCan's Succession*, 48 La. Ann. 145; *Trufant v. Nunneley*, 106 Mich. 554 (specific tracts to each of three children for life; remainder to the bodily heirs of all such children share and share alike); *Underwood v. Curtis*, 127 N. Y. 523 (a devise to a widow for her life, and remainder to be sold within ten years after the

death of the widow); *Greenland v. Waddell*, 116 N. Y. 234 (a gift to a woman for life if she does not survive her husband, remainder to her children if they survive her and reach the age of twenty-one; otherwise to others).

<sup>63</sup> *Fowler v. Ingersoll*, 127 N. Y. 472.

<sup>64</sup> *Siedler v. Syms*, 56 N. J. Eq. 275.

<sup>65</sup> *Dean v. Mumford*, 102 Mich. 510.

state will not accept, then to a grandson, is void as suspending the power of conveying an absolute fee for more than two lives in being, as the state has no title to the realty devised until the state accepts, and the grandson has no title till the expiration of five years after the death of testator's wife.<sup>66</sup>

### §637. Cases not within the statutory rule.

Under the statutory rule a devise or bequest is valid where a trust is created to last for only two lives in being.<sup>67</sup> Thus, a devise in trust to executors, to pay the income to testator's widow and son for their lives, and then in trust for a charity, with a provision that certain pieces of realty should "not be sold or incumbered," was held valid, the clause in restraint of alienation not being construed to apply to any but the first trust which was only for two lives in being.<sup>68</sup>

A devise to a person named, 'to be distributed by her among her descendants, children and grandchildren, according to her discretion,' is valid, for under such a devise, distribution must take place at the death of the beneficiary at the latest.<sup>69</sup>

A will devising the income of a fund to a daughter and two cousins of testator is valid, where there is a provision that if the cousins die before the daughter the daughter shall take absolutely; and if the daughter dies first, the income shall go to such as she shall name. In no event can the trust outlast the lives of the two cousins.<sup>70</sup>

So where a will attempted to settle life interests upon three persons, but one of them died before testator, such devise did not violate the statutory rule, as the condition of facts at testator's death determines the validity of the will.<sup>71</sup> And where a devise is made to two, jointly, the two may be counted as one tenant in estimating the number of lives, and a remainder over

<sup>66</sup> *State v. Holmes*, 115 Mich. 456.

<sup>67</sup> *Goldtree v. Thompson*, 79 Cal. 613; *Meek v. Briggs*, 87 Io. 610; *Cochrane v. Schell*, 140 N. Y. 516; *Corse v. Chapman*, 153 N. Y. 466; *McClelland v. McClelland* (Tex. Civ. App. 1898), 37 S. W. 350. *Saxton v. Webber*, 83 Wis. 617:

20 L. R. A. 509; *Beurhaus v. Cole*, 94 Wis. 617.

<sup>68</sup> *Beurhaus v. Cole*, 94 Wis. 617.

<sup>69</sup> *Woodbridge v. Winslow*, 170 Mass. 388.

<sup>70</sup> *Bird v. Pickford*, 141 N. Y. 18.

<sup>71</sup> *Mullreed v. Clark*, 110 Mich. 232.

and a provision for a sale on the death of the remainderman, and distribution of the proceeds among the legatees is valid.<sup>72</sup>

Where the will creates two or more trusts, none of which will last more than two lives in being, each of such trusts is valid, although by such a will the entire property of testator is not set free until after more than two lives in being.<sup>73</sup> And a devise in trust for a fixed number of years may be made valid by a further provision that if a life, or two lives, in being should terminate before the time limited that the estate should be vested in certain named persons.<sup>74</sup> And where upon a correct construction of the will certain bequests vest absolutely within the time limited, they are valid, even though trusts as to the residue of testator's estate are prolonged.<sup>75</sup>

A direction to receive certain rents until the leases are cancelled and power to sell when the leases are cancelled, does not forbid sale before the leases are cancelled, and is therefore not a statutory perpetuity.<sup>76</sup> And direction to executors to sell certain realty during the spring months of a certain year, a few months after testator's death, is not a perpetuity, as it only gives a reasonable time for sale and does not prevent an earlier sale.<sup>77</sup>

### §638. Accumulations.

After the adoption of the rule against perpetuities the attention of the courts was not especially directed for a considerable time to the dangers that lay in permitting accumulations; that is, devises and bequests in trust, the net income not to be expended but to be added to the principal, and the entire sum thus obtained to be used at the end of the accumulation period as provided by will. It thus became es-

<sup>72</sup> Hughes v. Hughes, 91 Wis. 138.

<sup>73</sup> Allen v. Allen, 149 N. Y. 280. Buchanan v. Little, 154 N. Y. 147; Schermerhorn v. Cotting, 131 N. Y. 48; Surdam v. Cornell, 116 N. Y. 305.

<sup>74</sup> Montignani v. Blade, 145 N. Y. 111.

<sup>75</sup> Sawyer v. Cubby, 146 N. Y. 192; Durfee v. Pomeroy, 154 N. Y. 583.

<sup>76</sup> Toland v. Toland, 123 Cal. 140.

<sup>77</sup> Deegan v. Wade, 144 N. Y. 573; Atwater v. Russell, 49 Minn. 22. See Sec. 629.

established law without much discussion that accumulations might be permitted for as long a time as the rule against perpetuities would permit any estate to be held on a contingency.<sup>78</sup>

The will of Mr. Thelluson called the attention of the courts and the public to the abuses possible under this rule. This remarkable document settled an estate worth about three million dollars upon certain trustees to invest and accumulate the income till the death of the last survivor of a number selected, in being at testator's death, and then to divide the accumulated funds among testator's descendants in designated proportions, and failing them, to the crown of England for the sinking fund. This devise was perfectly valid as the law then stood and was accordingly upheld.<sup>79</sup>

The comment caused by the case arose from the fact that it was discovered by careful computation that the trust would probably last for about seventy-five years, and the total accumulation would be upwards of one hundred and twenty-five million dollars.

This state of the law was at once remedied by the act of 39 and 40 Geo. III, ch. 98, which is popularly known as the "Thelluson Act." As far as this statute and the American statutes, which are based upon it, affect wills, they limit accumulation periods to twenty-one years after the death of testator, or during a period of minority where such period exists at the death of testator.

Accumulations can not be made for any longer period than that provided for by the act.<sup>80</sup> But where a bequest to a named beneficiary is to accumulate for his benefit beyond the time limited, such bequest is not void except as to the pro-

<sup>78</sup> *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Green v. Ekins*, 2 Atk. 473; *Harrison v. Rowley*, 4 Ves. 212; *Boughton v. Boughton*, 1 H. L. Cas. 406.

<sup>79</sup> *Thelluson v. Woodford*, 4 Ves. 227.

<sup>80</sup> *Baker v. Stuart*, 28 Ont. Rep.

439 (accumulation directed for sixty years); *Cochrane v. Schell*, 140 N. Y. 516 (accumulation to go to persons not in being at death of testator); *Farnum's Estate*, 191 Pa. St. 75; *Edward's Estate*, 190 Pa. St. 177 (accumulation for life).

vision for alienation, and the beneficiary can take immediately.<sup>81</sup>

A direction for accumulation which is evidently not intended to extend beyond the time fixed by law is not invalidated by a provision that trustees shall delay the erection of a certain building until the city decides in regard to a proposed change of grade affecting the property upon which the building is to be erected.<sup>82</sup>

### §639. Charitable Devises.—Definition.

A charitable devise is one for the benefit of an indefinite class of persons which may include the whole public, which devise is intended to promote the well-being of such class, within the limits allowed by the law.<sup>83</sup> Other definitions to the same effect in substance are given.<sup>84</sup>

Where the statute or the constitution permits relaxation of the ordinary rules in favor of "eleemosynary" devises, this is held equivalent to the common law meaning of "charitable," as here discussed.<sup>85</sup>

The size and scope of this book do not permit of a thorough and detailed investigation of the great subject of charitable trusts, yet a discussion of the nature and extent of a testamentary power would be incomplete without some reference to a subject which is of such importance by reason of its frequent recurrence in the law of wills. All that can be undertaken here is a brief résumé of the main principles of the subject as illustrated by a few of the adjudicated cases, chiefly those recently decided.

<sup>81</sup> *Wharton v. Masterman* (1895); A. C. 186; 64 L. J. Ch. (N. S.), 369.

<sup>82</sup> *Roger's Estate*, 179 Pa. St. 602.

<sup>83</sup> *Willey's Estate*, — Cal. —; 56 Pac. 550; *Mack's Appeal*, — Conn. —; 41 Atl. 242; *Old South Society v. Crocker*, 119 Mass. 1;

*Tilden v. Green*, 130 N. Y. 46; *Towle v. Nessmith*, — N. H. —; 42 Atl. 900.

<sup>84</sup> *Jackson v. Phillips*, 14 Allen (Mass.), 539; *Pennoyer v. Wadhams*, 20 Ore. 274; *Vidal v. Girard*, 2 How. (N. S.), 127.

<sup>85</sup> *People, Ellert v. Cogswell*, 113 Cal. 129.



**§640. Rule against perpetuities as applied to gifts to charitable uses.—Time of vesting.**

Charitable devises must be considered by themselves because of certain peculiarities which they possess. They are generally said not to be within the rule against perpetuities. Since the term "rule against perpetuities" is, as we have seen, ambiguous, the cases in which charitable devises are not within the rule must be considered in detail.

Where a devise to a charity is so given as not to vest within the time fixed by the rule against perpetuities, the devise is void. In this sense of the term, a devise to a charitable trust is within the rule against perpetuities.<sup>86</sup>

A devise to a charitable organization to be incorporated after testator's death, is held in some states not to be contrary to the rule against perpetuities, as the corporation is supposed to be created at once.<sup>87</sup> In others it is held invalid as contrary to the rule against perpetuities, since the corporation may not be formed for a considerable time after testator's death, and the delay is not limited to a life in being.<sup>88</sup> Even where the will provided that the act of incorporation, the details of which differ from the general statute, is to be obtained during the lifetime of the executors, or one of them, such gift was held too remote.<sup>89</sup> But where the devise is to a religious society, at the death of the wife of testator, to be

<sup>86</sup> *In re Gyde* (Ch.), 78 Law. T. Rep. 449; *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Jocelyn v. Nott*, 44 Conn. 55; *Parker v. Churchill*, 104 Ga. 122; 30 S. E. 642; *Crerar v. Williams*, 145 Ill. 625, affirming, 44 Ill. App. 487; *Brooks v. Belfast*, 90 Me. 318; *State v. Holmes*, 115 Mich. 456; *John's Will*, 30 Ore. 494; 47 Pac. 341; 36 L. R. A. 242.

<sup>87</sup> *Vidal v. Philadelphia*, 2 How. 127; *Hayes v. Pratt*, 147 U. S. 557; *Jones v. Habersham*, 107 U. S. 174; *Ould v. Hospital*, 95 U. S. 303; *Field v. Drew Theological Seminary*, 41 Fed. 371; *Coit v.*

*Comstock*, 51 Conn. 352; *First Society of M. E. Church v. Clark*, 41 Mich. 730; *Chase v. Stockett*, 72 Md. 235 (the trustees to become incorporated if they wished); *Lane v. Eaton*, 69 Minn. 141; 71 N. W. 1031; 38 L. R. A. 669; *Keith v. Scales*, 124 N. Car. 497; *Pepper's Estate*, 154 Pa. St. 331; *Emory College v. Shoemaker College*, 92 Va. 320.

<sup>88</sup> *Bond v. Home for Aged Women*, 94 Ia. 458; 62 N. W. 838; *Booth v. Church*, 126 N. Y. 215; *Leonard v. Burr*, 18 N. Y. 96.

<sup>89</sup> *People v. Simonson*, 126 N. Y. 299.

used as a parsonage only, to revert to testator's heirs if such use shall cease, and such society incorporates during the continuance of the life estate, it may take.<sup>90</sup>

But where the devise is to a charity, and upon a given event over to another charity, the gift is generally upheld, even though the event is so remote that it may not occur during the time limit fixed by the rule. The reason of this exception is generally said to be that since restraints on alienation are tolerated in charitable bequests, and since the estate has vested in the first charity within the time limited by the rule, the policy of the law is no more violated by a change of use from charity to charity, than by a continuance of the use in the first charity.<sup>91</sup>

A devise to a charity after a life estate is, of course, not contrary to the rule against perpetuities.<sup>92</sup>

#### §641. Rule against perpetuities as applied to gifts to charitable uses.—Restraint on alienation.

A charitable devise is, in another sense, an exception to the rule against perpetuities. If the devise is such that it is recognized by the law as charitable, it may restrain the alienation of property beyond the time fixed by such rule, and hold the property for such charitable use.<sup>93</sup> But such restraint

<sup>90</sup> *Lougheed v. Dykeman's Baptist Church*, 129 N. Y. 211; 14 L. R. A. 410.

<sup>91</sup> *In re Tyler (C. A.)*, (1891), 3 Ch. 252; *Ould v. Washington Hospital*, 95 U. S. 303; *Russell v. Allen*, 107 U. S. 163; *Jones v. Habersham*, 107 U. S. 174; *Church v. Trustees*, 67 Conn. 554 (to vest when first beneficiary should cease to be in communion with a given denomination); *Odell v. Odell*, 10 Allen (Mass.), 1; *John's Will*, 30 Ore. 494; 47 Pac. 341; 36 L. R. A. 242.

<sup>92</sup> *Mack's Appeal*, 71 Conn. 122; p 41 Atl. 242; *Pendleton v. Kinney*, 65 Conn. 222.

<sup>93</sup> *Russell v. Allen*, 107 U. S. 163; *Ould v. Washington Hospital*, 95 U. S. 303; *Field v. Drew Theological Sem.* 41 Fed. 371; *Spence v. Widney (Cal.)*, (1896), 46 Pac. 463; *Woodruff v. Marsh*, 63 Conn. 125; 26 Atl. 846; *Pendleton v. Kinney*, 65 Conn. 222; *Parker v. Churchill*, 104 Ga. 122; *Alden v. St. Peter's Parish*, 158 Ill. 631; *Ingraham v. Ingraham*, 169 Ill. 432; 169 Ill. 472; *Crerar v. Williams*, 145 Ill. 625; 34 N. E. 467; *Rush County v. Dinwiddie*, 139 Ind. 128; *Brooks v. Belfast*, 90 Me. 318; *In re Bartlett*, 163 Mass. 509; 40 N. E. 899; *Teele v. Bishop of Derry*, 168 Mass. 341; 47 N. E. 422; *Wardens*,

is to be construed in accordance with the general purpose of the will.<sup>94</sup> Thus, where a will devised lands for a home for disabled clergymen, and provided that no part of the land should be sold or devoted to other purposes, is not held to forbid the sale of isolated parcels which could not be used with the bulk of the estate.<sup>95</sup>

#### §642. Accumulations for charitable purposes.

In the third sense of the word charitable devises are exceptions to the rule against perpetuities. Property may be granted to accumulate for a period beyond the time fixed for ordinary accumulations, and if the fund is to be devoted to charity, and if it vests within the time limited, the devise will be upheld.<sup>96</sup> Thus, a devise in which ten thousand dollars of the income was to be added annually to the principal for one hundred years, and the residue of the income was to be devoted to educational purposes was held valid.<sup>97</sup> But accumulations may be for too long a period to be permitted by the local statute even for charitable uses.<sup>98</sup>

#### §643. Who may be beneficiaries of a charitable devise.

Any class of individuals may be beneficiaries under a charitable devise. Under the definition of a charitable trust<sup>99</sup> it is

etc. v. Attorney General, 164 Mass. 188; Jackson v. Phillips, 14 Allen (Mass.), 539; Odell v. Odell, 10 Allen (Mass.), 1; Penny v. Croul, 76 Mich. 471; 5 L. R. A. 858; Lane v. Eaton, 69 Minn. 141; 30 L. R. A. 669; Moore v. Moore, 25 Atl. 403; *In re John Mercer Home*, 162 Pa. St. 232; Mills v. Davison, 54 N. J. Eq. 659; Webster v. Wiggin, 19 R. I. 73; Staines v. Burton, 17 Utah, 331.

<sup>94</sup> See Secs. 634-637.

<sup>95</sup> *In re John C. Mercer Home*, 162 Pa. St. 232.

<sup>96</sup> Harbin v. Masterman (1894), 2 Ch. 184; Society v. Attorney General, 3 Russ. 142; Attorney General v. Bishop, 1 Bro. Ch. 444; Cham-

berlayne v. Brockett, L. R. 8 Ch. 206; Duggan v. Slocum, 83 Fed. 244; Woodruff v. Marsh, 63 Conn. 125; Ingraham v. Ingraham, 169 Ill. 432; 169 Ill. 472; Phillips v. Harrow, 93 Io. 92; Wardens, etc. v. Attorney General, 164 Mass. 188; *In re Bartlett*, 163 Mass. 509; Odell v. Odell, 10 Allen, 1; Tainter v. Clark, 5 Allen, 66; Nelson v. Cushing, 2 Cush. 519; American Academy v. Harvard College, 12 Gray 582; Webster v. Wiggin, 19 R. I. 73.

<sup>97</sup> Woodruff v. Marsh, 63 Conn. 125; 26 Atl. 846.

<sup>98</sup> Ingraham v. Ingraham, 169 Ill. 432, 472.

<sup>99</sup> See Sec. 639.

not necessary that the beneficiary be described with that certainty that is necessary in ordinary devises and bequests. Indeed, it is said that the uncertainty of the beneficiary is an essential characteristic of the charitable devise.<sup>100</sup>

The extent to which uncertainty is allowed is by no means the same in the different jurisdictions. There is the widest divergence, from the utmost liberality on down to the very narrowest constructions in determining the validity of charitable trusts with reference to the certainty of the beneficiaries. Thus a devise to the executors "to distribute among such charitable institutions as they may see fit" is held valid in some states,<sup>101</sup> and is held invalid elsewhere.<sup>102</sup> Thus a gift to the executors "for any charitable institution they may select or think of benefiting, to perpetuate my memory," was held void, being too specific for a general charity, and too indefinite for an ordinary devise.<sup>103</sup>

So where the general outlines of the charity are indicated and trustees selected, with discretionary powers for selecting the beneficiaries, such a devise is held in some states as void for indefiniteness.<sup>104</sup> But in the greater number of states a more liberal rule is adopted, and where the general purpose of

<sup>100</sup> Russell v. Allen, 107 U. S. 163; Wood v. Paine, 66 Fed. Rep. 807; Hinckley's Estate, 58 Cal. 457; Old South Society v. Crocker, 119 Mass. 1; Weber v. Bryant, 161 Mass. 400; Sowers v. Cyrenius, 39 O. S. 29.

<sup>101</sup> Sickles v. New Orleans, 80 Fed. 868; Powell v. Hatch, 100 Mo. 592; Kinike's Estate, 155 Pa. St. 101; Murphy's Estate, 184 Pa. St. 310; Sawtelle v. Witham, 94 Wis. 412.

<sup>102</sup> Burke's Succession, 51 La. Ann. 538; 25 So. 387; People v. Powers, 147 N. Y. 104; Fairchild v. Edson, 154 N. Y. 199; Read v. Williams, 125 N. Y. 560.

<sup>103</sup> Burke's Succession, 51 La. Ann. 538.

<sup>104</sup> People *ex rel.* v. Cogswell, 113 Cal. 129; L. R. A. (in trust for the

"boys and girls of California"); Long v. Gloyd, 25 Wash. L. Rep. 50; Moran v. Moran, 104 Io. 216; 39 L. R. A. 204 (a bequest to be divided among the Sisters of Charity without any further description of the beneficiaries. Here no discretionary power was given to the trustees); Yingling v. Miller, 77 Md. 104; 26 Atl. 491; (a devise to the "needy poor of said church," the church being unincorporated); Wheelock v. American Tract Society, 109 Mich. 141 (a devise to trustees to pay money to certain charities in such sums as they deemed proper, or to such worthy poor girls as they should select); Society v. Moll, 51 Minn. 277; 53 N. W. 648 (a devise to "those members of the 'Society of

the charity is indicated discretionary powers in the trustees for the selection of the beneficiaries do not vitiate the trust.<sup>105</sup>

the Most Precious Blood' who are under my control and subject to my authority at my death"); *Fairchild v. Edson*, 154 N. Y. 199 (a bequest to trustees to be by them divided among such "incorporated religious, benevolent and charitable societies of the City of New York" as they should select); *People v. Powers*, 147 N. Y. 104 (a like devise in the City of Rochester); *Fosdick v. Hempstead*, 125 N. Y. 581; 11 L. R. A. 715; *Albery v. Sessions*, 2 Ohio N. P. 237; 3 Ohio Dec. 330; *Brennan v. Winkler*, 37 S. Car. 457; 16 S. E. 190 (a devise "to educate young men for the priesthood or to educate individual boys and girls"); *Jones v. Green*, Tenn. Ch. App. 36 S. W. 729; *Field v. Van Wyck*, 94 Va. 557 (a bequest to trustees "for the benefit of the New Jerusalem Church as they shall deem best"); *Pack v. Shanklin*, 43 W. Va. 304; 27 S. E. 389 (a devise to the "trustees of each of these causes, home missions, foreign missions, American Bible Society of the Southern Presbyterian Church," where there were no such trustees. This could not be treated as a devise to the trustees of the general assembly of the Presbyterian Church in the United States); *McHugh v. McCole*, 97 Wis. 166; 40 L. R. A. 724; 72 N. W. 631 (a bequest to a bishop "to be used by him for the benefit and behoof of the Roman Catholic Church at X," where the church was not incorporated and consisted of several associations and organizations; and also a bequest to him "to be used for the benefit and behoof of the Roman Catholic Church"); *Fuller's Will*, 75 Wis. 431 (to pay

income to the American Baptist Publication Society of Philadelphia to support a Baptist colporteur and missionary in Wisconsin).

<sup>105</sup> *Phelps v. Lord*, 25 Ont. Rep. 259 (for "the cause of our Lord"); *In re Darling* (1896), 1 Ch. 50 (to "the poor and the service of God"); *Wood v. Paine*, 66 Fed. 807; *Duggan v. Slocum*, 83 Fed. 244 (a bequest to trustees to establish a public library and a protectory for boys, no means for selecting the beneficiaries being indicated); *John v. Smith*, 91 Fed. 827; *Strong's Appeal*, 68 Conn. 527 (a bequest to "the worthy poor of said town . . . as may be in needy and necessitous circumstances . . . always excluding . . . the criminal classes"); *Mack's Appeal*, 71 Conn. 122; 41 Atl. 242; *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, affirming 70 Ill. App. 575; *Phillips v. Harrow*, 93 Io. 92; 61 N. W. 434; *Bedford v. Bedford*, 99 Ky. 273; 35 S. W. 926; *Tichenor v. Brewer*, 98 Ky. 349; 33 S. W. 86 (devise to a bishop "to be by him used for the Roman Catholic charitable institutions in his diocese"); *Fox v. Gibbs*, 86 Me. 87 (devise to trustees to use at their discretion for "benevolent and charitable purposes"); *Darcy v. Kelly*, 153 Mass. 433; *Towle v. Nesmith*, — N. H. —; 42 Atl. 900; *Bird v. Merkle*, 144 N. Y. 544; *O'Neal v. Caufield*, 5 Ohio N. P. 149; *Pennoyer v. Wadhams*, 20 Ore. 274; 11 L. R. A. 210; *Trim's Estate*, 168 Pa. St. 395; *Dye v. Beaver Creek Church*, 48 S. Car. 444 (a devise to trustees "for poor children for their tuition"); *Staines v. Burton*, 17 Utah, 331; 53 Pac. 1015 (a devise

A comparison of these sets of cases will show that in some states a devise of realty may be upheld as definite if made to trustees where a similar devise would be held as too indefinite if made directly to the class without the intervention of trustees.<sup>106</sup>

In many states a devise, either directly or in trust, for an "unincorporated voluntary association whose membership is fluctuating and uncertain," is void for uncertainty, whether a trustee is interposed or not.<sup>107</sup>

In Tennessee a devise or bequest to the persons who are in fact trustees of a voluntary unincorporated society, where the will takes effect is valid; while a similar gift to such trustees as the society may select is invalid.<sup>108</sup> In some states a distinction is made between bequests of personalty to a voluntary unincorporated association, and devises of realty the former being upheld when the latter would not be.<sup>109</sup>

Legislation also has been busy upon this subject and many apparent conflicts in judicial decision are due solely to pecu-

to a bishop of the Mormon Church to spend the income in his discretion for the benefit of church members, where almost all the inhabitants of the community were members of that church); *Sheldon v. Stockbridge*, 67 Vt. 299; 31 Atl. 414 (a devise to the town of Stockbridge for the relief of the poor of said town); *Protestant Episcopal Education Society v. Churchman*, 80 Va. 718 (a devise "to be used exclusively for educating poor young men for the Episcopal ministry").

<sup>106</sup> Thus compare *Brennan v. Winkler*, 37 S. Car. 457 and *Dye v. Church*, 48 S. Car. 444; *Stone v. Griffin*, 3 Vt. 400; *Conklin v. Davis*, 63 Conn. 377; *Alden v. St. Peter's Parish*, 158 Ill. 631; *Cruse v. Axtell*, 50 Ind. 49; *Tappan v. Deblois*, 45 Me. 130; *Halsey v. Protestant Episcopal Convention*, 75 Md. 275; *Jackson v. Phillips*, 14 All. 539.

<sup>107</sup> *Philadelphia Baptist Association v. Hart*, 4 Wheat. 1; *Brewster v. McCall*, 15 Conn. 274; *First Society of M. E. Church v. Clark*, 41 Mich. 730; *Lane v. Eaton*, 69 Minn. 141; 38 L. R. A. 669; *White v. Howard*, 46 N. Y. 144; *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290; *Holland v. Alcock*, 108 N. Y. 312; *Fairchild v. Edson*, 154 N. Y. 199; *Rhodes v. Rhodes*, 88 Tenn. 637; *Wilmoth v. Wilmoth*, 34 W. Va. 426.

<sup>108</sup> *Sheets v. Hardin* (Tenn.), 48 S. W. 267; *Daniel v. Fain*, 5 Lea. 319; *Reeves v. Reeves*, 5 Lea. 644.

<sup>109</sup> *Wellbelove v. Jones*, 1 Sim. & Stu. 40; *Johnstone v. Harrowby*, 1 De G. F. & J. 183; *Williams v. Pearson*, 38 Ala. 299; *Hadden v. Dandy*, 51 N. J. Eq. 154; 32 L. R. A. 625; *Evangelical Association's Appeal*, 35 Pa. St. 316; *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644.

liarities of statute law. Thus, after the magnificent devise of Samuel J. Tilden was held void for uncertainty,<sup>110</sup> the legislature altered the rule to prevent a recurrence of such a failure, and now allows much greater liberality in indefinite beneficiaries.<sup>111</sup>

#### §644. Charitable devises to public corporations.

A public corporation may ordinarily be the beneficiary of a charitable devise; or may take as trustee for the benefit of its members or of certain specified classes of them. The state may be the beneficiary of a charitable devise,<sup>112</sup> but the state treasurer can not accept the devise for the state. The state legislature alone has this power.<sup>113</sup>

A devise may be made to a town, city or other municipal corporation as trustee for charitable purposes,<sup>114</sup> or to a board of county commissioners,<sup>115</sup> or to a board of water commissioners,<sup>116</sup> and if the town should be unwilling to accept,<sup>117</sup> or be not authorized by its charter to accept,<sup>118</sup> equity will appoint a new trustee and the devise will not fail.

The fact that the city could not have levied a tax for the charitable purpose specified in the will does not prevent the devise

<sup>110</sup> *Tilden v. Green*, 130 N. Y. 29.

<sup>111</sup> *Dammert v. Osborn*, 140 N. Y. 30.

<sup>112</sup> *In re Yale University*, 67 Conn. 237; *State v. Blake*, 69 Conn. 64; *Bedford v. Bedford*, 99 Ky. 273.

<sup>113</sup> *State v. Blake*, 69 Conn. 64.

<sup>114</sup> *Wood v. Paine*, 66 Fed. 807; *Phillips v. Harrow*, 93 Io. 92; *Sears v. Chapman*, 158 Mass. 400; *Higginson v. Turner*, 171 Mass. 586; 51 N. E. 172; *Barkley v. Donnelly*, 112 Mo. 561; *McIntosh v. Charlestown*, 45 S. Car. 584; *Sheldon v. Stockbridge*, 67 Vt. 299; *Beurhaus*

*v. Cole*, 94 Wis. 617; 69 N. W. 986.

Contra, as to a city; *Daily v. New Haven*, 60 Conn. 314; 14 L. R. A. 69.

<sup>115</sup> *Rush County Commissioners v. Dinwiddie*, 139 Ind. 128 (the statute authorized the board to appropriate money to aid in establishing an Old Woman's Home when a certain amount had been given or devised for such home).

<sup>116</sup> *Penny v. Croul*, 76 Mich. 471; 5 L. R. A. 858.

<sup>117</sup> *Phillips v. Harrow*, 93 Io. 92.

<sup>118</sup> *Wood v. Paine*, 66 Fed. 807.

from vesting,<sup>119</sup> and the fact that the district to which the devise is made for school purposes is not incorporated does not avoid the gift.<sup>120</sup>

A devise in trust for "charitable and benevolent institutions" is a devise to those institutions with the named district which are both charitable and benevolent.<sup>121</sup> A church convention which has power by statute to take property by devise may act as trustee in a charitable trust.<sup>122</sup>

#### §645. What are charitable purposes.—Education.

Upon the details of what constitute charitable purposes, the courts are not entirely in accord, although there is less marked divergence upon this topic than upon some others under the title of Charitable Trusts.

Education is held to be a charitable use, where the recipients of the gift are so indefinite as to render the grant charitable.<sup>123</sup> Thus, a devise to a state to establish a permanent school fund is a charitable devise.<sup>124</sup> So a devise for the benefit of public schools generally is a charitable devise, even though taxation provides such schools already.<sup>125</sup> A provision prohibiting religious or denominational teaching in

<sup>119</sup> *Phillips v. Harrow*, 93 Io. 92 (to aid the religious societies of the city to build and maintain a foundling hospital and to aid the poor and needy of the city).

*Contra*, *Darley v. New Haven*, 60 Conn. 314; 14 L. R. A. 69; *Bullard v. Shirley*, 153 Mass. 559; 12 L. R. A. 110.

<sup>120</sup> *Sears v. Chapman*, 158 Mass. 400.

<sup>121</sup> *People v. Powers*, 147 N. Y. 104.

<sup>122</sup> *Halsey v. Convention of P. E. Church*, 75 Md. 275.

<sup>123</sup> *Birchard v. Scott*, 39 Conn. 63; *Doughten v. Vandever*, 5 Del. Ch. 51; *Fox v. Gibbs*, 86 Me. 87; *Grand Prairie Seminary v. Morgan*, 171 Ill. 444; *John's Will*, 30 Ore.

494; *Attorney General v. Parker*, 126 Mass. 216; *DeCamp v. Dobbins*, 29 N. J. Eq. 36; *Clement v. Hyde*, 50 Vt. 716; *Dodge v. Williams*, 46 Wis. 70; *Almy v. Jones*, 17 R. I. 265.

<sup>124</sup> *Bedford v. Bedford*, 99 Ky. 273; 35 S. W. 926; *Sears v. Chapman*, 158 Mass. 400; *In re Bartlett*, 163 Mass. 509; *Attorney General v. Briggs*, 164 Mass. 561; *Almy v. Jones*, 17 R. I. 265.

<sup>125</sup> *John v. Smith*, 91 Fed. 827; *Handley v. Palmer*, 91 Fed. 948; *Green v. Blackwell* (N. J. Eq.); 35 Atl. 375; *John's Will*, 30 Ore. 494; 47 Pac. 341; 36 L. R. A. 242; *Bedford v. Bedford*, 99 Ky. 273; *Davis v. Barnstable*, 154 Mass. 224.



such school, is valid.<sup>126</sup> And a devise to an unincorporated state university is a valid charitable devise.<sup>127</sup> So is a devise to establish a polytechnic institute.<sup>128</sup> So is a devise to existing educational institutions of a private nature,<sup>129</sup> and to parochial schools,<sup>130</sup> and a devise to trustees for paying the tuition of poor children.<sup>131</sup> So are devises to educate young men, one at a time, for the priesthood.<sup>132</sup>

So a bequest in trust to offer prizes for essays upon medical subjects, and to pay for printing and circulating such essays, is a valid charitable bequest.<sup>133</sup> So is a devise to provide prizes for works of art, the fund ultimately to go to an art institute.<sup>134</sup> Also devises for the education of specific classes, such as the deaf, is a charitable devise.<sup>135</sup> But a devise to the public charities in certain specified districts was held not to include a theological seminary.<sup>136</sup>

#### §646. Public libraries.

Public libraries are recognized by the courts a most valuable means of education, and devises for such purposes are

<sup>126</sup> John's Will, 30 Ore. 494; 36 L. R. A. 242.

<sup>127</sup> Royer's Estate, 123 Cal. 614; 56 Pac. 461.

<sup>128</sup> People, Ellert v. Cogswell, 113 Cal. 129.

<sup>129</sup> Spence v. Widney, — Cal. —; 46 Pac. 463; Abend v. Endowment Fund Commission, 174 Ill. 96, affirming 74 Ill. App. 654; Grand Prairie Seminary v. Morgan, 171 Ill. 444; Curling v. Curling, 8 Dana (Ky.), 38; Blackbourn v. Tucker, 72 Miss. 735; 17 So. 737 (though void as to realty, yet valid as to personality); Taylor v. Bryn Mawr College, 34 N. J. Eq. 101; Franklin v. Armfield, 2 Sneed (Tenn.), 305.

<sup>130</sup> Hanson v. Little Sisters of the Poor, 79 Md. 434; 32 L. R. A. 293; Andrews v. Andrews, 110 Ill. 223; Keith v. Scales, 124 N. Car. 497.

<sup>131</sup> Dye v. Beaver Creek Church, 48 S. Car. 444; to the same effect is White v. McKeon, 92 Ga. 343.

<sup>132</sup> O'Neal v. Caulfield, 5 Ohio N. P. 149. (General Education): *In re Rymer* (C. A.), (1895), 1 Ch. 19; 64 L. J. Ch. (N. S.), 86 (Theological Seminary); Barnard v. Adams, 58 Fed. Rep. 313 (2 at a time); Field v. Drew Theol. Sem. 41 Fed. 371.

<sup>133</sup> Palmer v. Union Bank, 17 R. I. 627.

<sup>134</sup> Almy v. Jones, 17 R. I. 265; 12 L. R. A. 414.

<sup>135</sup> Farrington v. Putnam, 90 Me. 405; 37 Atl. 652; North Carolina School v. North Carolina Institute, 117 N. Car. 164.

<sup>136</sup> Ross v. Ross, 25 Can. S. C. 307.

upheld as charitable.<sup>137</sup> And a library whose reading-room is free to the general public, though only paying subscribers can take out books, the money thus obtained being used to buy new books, is held to be a public library, so that a devise to it is charitable.<sup>138</sup> So is a devise for a club and reading-room for the village, which by terms of the devise was to be kept up "for the furtherance of conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing."<sup>139</sup>

An astronomical observatory is *prima facie* for public benefit, and is therefore a charity.<sup>140</sup>

#### §647. Aid of poor and destitute.

Devises in aid of the poor and destitute are always upheld as charitable devises if the other requisite elements of a charity are present.<sup>141</sup> The beneficiaries may be limited to the poor of a certain area,<sup>142</sup> and in some states the beneficiaries

<sup>137</sup> *Duggan v. Slocum*, 83 Fed. 244; *Creerar v. Williams*, 145 Ill. 625, affirming 44 Ill. App. 497; *Dascomb v. Marston*, 80 Me. 223; *Weber v. Bryant*, 161 Mass. 400; *In re Bartlett*, 163 Mass. 509; *St. Paul's Church v. Attorney General*, 164 Mass. 188; *Manners v. Library Co.* 93 Pa. St. 165; *Penny v. Croul*, 76 Mich. 471; 5 L. R. A. 858 (*Scientific Library*).

<sup>138</sup> *Phillips v. Harrow*, 93 Io. 92.

<sup>139</sup> *In re Scoweroft* (1898), 2 Ch. 638.

<sup>140</sup> *Spence v. Widney*, — Cal. —; 46 Pac. 463.

<sup>141</sup> *In re Geek*, 69 L. T. N. S. 819; *In re Darling* (1896); 1 Ch. 50 (a devise "to the poor"); *Duggan v. Slocumb*, 83 Fed. 244; *Wood v. Paine*, 66 Fed. 807; *Strong's Appeal*, 68 Conn. 527 (devises to the "worthy poor of said town"); *Phillips v. Harrow*, 93 Io. 92 (a devise to the "poor and needy people" of a given city "who are dependent on

their own labor for a livelihood"); *Doughten v. Vandever*, 5 Del. Ch. 51; *Hunt v. Fowler*, 121 Ill. 269; *Dascomb v. Marsten*, 80 Me. 223; *McAlister v. Burgess*, 161 Mass. 269; 24 L. R. A. 158; *Bullard v. Chandler*, 149 Mass. 532; 5 L. R. A. 104; *Kelly v. Nichols*, 18 R. I. 62; 19 L. R. A. 413; *Tichenor v. Brewer*, — Ky. —; 33 S. W. 86; *Fox v. Gibbs*, 86 Me. 87; *Wardens, etc. of St. Paul's Church v. Attorney General*, 164 Mass. 188; *Chadwick v. Livesey*, 56 N. J. Eq. 453; 41 Atl. 1115, affirming 55 N. J. Eq. 204; *Trim's Estate*, 168 Pa. St. 395 (a devise "for the benefit of the poor" of a named township); *Staines v. Burton*, 17 Utah, 331; 53 Pac. 1015.

<sup>142</sup> See some cases especially quoted in last note; and *Hunt v. Fowler*, 121 Ill. 269; *Fellows v. Miner*, 119 Mass. 541; *Towle v. Nessmith*, — N. H. —; 42 Atl. 900; *Urmey v. Wooden*, 1 O. S. 160; *Scott v.*

may be restricted to the poor of a certain church,<sup>143</sup> or to the poor of a non-charitable association.<sup>144</sup> But in some states a devise to the poor of an unincorporated church or association is held void as too indefinite.<sup>145</sup>

Such devises are upheld even where taxation already provides for the poor who are to be benefited by the charity.<sup>146</sup> So a devise to such institutions a give shelter at night to the poor and homeless is a valid charitable devise.<sup>147</sup>

Whether the poor may be restricted to the poor relations of testator, so as to form a permanent trust in their behalf, is a question of considerable difficulty. The English authorities, and some American, hold that a devise in trust for testator's poor relations is valid as a charitable devise,<sup>148</sup> while in others it is held not a public charity, but is held lacking all the peculiarities of a devise to public charity.<sup>149</sup>

#### §648. Hospitals and asylums.

Devises to establish free hospitals are held to be charitable.<sup>150</sup> And a hospital, incorporated without capital stock, and not for any financial benefit of its members, is a charity within this sense.<sup>151</sup> So devises to establish homes and asy-

Trustees, 39 O. S. 153; Trim's Estate, 168 Pa. St. 395; Sheldon v. Stockbridge, 67 Vt. 299; Sawtelle v. Witham, 94 Wis. 412; 69 N. W. 72.

<sup>143</sup> Ross v. Ross, 25 Can. S. C. 307; Conklin v. Davis, 63 Conn. 377; Penick v. Thom, 90 Ky. 665; Bird v. Merkle, 144 N. Y. 544 (a devise to certain-named churches "according to the number of members to buy coal for the poor of said churches"); O'Neal v. Caulfield, 5 Ohio N. P. 149.

<sup>144</sup> *In re* Buck (1896), 2 Ch. 727; Willey's Estate, — Cal. —; 56 Pac. 550 (a devise to the "widows' and orphans' fund" of a non-charitable association); Guilfoil v. Arthur, 158 Ill. 600; Heiskell v. Chickasaw Lodge, 87 Tenn. 668.

<sup>145</sup> Yingling v. Miller, 77 (Md.) 104; 26 Atl. 491.

<sup>146</sup> Strong's Appeal, 66 Conn. 527.

<sup>147</sup> Croxall's Estate, 162 Pa. St. 579.

<sup>148</sup> Attorney General v. College, L. R. 4 Ch. 722; Gillam v. Taylor, L. R. 16 Eq. 581; Gafney v. Kenison, 64 N. H. 354.

<sup>149</sup> Kent v. Dunham, 142 Mass. 216 (distinguished, but not overruled in Darcy v. Kelley, 153 Mass. 433, where a devise to the use of testator's poor relatives, and then for the use of the poor generally was upheld). See Sec. 643.

<sup>150</sup> Hayden v. Connecticut Hospital for Insane, 64 Conn. 320; Hearn v. Waterbury, 66 Conn. 98.

<sup>151</sup> Hearn v. Waterbury Hospital, 66 Conn. 98.

lums for the orphan, the aged and the infirm are charitable.<sup>152</sup> So is a devise for the benefit of the disabled soldiers and seamen of the United States, who were engaged in the war of the rebellion.<sup>153</sup>

A gift of a farm in trust for a county home for orphans and the friendless is not invalid because it provides for the establishment of a church therein.<sup>154</sup>

#### §649. Support of religion.

In most jurisdictions the maintenance and support of religion is held to be a charitable use, and a devise for that purpose is upheld if it contains the elements of a valid charitable devise.<sup>155</sup> Thus, devises for the erection of buildings for public worship, for keeping them in repair, and the like, are upheld as charitable devises;<sup>156</sup> or for erecting a church building and a parsonage.<sup>157</sup> So are devises for supporting preaching and other religious work.<sup>158</sup> So are devises for missionary purposes, whether domestic or foreign.<sup>159</sup> So is a bequest in trust to publish religious books, where the character of such books is described with sufficient definiteness.<sup>160</sup> So is a de-

<sup>152</sup> *Hayes v. Pratt*, 147 U. S. 557; *Woodruff v. Marsh*, 63 Conn. 125; 26 Atl. 846; *State v. Blake*, 69 Conn. 64; *Bond v. Home for Aged Women*, 94 Io. 458; 62 N. W. 838; *Ingraham v. Ingraham*, 169 Ill. 432; 169 Ill. 472; *Rush County v. Dinwiddie*, 139 Ind. 128; *Pell v. Mercer*, 14 R. I. 412; *Barkley v. Donnelly*, 112 Mo. 561; *Chase v. Stockett*, 72 Md. 235.

<sup>153</sup> *Holmes v. Coates*, 159 Mass. 226; 34 N. E. 190.

<sup>154</sup> *Rush County v. Dinwiddie*, 139 Ind. 128.

<sup>155</sup> *McAllister v. Burgess*, 161 Mass. 269; 24 L. R. A. 158; *Murphy's Estate*, 184 Pa. St. 310.

<sup>156</sup> *In re Hunter*, C. A. (1897), 2 Ch. 105 (1897), 1 Ch. 518; *Mack's Appeal*, 71 Conn. 122; 41 Atl. 242; *In re Bartlett*, 163 Mass.

509; *Teale v. Bishop of Derry*, 168 Mass. 341; 38 L. R. A. —; 47 N. E. 422; *St. George's, etc. Society v. Branch*, 120 Mo. 226.

<sup>157</sup> *Pennoyer v. Wadhams*, 20 Ore. 274; 11 L. R. A. 210.

<sup>158</sup> *Conklin v. Davis*, 63 Conn. 377; *Mack's Appeal*, 71 Conn. 122; *Alden v. St. Peter*; 158 Ill. 631; 30 L. R. A. 232; *Church v. Shively*, 67 Md. 493; *Sowers v. Cyrenius*, 39 O. S. 29.

<sup>159</sup> *Dom. etc. Missionary Society v. Gaither*, 62 Fed. Rep. 422; *Hewitt's Estate*, 94 Cal. 376; *Lane v. Etaon*, 69 Minn. 141; 71 N. W. 1031; *Congregational, etc. Missionary Society v. Van Arsdall*, — N. J. Eq. —; 42 Atl. 1047; *Board of Foreign Missions, etc. v. Culp*, 151 Pa. St. 467.

<sup>160</sup> *Kelly v. Nichols*, 17 R. I. 306.

wise to a church directly, without any limitation upon its use,<sup>161</sup> and a condition that the minister of such religious society shall always wear a black gown in the pulpit is valid and enforceable.<sup>162</sup>

A gift to a Sunday school is a valid gift to a charity.<sup>163</sup> And a devise to a religious organization which is not Christian in its claims is a charitable devise.<sup>164</sup> But a private chapel used only by members of testator's family is not such a religious use that the rules of charitable uses apply.<sup>165</sup>

### §650. Masses.

At the common law of England devises for masses, and the like, were held to be void as against public policy.<sup>166</sup> This rule was the outgrowth of judicial decision resting upon the statute of 1 Edw. VI, a statute passed largely for political considerations.

In the United States no such statutes are in force, and a devise for the purpose of causing prayers to be said for testator is upheld in some jurisdictions,<sup>167</sup> and where such devises are not upheld it is not because the nature of the use is against public policy, but because there is in such devise no living beneficiary at all, for whose benefit such devise could be enforced.<sup>168</sup>

### §651. Cemeteries.

A devise to maintain a cemetery is generally upheld as a charity.<sup>169</sup> But a devise to maintain and keep up a private.

<sup>161</sup> *In re White* (C. A.), (1892).  
2 Ch. 41; *Hewitt's Estate*, 94 Cal.  
376.

<sup>162</sup> *In re Robinson* (1892), 1 Ch.  
95.

<sup>163</sup> *Knight's Estate*, 159 Pa. St.  
500.

<sup>164</sup> *Knight's Estate*, 159 Pa. St.  
500.

<sup>165</sup> *Butler v. Trustees*, 92 Hun,  
96.

<sup>166</sup> *In re Blundell*, 30 Beav. 360;  
*West v. Shuttleworth*, 2 Myl. & K.  
684.

<sup>167</sup> *Hoeffer v. Clogon*, 171 Ill. 462  
(where it was presumed that the  
masses would be said in public); *In*  
*re Schouler*, 134 Mass. 426; *Harris-*  
*son v. Brophy*, 59 Kan. 1; 40 L. R.  
A. 721.

<sup>168</sup> *Festorazzi v. St. Joseph's Cath-*  
*olic Church of Mobile*, 104 Ala.  
327; 25 L. R. A. 360; *O'Connor v.*  
*Gifford*, 117 N. Y. 275.

<sup>169</sup> *Moore v. Moore*, 50 N. J. Eq.  
554; 25 Atl. 403; *Sheldon v. Stock-*  
*bridge*, 67 Vt. 299.

tomb is not held to be a good charitable devise,<sup>170</sup> unless especially authorized by statute.<sup>171</sup>

But a provision not for creating a trust, but merely for providing for the funeral of testator's widow, and for erecting a suitable monument over her grave, is not a charitable use, since it can be completely performed immediately upon the death of the widow, thus ending with one life in being.\*

A trust, the income to be expended on the burial lot and monument of testator has in some cases been upheld.<sup>172</sup>

### §652. Parks.

The establishment of a public park and playground for children, to contain statues of prominent army and navy officers of the civil war, was held a good charitable devise.<sup>173</sup> So a bequest of a fund, the income of which is in part to be used to ornament the grounds on which the city waterworks is situated is a valid charitable bequest.<sup>174</sup>

### §653. Miscellaneous charitable uses.

A devise to protect and aid the negroes of the United States has been held valid.<sup>175</sup> Bequests for the advancement of woman suffragé have been upheld as valid,<sup>176</sup> and a devise for the purpose of promulgating the views of Henry George as to

<sup>170</sup> Piper v. Moulton, 72 Me. 155; Bates v. Bates, 134 Mass. 110; Hartson v. Elder, 50 N. J. Eq. 522; Kelly v. Nichols, 17 R. I. 306; 19 L. R. A. 413; Sherman v. Baker, 20 R. I. 446; 40 L. R. A. 717.

<sup>171</sup> Jones v. Habersham, 107 U. S. 174; Bronson v. Strouse, 57 Conn. 147; Hartson v. Elden, 50 N. J. Eq. 522; Moore v. Moore, 50 N. J. Eq. 554; Nauman v. Weidman, 182 Pa. St. 263; Sheldon v. Stockbridge, 67 Vt. 299.

\* Leonard v. Haworth, 171 Mass. 496.

<sup>172</sup> Green v. Hogan, 153 Mass. 462; so a similar provision was

said in Ford v. Ford, 91 Ky. 572, to come under the heading "charitable or humane."

<sup>173</sup> Smith's Estate, 181 Pa. St. 109; *In re Bartlett*, 163 Mass. 509; 40 N. E. 899.

<sup>174</sup> Penny v. Croul, 76 Mich. 471; 5 L. R. A. 858.

<sup>175</sup> Lewis' Estate, 152 Pa. St. 477. *Contra*, where the land was devised in Canada. Lewis v. Doerle, 28 Ont. Rep. 412.

<sup>176</sup> Garrison v. Little, 75 Ill. App. 402.

*Contra*, Jackson v. Phillips, 14 Allen (Mass.), 539.

land ownership is upheld as valid,<sup>177</sup> and for the suppression of vivisection,<sup>178</sup> and for volunteer regiment.<sup>179</sup>

Powers ancillary to the execution of a charitable devise may be passed by will without invalidating the devise. Thus, a devise to build an opera house and orphan asylum, the rents of the opera house to be used in supporting the orphan asylum, was upheld.<sup>180</sup> Thus power to the trustees to invest personal property in real securities does not render the trust invalid.<sup>181</sup>

And such powers as are reasonable must be implied in a charitable trust. Thus a devise to pay teachers is not void because the will made no specific provision for fuel, janitor service, and the like,<sup>182</sup> nor is the trust invalidated by a grant of authority to the judges who appoint the trustees to make rules for their government.<sup>183</sup>

#### §654. Uses not charitable.

Uses which do not come within the definition of charitable use can not be created by devise if vesting at a further time than that limited by the rule against perpetuities, or if the beneficiary is indefinite. Thus, a devise in trust to provide an annual trophy cup as a prize in yachting is not a charity.<sup>184</sup> Nor is an order to trustees to keep testator's house open for "ministers and others travelling in the service of the truth."<sup>185</sup>

Where an object not regarded as charitable is included among charitable objects, the devise is avoided. Thus a devise "for some one or more purposes, charitable, religious, phil-

<sup>177</sup> *George v. Braddock*, 4 L. N. J. Eq. 757; 6 L. R. A. 511, reversing 44 N. J. Eq. 124.

<sup>178</sup> *In re Foveaux* (1895), 2 Ch. 501; 64 L. J. Ch. N. S. 856.

<sup>179</sup> *In re Lord Stratheden and Campbell* (1894), 3 Ch. 265; *Philadelphia v. Keystone Battery*, 169 Pa. St. 526.

<sup>180</sup> *Barkley v. Donnelly*, 112 Mo. 561.

<sup>181</sup> *In re Hamilton* (1896), 2 Ch. 617.

<sup>182</sup> *Grand Prairie Seminary v. Morgan*, 171 Ill. 444.

<sup>183</sup> *John's Will*, 30 Oreg. 494; 47 Pac. 341; 36 L. R. A. 242.

<sup>184</sup> *In re Nottage* (1895), 2 Ch. 649.

<sup>185</sup> *Kelly v. Nichols*, 17 R. I. 306; 19 L. R. A. 413.

anthropic or ——," was by very strict construction held bad, not only because of the blank, but as not purely a charitable purpose,<sup>186</sup> and by like construction a devise "to humanity's friend A . . . to use and expend the same for the promotion of the religious, moral or social welfare of the people in any locality," was held to include objects not charitable.<sup>187</sup>

#### §655. The doctrine of *cy pres*.

The question of the validity of charitable devises, and the control of equity courts over them, is somewhat complicated by the different views taken by different courts of the extent of the application of the doctrine which is generally known as the "doctrine of *cy pres*."

The English chancery courts, according to the more probable view of the development of equity, assumed, at a very early date, that where it appeared from the will to be testator's intention that the property disposed of by will should be applied to charity in general, and indicated in his will the means whereby such application should be made, and it subsequently, by change of circumstances or a change of the law, became impracticable to administer the charitable trust in the manner provided for by testator in his will, the court of equity was empowered to construct a scheme of charitable disposition as near as possible to the original purpose described by testator in his will, and to apply the property disposed of by will to the purposes of the kindred trust.

This statement of the origin of the doctrine of *cy pres* is not unanimously acquiesced in. It is undoubtedly true that equity originated at a time when the distinction between executive, legislative and judicial power were not marked and distinguished as they now are. The gift was undoubtedly a source of both executive and judicial power; the judicial power of a court of equity being a delegation from the crown. In some cases, the courts of chancery exercised powers which were generally held not to be part of their normal judicial

<sup>186</sup> *In re Macduff* (1896), 2 Ch. 451.

204, affirmed as *Chadwick v. Livesey*, 56 N. J. Eq. 453; 41 Atl. 1115.

<sup>187</sup> *Livesey v. Jones*, 55 N. J. Eq.



functions, but to be especially delegated to them under the sign manual of the crown.

By this delegated prerogative power the courts of equity often practically create schemes of charitable disposition, and thus preserve a gift which, as it originally stood, would have been too vague and indistinct for execution.

The English courts still apply the doctrine of *cy pres* in the fullest and widest sense of the doctrine.

Under their system of government, being unrestrained by a written constitution, the English courts may safely follow their old precedents without disturbing themselves as to whether it is strictly judicial power or power originally of the royal prerogative that they are exercising.

A somewhat different question is presented in the United States of America. The written constitution of these states separate executive and judicial power almost entirely, and if a power is recognized in its nature to be executive, the judiciary can not exercise it, even though English courts under similar circumstances might exercise similar power.

Accordingly, the question of the extent to which the doctrine of *cy pres* originated in principles of equity on the one hand, or in the prerogative of the royal crown on the other, is a very important question for the American courts to solve, in determining the extent to which they will recognize the doctrine of *cy pres* as in force in their jurisdiction.

The states which do not recognize charitable trusts as a branch distinct from other trusts need not be considered here.

Of the states which recognize charitable trusts as a class of trust having peculiarities of its own, three classes may be made, according to the view which they take of the doctrine of *cy pres*.

States of the first class reject the doctrine of *cy pres* entirely. They take the view that it is not a power strictly judicial in its nature; that it originates in the exercise of the royal prerogative, and could not under our form of government be exercised by a court.<sup>188</sup>

<sup>188</sup> Keith v. Scales, 124 N. C. 497; McHugh v. McCole, 97 Wis. 166; 40 L. R. A. 724.

"It is settled that the doctrine of *cy pres*—as it exists in England, and as it has been applied in some

The second class of states takes the view upon the historical side of the question that the doctrine of *cy pres* originated to a very considerable extent in the doctrines of equity as distinguished from the exercise of the royal prerogative, and accordingly hold that they have a right to apply the doctrine as fully as it was recognized and applied in England, apart from the exercise of power in England under the sign manual of the crown.<sup>189</sup>

In states of this class will be found some in which the doctrine of *cy pres* was not recognized originally, but in which it has been to some extent recognized and adopted by statute.<sup>190</sup> In states taking this view of the doctrine of *cy pres* it has been held that where the will shows the intention of the testator to promote the cause of education in a certain school district, and that a bequest in the will for the support of the public school of the specified district is a means of carrying out this general intention, upon the abolition of the school district the fund should be applied to the education of persons residing in the territory comprised in the former district, even though an incidental benefit to others should result.<sup>191</sup>

In these states the applicability of the doctrine of *cy pres* turns upon the question of whether the will shows that testator's general intention was that the property disposed of by will should be applied to charity in any event, the form which the

of the states of the American Union, whereby trust provisions are administered and executed as near to the presumed intention of the donor or founder as may be—is not recognized or acted upon by the courts of this state as a part of the judicial power of the state. The doctrine rests upon a prerogative or sovereign power, is not strictly judicial in its nature, and consequently the courts of the state could not exercise it."

McHugh v. McCole, 97 Wis. 166; 40 L. R. A. 724; Fuller's Will, 75 Wis. 431; Heiss v. Murphy, 40 Wis.

276; Ruth v. Oberbrunner, 40 Wis. 238.

<sup>189</sup> Church of Jesus Christ of the Latter Day Saints v. The United States, 136 U. S. 1; Ingraham v. Ingraham, 169 Ill. 432, 472; Forbes v. The Ft. Scott Board of Education, 7 Kansas App. 452; Attorney General v. Briggs, 164 Mass. 561; 38 L. R. A. 629.

<sup>190</sup> Woodruff v. Marsh, 63 Conn. 125; 38 American State Reports, 346; Allen v. Stevens, 22 Misc. (N. N.), 158; 49 N. Y. Supplement, 431.

<sup>191</sup> Attorney General v. Briggs, 164 Mass. 561.

charitable gift assumes being testator's particular intent; or whether he intended the gift not to be devoted to charity at all unless in the manner specified in his will.<sup>192</sup> Thus where a testator devised property for the purpose of building a chapel, which purpose failed because the population of that place was decreasing in numbers so as to no longer support a chapel, and the ecclesiastical authorities had abolished the official standing of the church at such place, it was held that as the will did not show the testator's general intention to benefit the people of that town, the court could not, under the doctrine of *cy pres*, allow the property devised to be devoted to repairing a neighboring parish church, or to enlarge a graveyard for the parish. The bequest was held to fail entirely.<sup>193</sup>

States of the third class take a position intermediate between the states of the other two classes. They decline to recognize the English doctrine of the courts of chancery to construct a scheme of charitable disposition as a complete substitute for one which has failed.

On the other hand, they do recognize the power of the courts to provide different methods of carrying out the scheme created by testator, where such scheme as a whole is practicable, though certain details may not be. Thus, where testator created a trust fund for educational purposes, and provided that it should be invested in certain specified securities, it was held that the court could direct its investment in other securities where those specified in testator's will had become non-existing or worthless.<sup>194</sup>

<sup>192</sup> "In the administration of trusts, under the general equity jurisdiction of the court, it is an old and familiar principle that if the original purpose of a public charity failed and there are no other objects to which, under the specified terms of the trust, the funds can be applied, the court may determine whether, in the event that has happened, it was not the probable intention of the donor that his gift should be applied to some kindred charity, as near like the original

purpose as possible. This is commonly known as the doctrine of *cy pres*, which, in its last analysis, is found to be a similar rule of judicial construction designed to aid the court to ascertain and carry out, as near as may be, the true intention of the donor." Doyle v. Whalen, 87 Me. 414; Jackson v. Phillips, 14 All. 539.

<sup>193</sup> Teele v. The Bishop of Derry, 168 Mass. 341; 38 L. R. A. 629.

<sup>194</sup> McIntire v. Zanesville, 17 O. S. 352.

Where testator had created a trust fund for the education of the poor children of a certain city, which plan subsequently became impracticable by reason of the creation of free public schools supported by taxation, it was held that the trust fund should not be paid into the treasury of the school board, but that it should be devoted to any other means in aid of the education of the poor children incidentally to and ancillary of the public school system, as the trustees might deem advisable.<sup>195</sup> Where testator provided for the education of children of a certain city it was held that this included the city as subsequently enlarged by annexation of territory.<sup>196</sup>

<sup>195</sup> McIntire v. Zanesville, 17 O. S. 352. (The decree in this case pointed out the relief of the wants and interests of poor children in such a way as to make their education in the public schools possible, as a proper expenditure of the trust fund; and in its opinion the court intimated that the establish-

ment of night schools for such poor children as could not attend the day schools, would be a substantial compliance with the trust.)

<sup>196</sup> McIntire v. Zanesville, 17 O. S. 352; Zanesville Canal and Manufacturing Company v. The City of Zanesville, 20 Ohio, 483.

## CHAPTER XXIX.

## VESTED AND CONTINGENT INTERESTS.

## §656. Vested and contingent interests.—Definitions.

A vested interest is one in which there is a present fixed right, either of present enjoyment or of future enjoyment.<sup>1</sup>

A contingent interest is one in which there is no present fixed right of either present or future enjoyment; but in which a fixed right will arise in the future under certain specified contingencies.<sup>2</sup>

It can readily be seen that it is often a matter of great importance to determine whether a beneficiary under a will takes a vested or a contingent interest. We are met at the outset, however, with considerable confusion in definition. The courts are, by no means, harmonious as to the true test for determining whether an interest is vested or contingent.

It is well settled that where, under the terms of the gift, there is an ascertained person in existence who could take the remainder in possession immediately upon the determination of the particular estate, and, by the terms of the gift,

<sup>1</sup> Cox v. Handy, 78 Md. 108.

<sup>2</sup> Kingman v. Harmon, 131 Ill. 171; Hale v. Hobson, 167 Mass. 397.

"A vested remainder is an estate

*in presenti*, although to be enjoyed in the future. A contingent remainder is an estate to vest upon the happening of some future event." Spear v. Fogg, 87 Me. 132.

the particular estate must determine by the mere efflux of time, the estate is vested.<sup>3</sup>

Where, under the terms of the gift, there is no ascertained person in being who could take if the particular estate were at once to determine, or where the remainderman is ascertained by the terms of the gift but he can not take upon the determination of the particular estate, unless some other or further event occurs before such determination, it is well settled that the estate is a contingent one.<sup>4</sup>

There is, however, a large class of cases which some courts class as vested and others as contingent. These are cases where there are in existence persons who, by the terms of the gift, could take if the particular estate were to determine at once, but who may, by conditions subsequent, be incapable of taking if the particular estate should determine at a future time. In this class of cases the usual contingency inserted is either an express or implied provision that any of the beneficiaries who die before determination of the particular estate shall thereby be divested of all their interest in remainder, and that subsequently born beneficiaries may take; as where the estate is given to one for life and upon his death to such of his children as may be alive at the death of the life tenant. It is, in such cases, impossible to determine who the beneficiaries will be, until the particular estate determines. In cases like this, some authorities call the interest of the children a vested interest, subject to be divested by a condition subsequent.<sup>5</sup>

<sup>3</sup> *McArthur v. Scott*, 113 U. S. 340; *Cox v. Handy*, 78 Md. 108.

<sup>4</sup> *Kingman v. Harmon*, 131 Ill. 171; *Hale v. Hobson*, 167 Mass. 397; *Shaw v. Eckley*, 169 Mass. 119; *Wright v. Brown*, 116 N. Car. 26; *Richey v. Johnson*, 30 O. S. 288; *Hamilton v. Rodgers*, 38 O. S. 242.

<sup>5</sup> *Re Pickworth* (C. A.), 1899, 1 Ch. 642; 68 L. J. Ch. N. S. 324; *Kean v. Tilford*, 81 Ky. 600; *Gough v. Clifton Land Co.* (Ky.), 43 S. W. 405; *Shaw v. Eckley*, 169 Mass.

119, citing and following *Putnam v. Story*, 132 Mass. 205; *Darling v. Blanchard*, 109 Mass. 176; *Blanchard v. Blanchard*, 1 Allen, 223; *Smither v. Willock*, 9 Ves. 233; *L'Etorneau v. Henquenet*, 89 Mich. 428; 28 Am. St. Rep. 310.

"When the remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by efflux of time, the remainder

A remainder to A on the determination of a particular estate which is made conditional upon his surviving until the determination of the particular estate, and adding a gift over in case the remainderman dies without issue before the particular estate determines, is held to be a vested and not a contingent one.<sup>6</sup>

In other cases such a gift is treated as a contingent devise on the theory that it is impossible to determine who the remaindermen are until the determination of the particular estate.<sup>7</sup> So a remainder to the children of A or the survivors of them at the time of taking possession is said in some jurisdictions to be a contingent remainder.<sup>8</sup>

The view taken in these cases makes every gift to a class to be determined at the determination of the particular estate a contingent remainder. Thus a gift to A for life and at his death to his children and the heirs of such as might be deceased,<sup>9</sup> or to A's children or the survivors of them,<sup>10</sup> or to A's legal heirs,<sup>11</sup> is held, where such view obtains, to be a contingent remainder.

vested in interest as soon as the remainder man is *in esse* and ascertained; providing that nothing but his own death, before the determination of the particular estate, will prevent such remainder from vesting in possession."

Moore v. Lyons, 25 Wend. (N. Y.), 119, quoted in Cox v. Handy, 78 Md. 108, citing and following Doe, lessee of Poor v. Considine, 6 Wall. U. S. 458; McArthur v. Scott, 113 U. S. 340; Blanchard v. Blanchard, 1 Allen, Mass. 223.

<sup>6</sup> See cases cited in last note. The reason, which on principle, seems sound, is that during A's life there is a remainderman in being capable of taking at once if the particular estate were to determine.

<sup>7</sup> Owen v. Eaton, 56 Mo. App. 563; Sager v. Galloway, 113 Pa. St. 500 (a gift to A on his reaching 21).

<sup>8</sup> McClain v. Capper, 98 Io. 145; 67 N. W. 102; Spear v. Fogg, 87 Me. 132, citing Richardson v. Wheatland, 7 Met. 169; Putnam v. Gleason, 99 Mass. 454; Smith v. Rice, 130 Mass. 441.

"Our conclusion (in holding the devise contingent) is much aided by the language of the will, making the devise in this; that the division is to be made between the children named, their heirs or survivors of them; indicating that the property was to rest in Margaret if she survived, and if not, in her heirs, or their survivors, as they might be living to receive it." McClain v. Capper, 98 Io. 145.

<sup>9</sup> Hunt v. Hall, 37 Me. 363.

<sup>10</sup> Spear v. Fogg, 87 Me. 132; Denny v. Kettle, 135 Mass. 138.

<sup>11</sup> Read v. Fogg, 60 Me. 479.

**§657. Importance of distinction between vested and contingent interests.**

The distinction between a vested and contingent interest is of practical importance in many cases. For instance, if the remainderman dies before the life tenant his interest, if vested and unconditional, passes to his heirs or next of kin,<sup>12</sup> or to his devisee.<sup>13</sup> Under the laws upon the subject of the settlement of decedent's estate, however, payment of a legacy in money or a bequest of personal property should be made to the executor or administrator of the deceased beneficiary, and not directly to his next of kin.<sup>14</sup>

A contingent remainder fails under such circumstances.<sup>15</sup> A contingent interest may, of course, be assigned when the contingency is one of the person, subject, of course, to the contingency that the interest may never vest.<sup>16</sup>

**§658. General rule of construction as between vested and contingent interests.**

As between the vested and contingent interests the law, wherever possible, construes the interest as vested. "The law always gives preference to vested over contingent remainders. It does not favor the abeyance of estates. Where it is a remainder after a life estate, it is regarded as a vested remainder, and the possession only is postponed."<sup>17</sup> The law favors early vesting

<sup>12</sup> *Holcomb v. Wright*, 5 Appeal D. C. 76; *Chapin v. Parker*, 157 Mass. 63; *Bancroft v. Fitch*, 164 Mass. 401; *In re Seebeck*, 140 N. Y. 241.

<sup>13</sup> *McClain v. Capper*, 98 Io. 145.

<sup>14</sup> *Banning v. Gottshall*, 62 O. S. 210; *Chafee v. Maker*, 17 R. I. 739.

<sup>15</sup> *McClain v. Capper*, 98 Io. 145; *Spear v. Fogg*, 87 Me. 132; *Hale v. Hobson*, 167 Mass. 397.

<sup>16</sup> *Shaw v. Eckley*, 169 Mass. 119; *Wright v. Brown*, 116 N. C. 26; *Watson v. Smith*, 110 N. C. 6; *Foster v. Hackett*, 112 N. C. 546.

"Such interest is devisable, transferable and assignable, subject, of course, to the contingency upon the happening of which its value depends." *Cummings v. Sterns*, 161 Mass. 506.

<sup>17</sup> *McConnell v. Stewart*, 169 Ill. 374; *Bethea v. Bethea*, 116 Ala. 265; *Beckley v. Leffingwell*, 57 Conn. 163; *Newberry v. Hinman*, 49 Conn. 130; *Legwin v. McRee*, 79 Ga. 430; *Gingrich v. Gingrich*, 146 Ind. 227; *Hoover v. Hoover*, 116 Ind. 498; *Borgner v. Brown*, 133 Ind. 391; *Wright v. Charley*, 129 Ind. 257; *Scofield v. Olcott*, 120 Ill. 262;



of estates with especial insistence when a possible construction is presented which will delay vesting so long as to violate the rule against perpetuities. In such case, if it can be done consistently with testator's intention, the law will adopt the construction which causes the estate to vest within the period fixed by the rule.<sup>18</sup> As long as testator does not violate the rule against perpetuities, the law will permit him to create a contingent remainder, and while a construction which favors early vesting rather than deferred vesting is always preferred, the question is, after all, one of the intention of the testator. If he clearly shows his intention to defer the vesting of the estate, that intention must be given effect as long as it does not violate the rule against perpetuities.<sup>19</sup>

In determining testator's intention, great difficulty is sometimes experienced on account of the fact that testator has often no clear idea himself when the estate is to become vested. and probably does not appreciate the difference between vested and contingent interests. Some general rules have been worked out for ascertaining testator's probable intention, which are given in the following sections. These rules are strictly rules of construction, and have no application where the will clearly shows whether testator intended to create a vested or a contingent interest.

#### §659. Interests in realty.—Effect of postponement of possession.

Where testator devises real property by will to specified persons in being, without imposing any additional contingencies upon their taking the property, the fact that they are not to enter into enjoyment of possession of the land devised until after the determination of the particular estate given by will

Grimme v. Friedlich, 104 Ill. 245; Pike v. Stephenson, 99 Mass. 188; Crisp v. Crisp, 61 Md. 149; Cox v. Handy, 78 Md. 108; Stokes v. Weston, 142 N. Y. 433; Byrnes v. Stilwell, 103 N. Y. 453; Campbell v. Beaumont, 91 N. Y. 464; Pennsylvania Co.'s Appeal, 109 Pa. St. 489; Smith v. Hilliard, 3 Strobh. 211; Kimble v. White, 50 N. J.

Eq. 28; Linton v. Laycock, 33 O. S. 128; Bridgewater v. Gordon, 2 Sneed. (Tenn.), 5; Weatherhead v. Stoddard, 58 Vt. 529; Stokes v. Van Wyck, 83 Va. 724; Baker v. McLeod, 79 Wis. 534; Scott v. West, 63 Wis. 562.

<sup>18</sup> See Sec. 465.

<sup>19</sup> Denn v. Bagshaw, 6 T. R. 512; Shaw v. Eekley, 169 Mass. 119;

to some other person, does not prevent the interest of the remaindermen from being a vested interest upon the death of the testator.<sup>20</sup>

Where the devise is to a remainderman "from and after," the death of the life tenant, it is held that the remainders vest at the death of testator.<sup>21</sup> So where there is a direction to executors to take charge of and improve real estate until a certain time, when it is to belong to designated persons, these persons take a vested remainder at testator's death.<sup>22</sup>

Equitable estates, the enjoyment of which is postponed until the determination of the life estate, vest upon testator's death in the same manner as legal estates.<sup>23</sup> So where the remaindermen were to enter into possession on arriving at a certain age, an intermediate estate being created and no contingency or limitation being expressed, the remainder vests at once on testator's death.<sup>24</sup>

Hayes v. Tabor, 41 N. H. 521; Striker v. Mott, 28 N. Y. 82; Wright v. Brown, 116 N. Car. 26; Hamilton v. Rodgers, 38 O. S. 242; Baldwin v. Humphrey, 4 Ohio C. C. 57; *In re* Spencer, 16 R. I. 25.

<sup>20</sup> Halsey v. Goddard, 86 Fed. 25; Harrison v. Moore, 64 Conn. 344; Wright v. Gooden, 6 Hous. (Del.), 397; Marshall v. Augusta, 5 App. D. C. 183; Woodward v. Stubbs, 102 Ga. 187; Knight v. Pottgieser, 176 Ill. 368; Springer v. Savage, 143 Ill. 301; Aspey v. Lewis, 152 Ind. 493; McKensey v. McKensey, — Ky. — (1895); 28 S. W. 782; Williams v. Williams, 91 Ky. 547; Ernst v. Northern Bank (Ky.), (1899); 49 S. W. 333; Woodman v. Woodman, 89 Me. 128; Dulaney v. Middletown, 72 Md. 67; *State ex rel.* v. Willrich, 72 Minn. 165; Collier's Will, 40 Mo. 287; Linton v. Laycock, 33 O. S. 128; Foster v. Wick, 17 Ohio, 250; Brasher v. Marsh, 15 O. S. 103; Jeremy's Estate, 178 Pa. St. 477; Snyder's Estate, 180 Pa. St. 70; Brabham v. Crosland, 25 S. C. 525; McComb v.

McComb, 96 Va. 779; Hall v. Hall, 98 Wis. 193.

<sup>21</sup> Gingrich v. Gingrich, 146 Ind. 227; Hoover v. Hoover, 116 Ind. 498; Nelson v. Russell, 135 N. Y. 137; Hersee v. Simpson, 154 N. Y. 496.

<sup>22</sup> Heinrichsen v. Heinrichsen, 172 Ill. 462; Toner v. Collins, 67 Io. 369; Lowe v. Barnett, 38 Miss. 329; Christofferson v. Pfennig, 16 Wash. 491.

<sup>23</sup> Bolton v. Banks, 50 O. S. 290.

<sup>24</sup> Poor's Lessee v. Considine, 6 Wall. 458; Cropley v. Cooper, 19 Wall. 167; Danforth v. Talbot, 7 B. Mon. 623; McArthur v. Scott, 113 U. S. 340; Watkins v. Quarles, 23 Ark. 179; Tayloe v. Mosher, 29 Md. 443; Hancock v. Titus, 39 Miss. 224; Byrne v. France, 131 Mo. 639; Linton v. Laycock, 33 O. S. 128; Harris v. Alderson, 4 Sneed. 250.

*Contra*, McClain v. Capper, 98 Io. 145; 67 N. W. 102 (where, however, the gift was "when my youngest son arrives at full age, I desire that the real estate be equally divided between my children, their heirs or the survivors of them").

Where the devise to beneficiary creates no intermediate estate and postpones the enjoyment of the realty devised to some future time, testator's intention is so much the more doubtful. The test for determining testator's intention *prima facie* in case of such a gift is this. If the devise is given in terms absolute on its face and is followed by a provision that devisee is not to receive the devise until the future time or future event specified, the devise is treated as a vested one, subject, of course, to be divested upon non-performance of the conditions specified in the will.<sup>25</sup> But where the condition is so closely connected with the devise as to qualify its very existence, a devise to rest in the future where no intermediate estate is created and the condition refers to the capacity of the beneficiary, as his reaching a certain age and the like, is *prima facie* held to be a contingent devise.<sup>26</sup>

Where the condition does not refer to the devisee but to testator's estate, a different result is generally reached by the courts. Since it is in every case a question of testator's intention, and the presumption is always in favor of vested interests, it is held that postponement of possession for purposes connected with the settlement of testator's estate does not show an intention to postpone the vesting of the interest until that time.<sup>27</sup>

The context may qualify the general rule that a devise to one to begin in the future without any intervening estate is contingent if postponed on account of the devisee, by any form of expression showing that testator regarded the interest as in its nature vested. The commonest type of such modifying context is found where testator, after devising property to A upon his reaching some given age, or upon some similar event, provides for a gift over to B in case A dies before

<sup>25</sup> *Andrew v. Andrew*, 1 Ch. D. 410; *Shrimpton v. Shrimpton*, 31 Beav. 425; *Montgomerie v. Woodley*, 5 Ves. Jr. 522; *Meyer v. Eisler*, 29 Md. 28; *Packard v. Packard*, 16 Pick. 191; *Foster v. Wick*, 17 Ohio, 250.

<sup>26</sup> *Travis v. Morrison*, 28 Ala. 494;

*Colt v. Hubbard*, 33 Conn. 281; *Phayer v. Kennedy*, 169 Ill. 360; *McClain v. Capper*, 98 Io. 145; *Dawson v. Schaefer*, 52 N. J. Eq. 341; *Whitesides v. Cooper*, 115 N. Car. 570; *Handy's Estate*, 182 Pa. St. 68.

<sup>27</sup> *Neeley v. Boyce*, 128 Ind. 1.

reaching such age, or in case the contingency in general should fail. The provision for a gift over is held to show that testator intended the gift to A to vest at once, subject to be divested upon his death before reaching the age specified, or other failure of the specified event.<sup>28</sup>

#### §660. Effect of power of sale.

Where the enjoyment of property devised is postponed till after the determination of the life estate, and testator further gives to executors a power to sell this land, if necessary to pay debts of testator or for other specified purposes, the remaindermen take a vested interest upon the death of testator, subject to be divested by the exercise of the power to sell.<sup>29</sup> So, where the life tenant is given power to sell the real property, if necessary for his support and maintenance, the remainders after such life estate are, nevertheless, vested remainders, subject to be defeated by the exercise of power of sale.<sup>30</sup> And the fact that the amount which the remaindermen will take is uncertain does not make the remainder contingent.<sup>31</sup>

#### §661. Vested remainders opening to let in after-born remaindermen.

Where a devise in remainder is made to a class who may be increased after the death of testator by the birth of others answering the description before the estate takes effect in

<sup>28</sup> Boraston's Case, 3 Coke, 51 (one of the oldest and most often quoted cases on this subject); Collier's Will, 40 Mo. 287; Roome v. Phillips, 24 N. Y. 463; Engle's Estate, 167 Pa. St. 463.

<sup>29</sup> Allen v. McFarland, 150 Ill. 455; Drake v. Paige, 127 N. Y. 562; Bonnell v. Bonnell, 47 N. J. Eq. 540; Todd v. Wortman, 45 N. J. Eq. 723; Barkman v. Hain, 5 O. N. P. 508; Moores v. Moores, 12 Vroom, 440; Romaine v. Hendrickson, 9 C. E. Green, 231.

<sup>30</sup> Lehnard v. Specht, 180 Ill. 208; Woodman v. Woodman, 89 Me. 128.

<sup>31</sup> Bancroft v. Fitch, 164 Mass. 401; Min Young v. Min Young, 47 O. S. 501.

*Apparently contra*, Watson v. Conrad, 38 W. Va. 536, where it was held that the interest of the remainderman in such case did not pass by a sale in bankruptcy proceedings of his interest in such property.

possession, the courts will, if possible, construe this as a vested remainder in those of the class answering the description at the death of testator. Such remainder, however, can not by the terms of the will vest absolutely in those beneficiaries to the exclusion of those born thereafter, and before the time of taking possession who answer to the description. The remainder, therefore, while vesting on testator's death, will open to let in the after-born, and to that extent the original beneficiaries will be divested of a proportionate interest.<sup>32</sup> Thus, a gift to be divided upon A's death among the children that he "may hereafter have" opens to let in the children of A born after testator's death.<sup>33</sup>

#### §662. Vested defeasible remainders.

Under the definition of vested remainder employed by the courts in many jurisdictions, a vested remainder does not always take effect even if the remainderman is in existence at the time of the determination of the particular estate. Like all other estates classified upon the basis of duration or time of enjoyment, a vested remainder may be conditional. We have already seen that any condition precedent other than that of remainderman's surviving the duration of the particular estate, makes the remainder a contingent one; but a remainder once vested may be divested upon a condition subsequent.<sup>34</sup>

Thus where land is devised to one for life, remainder to testator's son upon coming of age, or if he should come of age,

<sup>32</sup> Johnson v. Webber, 65 Conn. 501; Field v. Peeples, 180 Ill. 376; Green v. Hewitt, 97 Ill. 113; Allen v. Mayfield, 20 Ind. 293; Middleton v. Middleton, — Ky. —; 43 S. W. 677; Hovey v. Nellis, 98 Mich. 374; Budd v. Haines, 52 N. J. Eq. 488; Haggerty v. Hockenberry, 52 N. J. Eq. 354; *In re Seaman's*, 147 N. Y. 69; Losey v. Stanley, 147 N. Y. 560; Gourley v. Woodberry, 42 Vt. 395; Leeming v. Sherratt, 2 Hare, 14.

<sup>33</sup> Cherbonnier v. Goodwin, 79 Md. 55.

<sup>34</sup> Richardson v. Penicks, 1 App. D. C. 261; Gingrich v. Gingrich, 146 Ind. 227; Mullreed v. Clark, 110 Mich. 229; Patterson v. Madden, 54 N. J. Eq. 714; Brasher v. Marsh, 15 O. S. 103; Jeffers v. Lampson, 10 O. S. 101; Baker v. McLeod, 79 Wis. 534; Marshall v. Marshall, 42 S. C. 436.

was construed as passing an estate vested in the son upon testator's death, subject to be defeated by the death of the son before arriving at the age named.<sup>35</sup>

Remainders are often granted after a life estate with a provision that if the remainderman shall die without issue the property shall pass to another. As is hereafter stated, the clause "dying without issue" is, wherever possible, construed to mean death in the lifetime of the testator.<sup>36</sup>

Where "dying without issue" is held to mean without issue at the death of the person named as ancestor, and an estate granted to one for life with a remainder to another named, but if the remainderman dies without issue, then to others, the remainder man takes a vested remainder defeasible upon the condition subsequent to his dying without issue surviving him.<sup>37</sup>

Vested defeasible remainders are often created by a gift to A but providing that if he should die before a certain time leaving issue, his interest shall pass to such issue.<sup>38</sup> Such a devise is not defeated by the death of the devisee without issue.<sup>39</sup>

Since estates are held to be vested rather than contingent, a devise to testator's wife for life, remainder to testator's son A, on condition that he should take care of his mother and provide for her support as long as she lived, was held to give to

<sup>35</sup> *Richardson v. Penicks*, 1 App. D. C. 261; *Dickison v. Ogden*, — Ky. — (1890); 12 S. W. 191.

<sup>36</sup> *Hamilton v. Ritchie* (H. L. Scot), (1894), A. C. 310; *Lee v. Mumford*, — Ky. —; 44 S. W. 91; *Small v. Marburg*, 77 Md. 11; *Tienken v. Tienken*, 131 N. Y. 391; *Tompkins's Estate*, 154 N. Y. 634; *Reams v. Span*, 26 S. C. 561. See Sec. 676.

<sup>37</sup> *Mullreed v. Clark*, 110 Mich. 229; *Patterson v. Madden*, 54 N. J. Eq. 714; *Powers v. Bullwinkle*, 33 S. C. 293; *Marshall v. Marshall*, 42 S. C. 436.

<sup>38</sup> *Shaw v. Eckley*, 169 Mass. 119; *Putnam v. Story*, 132 Mass. 205;

*Brasher v. Marsh*, 15 O. S. 103.

<sup>39</sup> *Bonnell v. Bonnell*, 47 N. J. Eq. 540.

As conditions are not favored in construction, and estates are held to be absolute rather than conditional. (See Sec. 674), a devise to testator's "children then living," *i. e.*, at the death of the life tenant "or their heirs," is held to be vested and not defeasible upon the death of one of testator's children after testator, the phrase "or their heirs" applying to the heirs of such children of testator as had died before testator. *Linton v. Laycock*, 33 O. S. 128.

A a vested remainder upon testator's death, and not a remainder whose vesting was deferred to his mother's death and was contingent upon his support of her. In this case the mother died before the testator, and under the construction placed upon the will it was held that A took in fee upon testator's death.<sup>40</sup> A similar view was taken where the son did not remain with the widow and support her during her lifetime, because he died before she did.<sup>41</sup>

On the same principle it was held that, where a life estate is created for the benefit of the life tenant and the remainder over is given to remaindermen upon the death of the life tenant, the remainder is vested in the remaindermen; and if the life tenant dies before the testator, the remainder takes effect in possession upon the testator's death.<sup>42</sup>

### §663. When contingent interests become vested.

Since the law favors the early vesting of interests, a remainder which is contingent at testator's death is to be so construed as to be converted into a vested remainder at the earliest moment possible consistent with testator's intention.<sup>43</sup>

Thus where there was a life estate to testator's wife, subject to be determined by her remarriage, with remainder over to testator's son, upon the death or remarriage of the widow with a remainder to the daughter of testator, contingent upon the death of the son before the wife, it was held that upon the remarriage of the widow the estate vested in the son, and was not divested by his death before that of the widow.<sup>44</sup>

So where there was a devise to A in case he survived the testatrix and attained to the age of twenty-one, though modified by

<sup>40</sup> *Gingrich v. Gingrich*, 146 Ind. 227.

<sup>41</sup> *McCall v. McCall*, 161 Pa. St. 412.

<sup>42</sup> *Healy v. Healy*, 70 Conn. 467.

<sup>43</sup> *Poor's Lessee v. Considine*, 6 Wall. 458; *Cropley v. Cooper*, 19 Wall. 167; *McArthur v. Scott*, 113 U. S. 340; *Gindrat v. Western Ry.* 96 Ala. 162; 19 L. R. A. 839; *Young v. Harkleroad*, 166 Ill. 318; *Lin-*

*ton v. Laycock*, 33 O. S. 128; *Scott v. Best*, — Ky. — (1894); 25 S. W. 745; *Dorr v. Johnson*, 170 Mass. 540; *Boyd v. Sachs*, 78 Md. 491; *Herriot v. Prime*, 155 N. Y. 5; *Moore's Estate*, 152 N. Y. 602; *Hinkson v. Lees*, 181 Pa. St. 225.

<sup>44</sup> *Boyd v. Sachs*, 78 Md. 491, citing *Snider v. Nesbitt*, 77 Md. 576.

codicil, providing that if he died leaving no lawful issue at the time of his death to be entitled to the trust property, the property should pass to others, it was held that upon A's surviving the testatrix, and attaining the age of twenty-one he took a vested interest in the fund although he subsequently died without lawful issue.<sup>45</sup>

Where a will provides for subsequent division of property in such a way as to prevent the vesting of the estate before the division, it is held that the interests vested absolutely upon the division.<sup>46</sup>

So where a will provided that a house should be divided among testator's children at the death of testator's wife, but that since division was impossible, it should be appraised and taken by the devisee or devisees who should take the farm attached to it, securing the others for their shares in money by bond and mortgage, it is held that the remainder in this house vested absolutely in the person who took the farm, immediately upon his taking such farm.<sup>47</sup>

Where the terms of the will vesting is postponed until the beneficiary shall reach a certain age, it is held that, upon his reaching that age, the estate vests, though the enjoyment thereof may be postponed until the determination of the life estate.<sup>48</sup> So a devise to testator's two sons, to be equally divided between them when the younger son came of age, remainder to the widow for life, in case both of the sons died without heirs, and on her death over to others, was held to vest absolutely in one son upon the death of the other after majority leaving issue.<sup>49</sup> So where a contingent remainder is devised to named persons upon the death of the first taker, without issue, the estate vests at once upon such contingency.<sup>50</sup> So in a devise to A, but if she die without issue to B for life, remainder to the

<sup>45</sup> *Bailey v. Hawkins*, 18 R. I. 573 (1894), affirming on rehearing 18 R. I., 27 Atl. 512.

<sup>46</sup> *Wilson v. Bryan*, 90 Ky. 482; *Welder v. McComb*, 10 Tex. Cir. App. 85.

<sup>47</sup> *Dean v. Winton*, 150 Pa. St. 227.

<sup>48</sup> *Keepers v. Fidelity, Title & Deposit Co.*, 56 N. J. Law, 302; *Dimmick v. Patterson*, 142 N. Y. 322.

<sup>49</sup> *Scott v. Best*, Ky. (1894); 25 S. W. 745.

<sup>50</sup> *Dorr v. Johnson*, 170 Mass. 540; *Moore's Estate*, 152 N. Y. 602.



children of C, C's children take a vested interest on the death of A.<sup>51</sup> So where a will devised property to testator's widow for life, with remainder to his brothers and sisters, and, in a codicil, he provided that, in case of a birth of child to testator, the will should remain in force until the child should reach the age of twenty-one, when the wife and the child should divide the property between them; and further providing that, if the wife should die or marry before the child should reach the age of twenty-one, and that, if both wife and child died before the child reached the age of twenty-one, the property should go to the brothers and sisters, it was held that, upon the death of the wife before the child reached the age of twenty-one, the remainder vested in such child, subject to be divested by the death of the child before reaching the age of twenty-one.<sup>52</sup>

Where property was devised to one if he should "have an heir of his body," and if he died leaving no heir, to others, it is held that the estate vested absolutely and undefeasably, upon the birth of a child, to such person, although the child might die before such person.<sup>53</sup>

A provision that, after the death of testator's wife, a plantation should be "equally divided among my children that may be alive at that time", and further providing that, if the children could not stay on the place together, their guardians should "receive and pay out to them what may be coming to them of my estate", was held to give vested remainders to the children upon their removal from the plantation. At any event, upon the death of all the children except one, unmarried and childless, a deed from the survivor and the widow will pass the absolute estate.<sup>54</sup>

Where property is devised to one for life, remainder over to another, providing that other survives the life tenant, it is said in some jurisdictions that this interest of the remainder-man

<sup>51</sup> Nathan v. Hendricks, 147 N. Y. 348.

<sup>53</sup> Moore v. Feig, 17 O. C. C. 27.

<sup>54</sup> Nicholson v. Cousar, 50 S. C.

<sup>52</sup> Herriot v. Prime, 155 N. Y. 206; 27 S. E. 628.

is a contingent remainder.<sup>55</sup> At any event, such interest is one that can not be fairly appraised and sold, and the courts are, accordingly, unwilling to allow it to be subject to attachment.<sup>56</sup>

#### §664. Contingent remainders.

A contingent remainder exists where, under the terms of the gift, there is either no definite or ascertained person in existence who will take, if the particular estate were to determine at once, or where, although the person who is to take is definite and ascertained, some contingency or event other than that of the determination of the particular estate must occur before such remainder-man can take.<sup>57</sup>

From this definition, it is evident that there are two kinds of contingencies: contingencies of the event and contingencies of the person. A third class might undoubtedly be suggested in cases where there is a contingency of both the event and person, though this latter class has never been recognized by the courts as distinct from the other two. A contingency of the event exists where the person who is to take upon the determination of the life estate is in existence, and is sufficiently designated; but some event other than the determination of the particular estate must occur before the remainder-man can take at such determination.<sup>58</sup>

Any lawful event which testator may select may be the subject of the contingency. A common contingency is where the remainder is to pass to the remainder-man, provided he survives some designated person. In such case, at least as long as the designated person is alive, the remainder-man has only a contingent remainder,<sup>59</sup> or the contingency may be the re-

<sup>55</sup> *Watson v. Adams*, 103 Ga. 733; *Madison v. Larmon*, 170 Ill. 65; *Brooks v. Kipp*, 54 N. J. Eq. 462; *Riggan v. Lamkin*, 120 N. C. 44.

<sup>56</sup> *Smith v. Gilbert*, 71 Conn. 149; *Watson v. Adams*, 103 Ga. 733.

<sup>57</sup> *Shaw v. Eckley*, 169 Mass. 119 (remainder to A if C died before life tenant B held contingent). See Sec. 656.

<sup>58</sup> *Turner v. Balfour*, 62 Conn.

89; *Phayer v. Kennedy*, 169 Ill. 360; *Lepps v. Lee*, — Ky. — (1892); 17 S. W. 146; *Hopper v. Harrod*, — Ky. — (1894); 24 S. W. 870.

<sup>59</sup> *Turner v. Balfour*, 62 Conn. 89; *Phayer v. Kennedy*, 169 Ill. 360; *Lepps v. Lee*, — Ky. — (1892), 17 S. W. 146; *High's Estate*, 136 Pa. St. 222, 236; *Gormley's Estate*, 154 Pa. St. 378.

marriage of a specified person.<sup>60</sup> So where testator devised land to his wife, and provided that if a certain designated person married and had issue, and, if the wife thought it advisable, she might convey the land to such issue or children, and if she did not so convey, the land should go to a designated township, the interest of the children of the designated person was held to depend entirely upon the fact of the conveyance. So when the wife conveyed to one child only, the other children were held to acquire no interest whatever in such land.<sup>61</sup> A devise to A, but if he should die without issue to B, gives B a contingent remainder, dependent on the death of A without issue.<sup>62</sup> So a devise to be divided by trustees among certain persons at their discretion does not, until such division, give any interest to such beneficiary that can be bound by a lien.<sup>63</sup>

Since testator does not usually understand the difference between vested and contingent interests, especial care must be taken in determining the nature of the interest given when it is expressly made to depend upon the happening of specified events. These interests are, under the definition, ordinarily contingent; but analysis of the will may disclose that the contingencies, when put together, merely amount to a description of the particular estate. A vested remainder is necessarily dependent upon the determination of the particular estate. It therefore follows that no extension or repetition of the description of the particular estate will make the remainder dependent thereon contingent instead of vested.<sup>64</sup>

### §665. Contingencies of the person.

A remainder may also be contingent because of the contingency of the person. This estate exists where, by the terms of

<sup>60</sup> Carr v. Bredenberg, 50 S. C. 471.

<sup>61</sup> Crist v. Schank, 146 Ind. 277; 45 N. E. 190.

<sup>62</sup> St. John v. Dann, 66 Conn. 401.

<sup>63</sup> Handy's Estate, 182 Pa. St. 68.

<sup>64</sup> Woodman v. Woodman, 89 Me.

128; Nelson v. Russell, 135 N. Y. 137; Sellers v. Reed, 88 Va. 377. But a line of cases consider that a contingent remainder is created where it is expressly provided by will that the remainder man must survive the life-tenant. See Secs. 656 and 663.

the gift, the beneficiary can not be ascertained until the happening of some future event. Thus, where a devise is made to a class in such terms that the class can not be ascertained at the death of the testator, but must be ascertained at some future time, it is held in many states that, until such class is definitely ascertained, the interest of the members of such class corresponding to such description is a mere contingency;<sup>65</sup> hence the bankruptcy of one, who may take a contingent interest at the time for fixing the class of beneficiaries, passes no title to assignee or trustee in bankruptcy.<sup>66</sup> And on the death of such person no interest passes to his issue unless specifically so provided by the terms of the will, and, in this case, the issue take, not by descent, but by purchase;<sup>67</sup> nor has the surviving wife or husband of such person any interest in the property in which decedent had such contingent remainder.<sup>68</sup>

#### §666. Contingent legacies.

As in devises, contingent legacies may be of two kinds: legacies contingent on account of some event and legacies contingent because of the uncertainty of the beneficiaries. A legacy contingent on account of the event is created by will which provides that the legatee shall take at a future time only in case some other and further event happens.<sup>69</sup> And a beneficiary who has no vested interest is still entitled to protection against the acts of the widow or executor in so dealing with the estate, as to make it impossible to pay his legacy should the contingency happen.<sup>70</sup>

<sup>65</sup> *Buchanan v. Denig*, 84 Fed. Rep. 863; *Gindrat v. Western Ry.* 96 Ala. 162; 19 L. R. A. 839; *Bates v. Gillett*, 132 Ill. 287; *Madison v. Larmon*, 170 Ill. 65; *Loeb v. Struck* (Ky.), 42 S. W. 401; *Ried v. Walbach*, 75 Md. 205; *Fitzhugh v. Townsend*, 59 Mich. 427; *Whitesides v. Cooper*, 115 N. C. 570; *Wilson v. Denig*, 166 Pa. St. 29; *Nicholson v. Cousar*, 50 S. C. 206; 27 S. W. 628; *Forest v. Porch*, 100 Tenn. 391.

<sup>66</sup> *Buchanan v. Denig*, 84 Fed. 864.

<sup>67</sup> *Fitzhugh v. Townsend*, 59 Mich. 427; *Whitesides v. Cooper*, 115 N. C. 570.

<sup>68</sup> *Wilson v. Denig*, 166 Pa. St. 29.

<sup>69</sup> *Duggan v. Duggan*, 17 Can. S. C. 343; *Lapham v. Martin*, 33 O. S. 99; *Rebman v. Dierdorf*, 186 Pa. St. 401.

<sup>70</sup> *Duggan v. Duggan*, 17 Can. S. C. 313; see Sec. 598.

A legacy may also be contingent on account of the uncertainty of the beneficiary. This usually occurs when the beneficiaries are not named but are described, as for example, by reference to the class to which they belong in such terms that they can not be ascertained accurately until the happening of some future event. Such a legacy is contingent until the happening of the event by which the legatees can be definitely ascertained.<sup>71</sup> Thus, a legacy to such of A's children as shall be alive at the death of A, is contingent until A's death.<sup>72</sup>

**§667. Vested and contingent legacies.—General rule of construction.**

The law in the case of legacies, as in the case of devises, prefers, wherever testator's language is ambiguous, or obscure, or doubtful, a construction which will make a legacy vested rather than contingent, or, if contingent, will make it vested as soon as possible;<sup>73</sup> nor will the fact that the legatee may die before the time of the payment of the legacy conclusively show that it is a contingent and not a vested interest.<sup>74</sup> So a legacy payable "within one year after the death of my wife, if she survive me" is held to be vested, and not contingent, the condition referring solely to the time of payment.<sup>75</sup>

Within the limits of the rule against perpetuities, however, testator has absolute right to dispose of his property as he pleases, as far as the time of the vesting is concerned; and he may, therefore, create either vested or contingent legacies at his pleasure; and, when he specifically provides in his will

<sup>71</sup> *In re Marvin* (1891), 3 Ch. 197; *McCartney v. Osburn*, 118 Ill. 403; *Wilhelm v. Calder*, 102 Io. 342; *Hopkins v. Keazer*, 89 Me. 347; *Hale v. Hobson*, 167 Mass. 397; *Hall v. Wiggin*, 67 N. H. 89 (1894); 29 Atl. 671; *Jones v. Jones*, 46 N. J. Eq. 554, affirming *Dutton v. Pugh*, 45 N. J. 426; *Rhode Island Trust Company v. Harris*, 20 R. I. 408.

<sup>72</sup> *Wilhelm v. Calder*, 102 Io. 342;

*Hopkins v. Keazer*, 89 Me. 347; *Jones v. Jones*, 46 N. J. Eq. 554; *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408.

<sup>73</sup> *Bethea v. Bethea*, 116 Ala. 265; *Hills v. Barnard*, 152 Mass. 67, 9 L. R. A. 211.

<sup>74</sup> *Spencer v. Greene*, 17 R. I. 727; *Lovass v. Olson*, 92 Wis. 616; 67 N. W. 605.

<sup>75</sup> *Lovass v. Olson*, 92 Wis. 616; 67 N. W. 605.

at what moment the legacies shall vest, the courts will give full effect and force to his wishes. Cases of this kind are, however, rarely presented to the courts for construction. The wills in which testator did not provide specifically as to the time of the vesting of the legacies are the ones commonly presented for judicial decision. The rules most frequently invoked are those for determining testator's probable intention. In such cases, while, as usual, each will is to be construed by itself, and depends for its meaning largely upon its own context and subject matter, some *prima facie* rules have become well settled. Where the legacy is to be paid as soon as testator's estate is settled, such legacy is vested at once upon testator's death. This proposition is so well settled that but few cases arise involving it.

**§668. Effect of postponing time of payment to create intermediate interest.**

Where testator postpones the payment of the legacy simply for the purpose of creating an intermediate interest in some other person, upon the determination of which interest the legacy is to be paid, such legacies are *prima facie* treated as vested upon testator's death, and not contingent.<sup>76</sup> And

<sup>76</sup> Dwyer v. Mapother, 26 N. S. 294; Walker v. Atmore, 50 Fed. 644; Bethea v. Bethea, 116 Ala. 265; Scofield v. Clcott, 120 Ill. 362; Everett v. Mount, 22 Ga. 323; Owen v. Eaton, 56 Mo. App. 563; Cook v. Hayward, 172 Mass. 195; Marsh v. Hoyt, 161 Mass. 459; Hall v. Wiggin, 67 N. H. 89; 29 Atl. 671; Benton v. Benton, 66 N. H. 169 (1891); 20 Atl. 365; Budd v. Haines, 52 N. J. Eq. 489; Conant v. Bassett, 52 N. J. Eq. 12; Cook v. McDowell, 52 N. J. Eq. 351; Adams v. Woolman, 50 N. J. Eq. 516; Kimble v. White, 50 N. J. Eq. 28; Crane v. Bolles, 49 N. J. Eq. 373; Booraem's Estate, 55 N. J. Eq. 759; Bowditch v. Ayrault, 138 N. Y. 222; Weymouth v. Irwin, 7 O. D. 91; 5 O. N. P.

248; Collier v. Grimsey, 36 O. S. 22; Bartholomew's Estate, 155 Pa. St. 314; Thomman's Estate, 161 Pa. St. 444; Eckert's Estate, 157 Pa. St. 585; Wengert's App. 143 Pa. St. 615; 13 L. R. A. 360; Ritter's Estate, 190 Pa. St. 102; Rowland's Estate, 141 Pa. St. 553; Mull v. Mull, 81 Pa. St. 393; Little's Appeal, 117 Pa. St. 14; McClure's Appeal, 72 Pa. St. 414; Patterson v. Hawthorne, 12 S. & R. 112; Sherman v. Baker, 20 R. I. 446; 40 L. R. A. 717; Newport Bank v. Hayes, 18 R. I. 464; Spencer v. Greene, 17 R. I. 727; Jones v. Knappen, 63 Vt. 391; 14 L. R. A. 292; Chapman v. Chapman, 90 Va. 409; Stanley v. Stanley, 92 Va. 534, 1896; 24 S. E. 229; Baker v. McLeod, 79 Wis. 534;

where such legacy is given absolutely, the payment being postponed to let in a life estate, the interest of the legatee, if he dies before the period of payment, passes to his legatees or next of kin. Such a legacy may be, however, granted upon a condition subsequent to be divested if the legatee dies without issue. Although a vested legacy, it is, of course, divested by such a contingency.<sup>77</sup> Such a legacy may be further so given that, although it vests in the legatees at testator's death, or as they afterwards come into being, it will open to let in after-born legatees. Thus, where a bequest is given to one for life, or until the youngest child of such person came of age, and then to such children, it was held that the interest in this legacy vested in the children as they were born, subject to open and let in after-born children.<sup>78</sup>

**§669. Effect of postponing time of payment where no intermediate interest exists.**

Where a will bequeaths outright a certain sum of money to a legatee, and further provides that the payment of this money shall be postponed until a future time, it is held that the legatee vests at once upon the death of the testator, although the period of enjoyment is to be postponed until the time indicated, generally the arrival of the beneficiary at a certain age.<sup>79</sup> "If testator gives a legacy to A. B., at the end

<sup>77</sup> *Hickling v. Fair* (1897), A. C. 15; 68 L. J. P. C. N. S. 12; *Webster v. Webster*, 93 Ky. 632.

<sup>78</sup> *Male v. Williams*, 48 N. J. Eq. 43; *Campbell v. Stokes*, 142 N. Y. 23; *Bradley's Estate*, 166 Pa. St. 300.

<sup>79</sup> *Bruce v. Charlton*, 13 Sim. 68; *Marsh v. Wheeler*, 2 Edw. Ch. 162; *Walkerly's Estate*, 108 Cal. 627; *Hibler v. Hibler*, 104 Mich. 274; *Smith v. Jackson*, 115 Mich. 192; *McCarty v. Fish*, 87 Mich. 48; *Rood v. Hovey*, 50 Mich. 395; *Bishop v. McClelland*, 44 N. J. Eq. 450; 1 L. R. A. 551; *Atmore v. Walker*, 46 Fed. 429; *Bethea v. Bethea*, 116 Ala.

265; *Nixon v. Robbins*, 24 Ala. 663; *Harrison v. Moore*, 64 Conn. 344; *Ingraham v. Ingraham*, 169 Ill. 432, 472; *Eldridge v. Eldridge*, 9 Cush. 516; *Wardwell v. Hale*, 161 Mass. 396; *Furness v. Fox*, 1 Cush. (Mass.), 134; 48 Am. Dec. 593; *Clafin v. Clafin*, 149 Mass. 19; *Smith v. Parsons*, 164 N. Y. 116; *Goebel v. Wolfe*, 113 N. Y. 405; *Nelson v. Blue*, 63 N. C. 659; *Reed v. Buckley*, 5 Wats. & S. 517; *McReynolds v. Graham* (Tenn. Ch. App.), 43 S. W. 138; *Lovass v. Olson*, 92 Wis. 616; 67 N. W. 605. So where one bequeathes to his grandchildren who were over twen-

of ten years after his death the legacy is contingent; but if he gives it to A. B. to be paid to him at the end of ten years, it is vested."<sup>80</sup> Thus, where a will gave a legacy to testator's son, payable when he was twenty-one, and provided: "I also give him the sum of \$20,000 to be paid to him when he shall attain the age of twenty-five years, together with the further sum of \$20,000 to be paid to him when he shall attain the age of thirty years," it was held that these legacies were vested.<sup>81</sup> So, where a legatee is given, in absolute terms, a provision that the payment shall not be made until the legatee reforms, and if he shall not reform within five years of testator's death his share shall be held in trust for his children, shall not prevent the vesting of the legacy so that where he dies within five years it descends as intestate property to his widow and children;<sup>82</sup> nor is a legacy prevented from vesting by the fact that trustees were appointed to pay the income to legatee, and not pay him the principal until they think it proper.<sup>83</sup>

Where a will gives a legacy in such terms as would otherwise pass a vested interest, the fact that a power of disposing of the property in some other manner, generally for the support of testator's widow, is given, does not render the legacy contingent, although, of course, it may be defeated by the exercise of the power.<sup>84</sup>

A somewhat different case, however, was presented where the testator's son was empowered to "use the principal for his

ty-one years, a certain sum outright, and bequeaths a like sum to those under twenty-one, payable when they arrive at the age of twenty-one, and appointed a trustee to manage the sum in the meantime, it was held that the legacy vested in those under age at the death of testator. "The appointment of a trustee in connection with the language of the defendant clearly shows that the legatees are to be paid as other legatees upon the settlement of the estate." *Nelson v. Pomeroy*, 64 Conn. 257.

<sup>80</sup> *Bruce v. Charlton*, 13 Sim. 68,

quoted in *Hibler v. Hibler*, 104 Mich. 274.

<sup>81</sup> *Wardwell v. Hale*, 161 Mass. 396. (So as the son died at the age of 26 his administrator could recover the legacy payable when he was [or would have been] 30.

<sup>82</sup> *Burnham v. Burnham*, 79 Wis. 557.

<sup>83</sup> *Lippincott v. Stottenburg*, 47 N. J. Eq. 21.

<sup>84</sup> *Heilman v. Heilman*, 129 Ind. 59; *McCarty v. Fish*, 87 Mich. 48; *In re Brown*, 154 N. Y. 313; *Chafee v. Maker*, 17 R. I. 739.



children, or any of them, equally or unequally." By the exercise of the power of appointment, the parent could substantially defeat the interest of any of his children. The interests of his children were accordingly held to be contingent during the lifetime of their father.<sup>85</sup> It seems well settled that a legacy to the "heirs" of testator vests the interest in the legacy at the death of testator.<sup>86</sup> And a legacy given absolutely is vested, although not payable till the death of the life tenant.<sup>87</sup>

Where a legacy is not given in specific language, but is only to be implied from the direction to pay the legacy to the legatees at some time subsequent to the death of testator, it is a *prima facie* rule of construction that such a legacy does not vest at the death of testator, but is contingent until the time fixed for its payment.<sup>88</sup> Thus, a direction to pay a certain sum to a named legatee at the end of two years, if in the judgment of the executor he has then reformed, does not create a vested interest in such legatee at testator's death.<sup>89</sup> This presumption may be, of course, strengthened by the context of the will showing that testator does not regard the legacy as vested until the time of payment.<sup>90</sup>

This rule, however, while a *prima facie* rule of construction, is subordinate to the primary rule that the intention of testator must be collected from the whole will, and any form of lan-

<sup>85</sup> Lewis v. Citizens' National Bank, 95 Ky. 79.

<sup>86</sup> Muhlenburg's App. 103 Pa. St. 587.

<sup>87</sup> Carper v. Crowd, 149 Ill. 465; Kelly v. Gonce, 49 Ill. App. 82.

<sup>88</sup> Walker v. Mower, 16 Beav. 365; Gardiner v. Slater, 25 Beav. 509; *In re* Soules, 30 Ont. Rep. 140; Scofield v. Olcott, 120 Ill. 363; Powers v. Egelhoff, 56 Ill. App. 606; Owen v. Eaton, 56 Mo. App. 563; Snow v. Snow, 49 Me. 159; Eager v. Whitney, 163 Mass. 463; Garland v. Smiley, 51 N. J. Eq. 198; Paget v. Melcher, 156 N. Y. 399; Green v. Green, 86 N. Car. 546; Union Savings and Trust Co. v. Darr, 10 Ohio C. D. 554; Bartholomew's Es-

tate, 155 Pa. St. 314; Pleasanton's Appeal, 99 Pa. St. 363.

<sup>89</sup> Markham v. Hufford (Mich.) (1900), 82 N. W. 222.

<sup>90</sup> "It is, therefore, apparent that the concluding clause of the will of the father providing that no descendants of his survive his wife, the property shall belong and be delivered over by the executors to the persons named by him, of necessity shows that he did not intend that his children should have a vested interest during the lifetime of his wife so as to make it pass under their wills or go to their next of kin." Paget v. Melcher, 156 N. Y. 399.

guage in the will which clearly shows that testator intends the legacies to vest before the time of payment must be given full effect by the courts.<sup>91</sup>

"If there be no other gift than in the direction to pay or distribute *in futuro*, yet if such gift or distribution happens to be postponed for the convenience of the fund or property, or where the gift is only postponed to let in some other interest, the vesting will not be deferred till the period in question." \*

### §670. When contingent legacies become vested.

Since the law favors the vesting of legacies as soon as possible, a contingent legacy is held to vest in the beneficiary the instant that the contingency happens; even though the payment of the legacy may be postponed until some future event occurring thereafter.<sup>92</sup> Thus, a provision that testator's daughter, who had received a specified gift by the will, should receive an additional gift if she became insane, was held to give her an interest which vested at the moment of her becoming insane, and, accordingly, descended to her legal representatives in event of her death before receiving it.<sup>93</sup>

Where a legacy was given to one for life, and "from and after her death" to such of life tenant's children as were living at the period, not exceeding nine months after the death of the testator, it was held that at the expiration of such nine months the legacies vested and were not subject to be divested by the death of one of these children during the lifetime of the life tenant.<sup>94</sup> So, in a gift of the income of a fund, with a right to use the principal on demand, the right to the principal vests on demand.<sup>95</sup> Hence, where the legatee demands the principal before her death, but it is not paid to her, it should be paid to her estate.<sup>96</sup>

<sup>91</sup> *In re Brown*, 154 N. Y. 313.

\* *McClure's Appeal*, 72 Pa. St. 414, quoted in *Little's Appeal*, 117 Pa. St. 14.

<sup>92</sup> *Goldtree v. Thompson*, 79 Cal. 613; *Stephen's Estate*, 164 Pa. St. 209; *Bailey v. Hawkins*, 18 R. I. 573; *McGill v. Gardner* (Tenn. Ch. Ap.) (1898), 46 S. W. 767.

<sup>93</sup> *Hudgins v. Leggett*, 84 Tex. 207.

<sup>94</sup> *Mann's Estate*, 160 Pa. St. 609.

<sup>95</sup> *Smith v. Jackman*, 115 Mich. 192; *Godshalk v. Akey*, 109 Mich. 350.

<sup>96</sup> *Smith v. Jackman*, 115 Mich. 192.

**§671. Destruction of contingent legacy.**

Likewise, upon the occurrence of such contingencies as make it impossible for the contingency upon which the legacy is given ever to occur, the contingent interest is absolutely extinguished. Thus, where a legacy was given to testator's daughter, and it provided that if she should die before her husband, without children, the legacy should go to the children of a son of testator immediately upon the death of the daughter, it was held that the contingent interest of these children of testator's son was destroyed by the death of the husband of the daughter before the daughter, although she was childless at the time.<sup>97</sup>

<sup>97</sup> *Rebman v. Bierdorf*, 186 Pa. St. 401.

## CHAPTER XXX.

### CONDITIONS.

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#### §672. Classes of conditions.

Estates may be devised either absolutely or upon condition. It is, therefore, often of great practical importance to determine whether a will devises an estate absolutely or upon condition; and, if upon condition, to determine the exact nature and effect thereof.

Conditions as to their effect upon the estate to which they are annexed are of two kinds, precedent and subsequent, and they are best defined separately instead of by a general definition of a condition.

A condition precedent is an event the happening or not happening of which causes a conditional estate to vest or to be enlarged.<sup>1</sup> A condition subsequent is an event the happening or not happening of which determines an estate already vested.<sup>2</sup>

#### §673. Condition distinguished from motive.

It is often difficult to determine whether a declaration that a certain devise was on account of something to be done by the de-

<sup>1</sup> Moore v. Perry, 42 S. Car. 369. 412; Tilley v. King, 109 N. Car.

<sup>2</sup> McKinnon v. Lundy, 21 Ont. 461.

App. 560; Tappan's Appeal, 52 Conn.

visée before the death of testator or before the time of the vesting of the estate, is a condition, or merely a declaration of the motive which leads testator to bestow the gift. The question, however, is purely one of construction of the whole will. Where it clearly appears that the gift was only upon condition precedent that the devisee should perform some act, the devise will not take effect unless the condition is complied with; and if it appears that the gift is to fail upon the happening or non-happening of the event, such event is a condition subsequent.<sup>3</sup>

Although there is some authority to the contrary, it seems not to be necessary that the devisee should be informed of the condition.<sup>4</sup> The devise may further refer to service as to be made, and yet not be conditioned upon the rendition of such service.<sup>5</sup>

A recital in a will that the legacy given is in consideration of the legatee's attention to testatrix and her husband,<sup>6</sup> or an expression of gratitude toward a legatee for his services to be rendered as executor,<sup>7</sup> was held to be an expression of motive of testator in making the gift, and not a condition upon which

<sup>3</sup> Whiting's Appeal, 67 Conn. 379; *Tilley v. King*, 109 N. Car. 461 (a devise was on condition that devisee "stays with us until after our deaths." Although there was no devise over, it was held that if he did not stay his devise was forfeited).

<sup>4</sup> Whiting's Appeal, 67 Conn. 379; (In this case a devise was made to one provided he should pay the testatrix a certain sum equal in value to the property which he had received from her. Subsequently by agreement between the testatrix and the devisee, the interest only was to be paid during the life of the testatrix, and it was agreed that in case of the death of testatrix before that of the devisee, the debts should be given to the devisee. Subsequently the testatrix executed a codicil reaffirming the will. It was held that the payment of interest under the

contract did not prevent the forfeiture of the devise unless the devisee should pay the sums specified.) *Merrill v. Wisconsin Female College*, 74 Wis. 415.

<sup>5</sup> *Bigstaff v. Lumpkins* (Ky.), 16 S. W. 449; 13 Ky. L. Rep. 448. (In this case testator devised the services of his slaves to his heirs, until his slaves reached the age of thirty years respectively, when they were to be freed and receive certain lands. The heirs freed the slaves at once. It was held that this did not destroy the devise, as it was not conditioned upon the rendition of the services.)

<sup>6</sup> *McCarty v. Fish*, 87 Mich. 48.

<sup>7</sup> *Chassaing v. Durrand*, 85 Md. 420. (After the gift was added "I thank him in advance for services in closing up my estate as testamentary executor.")

he made it. Accordingly, the failure of the beneficiary to act as expected by testator does not avoid a gift. So a gift of a homestead to testator's wife "for a home for her and my children" shows testator's motive in making the gift, and does not impose a condition that testator's wife shall continue to reside thereon.<sup>8</sup>

A gift to one upon condition that after receiving the gift he pay certain sums of money to persons designated, is generally considered not strictly a condition, the breach of which may forfeit the estate, but rather as imposing a personal liability upon such devisee, or as creating a trust.<sup>9</sup> But where the payment to a class is especially made a condition precedent to the vesting of the devise, it is held to be a valid condition.<sup>10</sup>

#### §674. Construction of conditions in general.

As a general and broad proposition it may be said that the law favors such construction as will create an absolute rather than a conditional estate.<sup>11</sup> Thus, where testator devised cer-

<sup>8</sup> *Davis v. Hardin*, 80 Ky. 672; *Talbot v. Schneider*, 151 Mo. 299.

<sup>9</sup> *Young v. Grove*, 4 C. B. 668; *Woodward v. Walling*, 31 Ia. 533; *Cunningham v. Parker*, 146 N. Y. 29. (This is recognized by the courts especially where there is no gift over.)

<sup>10</sup> *Moore v. Perry*, 42 S. C. 369. (A gift of a house and lot encumbered by a mortgage" to be owned by all the children as soon as the mortgage is satisfied, provided," that they pay to one of the children what he has paid or may pay to ward satisfying the mortgage, is held to be a gift upon condition precedent, not vesting until all the beneficiaries have repaid the amount advanced, and a delay of several years was held to be a renunciation of their right to acquire an interest in the property.)

<sup>11</sup> *Tarver v. Tarver*, 9 Pet. (U. S.) 174; *Bonner v. Young*, 68 Ala. 35;

*Likefield v. Likefield*, 82 Ky. 589; *Bentz v. Maryland Bible Society*, 86 Md. 102, 1897; 37 Atl. 708; *McElwaine v. Holyoke First Congregational Society*, 153 Mass. 238; *Van Giesen v. White*, 53 N. J. Eq. 1; *Acken v. Osborn*, 18 Stew. Eq. 377; 1 Dick. Ch. 607; *Crane v. Bolles*, 4 Dick. 373; *Newell v. Nichols*, 75 N. Y. 78; *Smith's Appeal*, 23 Pa. St. 9; *Casey v. Casey*, 55 Vt. 518; *Lovass v. Olson*, 92 Wis. 616 (a legacy to A to be paid within one year after the death of testator's wife "if she survive me," was held conditional as to the time of payment only, not as to the existence of the legacy).

A construction which creates a covenant upon the part of devisee to do certain acts is preferred to one which creates a condition divesting his estate upon failure to do such acts. *Worman v. Teagarden*, 2 O. S. 380.

tain lands to his son on condition that testator gained a certain law suit, and then immediately after devised "also four sections of my Texas land," it was held that the devise of the Texas land was not contingent upon the result of the litigation.<sup>12</sup>

Conditions as to the gift of the principal will not be extended by construction to apply to gifts of the income in preceding clauses,<sup>13</sup> nor will conditions as to residuum be extended to previous gifts.<sup>14</sup>

Conditions attached to a legacy in a will, are, however, presumed to attach to a substituted legacy given in a codicil,<sup>15</sup> and if the estate is clearly intended to be conditional, the law will construe it as an estate upon condition subsequent rather than upon condition precedent, since the law favors the early vesting of estates.<sup>16</sup>

In actual practice, conditions which tend to defeat estates are quite strictly construed.<sup>17</sup> Thus, where land was devised to testator's widow for life or during widowhood, with remainder over upon her remarriage or death to testator's son, and, in the event of his dying before majority and her remarrying before his death, to testator's mother and brother equally, it was held that where the son died before coming of age, and before the remarriage of the widow, she took the land in fee as the heir of such son.<sup>18</sup>

Where an estate is to cease upon the performance of two conditions, both must be performed in order to determine the estate.<sup>19</sup> Thus, where a gift to two sons provided that if neither have issue the fund was to go to another, it is held

<sup>12</sup> *Yeatman v. Haney*, 79 Tex. 67.

<sup>13</sup> *McElwain v. Holyoke First Congregational Society*, 153 Mass. 238.

<sup>14</sup> *Bedford v. Bedford*, 99 Ky. 273.

<sup>15</sup> *DeLaveaga's Estate*, 119 Cal. 651.

<sup>16</sup> *McKinnon v. Lundy*, 21 Ont. App. 560; *Gingrich v. Ginrich*, 146 Ind. 227; *Hoss v. Hoss*, 140 Ind. 551; *Marwick v. Andrews*, 25 Me. 525; *Yeatman v. Haney*, 79 Tex. 67.

<sup>17</sup> *McFarland v. McFarland*, 177 Ill. 208.

<sup>18</sup> *McGurry v. Wall*, 122 Mo. 614; 614; *Patterson v. Madden*, 54 N. J. Eq. 714.

<sup>19</sup> *Laurence v. McQuarrie*, 26 N. S. 164; *Bedford v. Bedford*, 99 Ky. 273; *Forsyth v. Forsyth*, 46 N. J. Eq. 400; *Kennedy's Estate*, 190 Pa. St. 79.

that such other does not take where either of the sons have issue.<sup>20</sup> So a devise to A, with a reversion if she died "before her son shall have arrived at the age of maturity, and should her son die without issue," was held conditioned upon the double contingency of the death of A during her son's minority, and his death without issue.<sup>21</sup> A gift to testator's wife for life or during widowhood, with remainder over to A upon her remarriage, is held to give A a remainder taking effect upon the death of the widow.<sup>22</sup>

### §675. Effect of failure of condition.

If a condition precedent becomes impossible, the estate which depended upon it can never take effect.<sup>23</sup> If a condition is clearly created, breach of such condition defeats the estate, even where the condition was beyond the control of the beneficiary, and he was entirely free from blame.<sup>24</sup> Thus a direction to executor to pay a legacy to A when he attains the age of thirty, if the executor thinks that he will make a prudent use of it, fails where A dies before the testator.<sup>25</sup>

Where a condition subsequent becomes impossible, the general rule is that an estate granted upon it can never be divested.<sup>26</sup> Thus a devise of realty on condition that devisee pay off a mortgage was held to be on condition subsequent and not defeated by payment of the mortgage by testator.<sup>27</sup> So

<sup>20</sup> *Collins v. Collins*, 40 O. S. 353; *Kennedy's Estate*, 190 Pa. St. 79.

<sup>21</sup> *Bedford v. Bedford*, 99 Ky. 273.

<sup>22</sup> *Smith v. Chadwick*, 111 Ala. 542, 1896; 20 So. 436; *Terry v. Bourne*, — Ky. — 1896; 33 S. W. 403. (The whole will showed testator's intention to create a remainder in A upon the termination of the widow's estate, which intention the courts would not defeat because re-marriage only was expressly mentioned.)

<sup>23</sup> *Boyce v. Boyce*, 16 Sim. 476; *Davis v. Angel*, 4 De G. F. & J. 524; 31 Beav. 223; *Ransdell v.*

*Boston*, 172 Ill. 439; *Johnson v. Warren*, 74 Mich. 491; *West v. Moore*, 37 Miss. 114; *Wilson v. Hall*, 6 Ohio C. C. 570; *Stark v. Conde*, 100 Wis. 633.

<sup>24</sup> *Stark v. Conde*, 100 Wis. 633.

<sup>25</sup> *Starke v. Conde*, 100 Wis. 633.

<sup>26</sup> *McKinnon v. Lundy*, 21 Ont. App. 560; *Derickson v. Garden*, 5 Del. Ch. 323; *Morse v. Hayden*, 82 Me. 227; *Parker v. Parker*, 123 Mass. 584; *Conrad v. Long*, 33 Mich. 78; *Dukes v. Faulk*, 37 S. C. 255; *Burnham v. Burnham*, 79 Wis. 557.

<sup>27</sup> *McKinnon v. Lundy*, 21 Ont. App. 560.



a gift to A on condition that he support B was held to be on condition subsequent, and was not defeated by B's death before testator.<sup>28</sup>

A gift to A of certain property, for the purpose of giving him a collegiate education, with a gift over if he did not make such use of it by reason of his indifference is not defeated by A's death while pursuing his studies.<sup>29</sup>

Where, however, a condition subsequent is made to a legatee which, as in case of corporation, has no legal powers to perform the condition, it has been held that the gift can never take effect.<sup>30</sup> But if the nominal condition is in reality a gift of a life estate to A, with remainder over to the corporation, it is, of course, valid.<sup>31</sup>

### §676. Conditions concerning death of devisee.

Where the testator devises property to a named beneficiary with the condition that if this beneficiary shall die "without issue" or "without heirs" the property devised shall go to some other designated person, several interesting questions are presented. The first question to consider is whether this is a devise upon condition or not. The termination of this question turns on the construction of the phrase "dying without issue." The weight of modern authority is that such a phrase, without anything further in the will to indicate the intention of testator, and when inserted in order to provide for

<sup>28</sup> *Morse v. Hayden*, 82 Me. 227.

<sup>29</sup> *Ellicott v. Ellicott* (Md.), 1900; 45 Atl. 183; 48 L. R. A. 58.

<sup>30</sup> *Bullard v. Shirley*, 153 Mass. 559; 12 L. R. A. 110.

*Contra*, *Carder v. Fayette County*, 16 O. S. 353. In this case a devise was made to a county upon condition that it paid an annuity to testator's widow. In a suit involving the validity of this annuity it was held that the question of the power of the county to pay such annuity or to impose a tax for such purpose was immaterial.

<sup>31</sup> A gift to a corporation upon condition that the corporation pay an annual sum equal to the interest on such gift to certain named persons for life has been held to be valid, although the corporation had no legal power to make such persons its beneficiaries, since the condition is in effect only to hold the principle as trustee for the life of the beneficiaries, and upon their death to trustee's own use. *Booth v. Baptist Church*, 126 N. Y. 215.

a gift to another in the event of dying without issue, means death in the lifetime of testator. Accordingly, if the beneficiary named in the will dies before the testator, neither his estate nor his heirs can claim any interest in the devise, while, if he survives testator, he takes an absolute fee simple free from any conditions.<sup>32</sup>

This construction treats these words as not strictly conditions, but as directions for substitution in order to prevent lapse; and, if at the death of testator, the designated beneficiary survives him, he takes the estate given absolutely, and is not divested thereof by his subsequent death without issue, but it passes by his will, or descends as his property in case of intestacy.<sup>33</sup>

<sup>32</sup> *Burdge v. Walling*, 45 N. J. Eq. 10; *Pennington v. Van Houten*, 4 Hal. Ch. 272; 4 Hal. Ch. 745; *Williamson v. Chamberlain*, 2 Stock. 373; *Baldwin v. Taylor*, 37 N. J. Eq. 78; 38 N. J. Eq. 637; *Barrell v. Barrell*, 38 N. J. Eq. 60; *Lafay v. Campbell*, 42 N. J. Eq. 34; *Walsh v. McCutcheon*, 71 Conn. 283; *Lawlor v. Holohan*, 70 Conn. page 87; *Morgan v. Robbins*, 152 Ind. 362; *Moore v. Schindehette*, 102 Mich. 612; *In re N. Y. L. & W. R. Co.*, 105 N. Y. 89; *Stokes v. Weston*, 142 N. Y. 433; *Benson v. Corbin*, 145 N. Y. 351; *Washbon v. Cope*, 144 N. Y. 287; *Baker v. McGrew*, 41 O. S. 113; *Smith v. Hankins*, 27 O. S. 371; *Patterson v. Earhart*, 29 W. L. B. 313; *Sugden v. McKenna*, 147 Pa. St. 55; *Mitchell v. Pittsburg, etc., Ry.*, 165 Pa. St. 645; *Morrison v. Truby*, 145 Pa. St. 540; *Keating v. McAdoo*, 180 Pa. St. 5; *Engel's Estate*, 180 Pa. St. 215; *Flick v. Forest Oil Co.*, 188 Pa. St. 317; *Bethea v. Bethea*, — S. Car. — (1897), 26 S. E. 716; *Lovass v. Olson*, 92 Wis. 616.

"It may be regarded as a settled rule of construction that where there is a devise to one person in fee and in case of his death to another, the contingency referred to is the death of the first named beneficiary during the lifetime of the testator, and that if such devisee survives the testator, he takes an absolute fee; that the words of contingency do not create a remainder over, to take effect upon the death at any time of the first taker, nor an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devise first named should not be living at the time of the death of the testator." *In re N. Y. L. & W. R. Co.*, 105 N. Y. 89, quoted in *Stokes v. Weston*, 142 N. Y. 432.

<sup>33</sup> *Pendleton v. Bowler*, 27 W. L. B. 313; *Patterson v. Earhart*, 6 Ohio Dec. 16; *Engel's Estate*, 180 Pa. St. 215; *Jackson's Estate*, 179 Pa. St. 77; *Meacham v. Graham*, 98 Tenn. 190; 39 S. W. 12.

This rule, while occasionally open to criticism as in individual cases tending to defeat the will of testator, probably enforces the intention of testator in the average number of cases as well as any which could be suggested. The rule itself grows out of the principle that the law favors absolute rather than conditional estates.<sup>34</sup> Testator's intention is, at best, doubtful in such cases; and the law accordingly settles such doubt by construing the will as creating an absolute estate, with a substitution of the beneficiary in case the first named beneficiary dies before testator.<sup>35</sup> Such presumption is strengthened where it appears from the will that testator meant to give to the beneficiary such estate as he could sell and dispose of absolutely;<sup>36</sup> and such presumption is not overcome by a provision that if any rents and profits accumulate before the death of the first devisee they shall pass to a second.<sup>37</sup> The presumption that "dying without issue" in such case means death during the lifetime of testator may be overcome by an express provision in the will. The rule that "death" means death during the lifetime of testator is only a *prima facie* rule of construction. The context of the will may show that testator had fixed some other point of time as that upon which such death, or death without

<sup>34</sup> See Sec. 674.

<sup>35</sup> Lifford v. Sparrow, 13 East. 359; Gee v. Manchester, 17 Ad. & Ell. 737; Woodburne v. Woodburne, 23 L. J. Ch. 336; First National Bank v. DePauw, 86 Fed. 722; 30 C. C. App. 360; Austin v. Bristol, 40 Conn. 120; 16 Am. Rep. 23; Gay v. Dibble (Conn.), (1900), 45 Atl. 359; Rickards v. Gray, 6 Hous. (Del.), 232; Jones v. Webb, 5 Del. Ch. 132; Arnold v. Alden, 173 Ill. 229; Wright v. Charley, 129 Ind. 257; Borgner v. Brown, 133 Ind. 391; Fowler v. Duhme, 143 Ind. 248; Antioch College v. Branson, 145 Ind. 312; Cornwall v. Falls City Bank (Ky.), 18 S. W. 452; 13 Ky. L. Rep. 606; Small v. Marburg, 77 Md. 11; Cox v. Handy, 78 Md. 108; Branson v. Hill, 31 Md. 181;

1 Am. Rep. 30; Embury v. Sheldon, 68 N. Y. 227; Stokes v. Weston, 142 N. Y. 433; rev. 69 Hun, 608; Black v. Williams, 51 Hun, (N. Y.), 280; Moore v. Lyons, 25 Wend. N. Y. 119; Nelson v. Russell, 135 N. Y. 137; Vanderzee v. Slingerland, 103 N. Y. 47; Brown v. Lippincott, 49 N. J. Eq. 44; Cowley v. Knapp, 13 Vr. 297; King v. Frick, 135 Pa. St. 575; Morrison v. Truby, 145 Pa. St. 540; Coles v. Ayres, 156 Pa. St. 197; Harris v. Dyer, 18 R. I. 540; *In re Durfee*, 17 R. I. 639; Lovass's Estate, 92 Wis. 616; see Sec. 582.

<sup>36</sup> Benson v. Corbin, 145 N. Y. 351.

<sup>37</sup> Lawlor v. Holohan, 70 Conn. 87.

issue, is to occur in order to divest the estate.<sup>38</sup> Thus the testator may fix the arrival of the legatee or devisee at a certain age as the time before which the death is to occur,<sup>39</sup> or he may fix the marriage of the legatee or devisee as such time.<sup>40</sup>

Even where testator does not fix the time, before which the death is to occur in order to defeat the estate, as subsequent to his own death, the context of the will may show that such was his intention. One of the commonest forms which the context assumes in order to show such intention is where testator creates a life estate to one, and subsequent to that a remainder to another, provided that on the death of such other (generally "without issue") the estate shall go to a third beneficiary. Under such devise the testator contemplates death of the first remainderman subsequent to his own.<sup>41</sup>

This rule has especial application where the life tenant is also executrix, and provision is made by will for the appointment of another person as executor upon the "death" of the wife.<sup>42</sup> Where the "death," or "death without issue," is to occur subsequent to the death of testator, a conditional estate is created defeasible upon a condition subsequent in the event of the occurrence of the death as specified in the will, provided the condition is one which the law will enforce in other respects.<sup>43</sup> Hence, a devise to one and his heirs provided that,

<sup>38</sup> *Hollister v. Butterworth*, 71 Conn. 57; *Kinney v. Keplinger*, 172 Ill. 449; *Jordan v. Hinkle*, 82 N. W. 426; *Naylor v. Godman*, 109 Mo. 543; *Kornegay v. Morris*, 122 N. C. 199, modified on rehearing 123 N. C. 128; 31 S. E. 375; *Brown v. Lippincott*, 49 N. J. Eq. 444; *Shimer v. Shimer*, 50 N. J. Eq. 300; *In re Denton*, 137 N. Y. 428; *Mead v. Maben*, 60 Hun, 268; *Pendleton v. Bowler* (Cin. S. O.), 27 W. L. B. 313.

<sup>39</sup> *Rogers' Estate*, 94 Cal. 526; *Iimas v. Neidt*, 101 Ia. 348; *McDaniel v. McDaniel* (Ky.), 15 S. W. 129; *Shimer v. Shimer*, 50 N. J. Eq. 300; *Smith's Estate*, 189 Pa.

St. 587; *McMasters v. Negley*, 152 Pa. St. 303.

<sup>40</sup> *Forman v. Woods* (Ky.) (1899), 50 S. W. 61.

<sup>41</sup> *Hollister v. Butterworth*, 71 Conn. 57; *Naylor v. Godman*, 109 Mo. 543; *Kornegay v. Morris*, 122 N. C. 199, modified on rehearing 123 (N. C.) 128; 31 S. E. 375; *In re Denton*, 137 N. Y. 428.

<sup>42</sup> *Kinney v. Keplinger*, 172 Ill. 449, reversing 71 Ill. App. 334.

<sup>43</sup> *Newson v. Holesapple*, 101 Ala. 682; *Bethea v. Bethea*, 116 Ala. 265; *Koeffler v. Koeffler*, 185 Ill. 261; *Smith v. Kimball*, 153 Ill. 368; *Pate v. French*, 122 Ind. page 10; *Jones v. Moore*, 96 Ky. 273; *Pruitt*

if the first taker should die without lawful issue, the estate should go over to another, gives the first taker a fee defeasible upon his death without issue; and in case of his death with issue, such issue have no interest in the property devised as against grantees or devisees of the first taker.<sup>44</sup>

The intention of testator that dying without issue may mean a death after the death of testator may also be inferred from other provisions in the will. Thus, a provision that, in case of the death of the beneficiary without issue, her share shall revert to the estate of testator shows that he contemplates her death without issue after his own.<sup>45</sup> So a provision that certain lands shall pass to testator's sons after the death of testator's widow, provided that if either dies without issue his estate shall pass to another, shows that the death without issue meant a death after that of testator.<sup>46</sup>

Where a life estate is created and interests of the remaindermen are postponed simply in order to permit of the creation of the life estate for the benefit of the life tenant, the remainder vests immediately in possession upon testator's death if the life tenant has died before testator; and the vesting of a life estate in the remainderman is not condition precedent to the vesting of the remainder.<sup>47</sup> Where the condition on which the estate is to pass over is the death of the one without "leaving" a child, it was held that the estate goes over where such named

v. Holland (Ky.), 18 S. W. 852; 13 Ky. L. Rep. 867; Brooks v. Kip, 54 N. J. Eq. 462; Hinkson v. Lees, 181 Pa. St. 225; Thomson v. Peake, 38 S. C. 456 (440); Shaw v. Erwin, 4 S. C. 209; Jennings v. Parr, 51 S. C. 191; Waring v. Waring, 96 Va. 641.

<sup>44</sup> Bethea v. Bethea, 116 Ala. 265; Mitchell v. Campbell, 94 Ky. 347. (A devise to A providing that A "shall continue the ownership of the estate and do as she pleases with it at her death, provided she leaves heirs of her own body, which heirs are to take it. But if she

dies without heirs of her own body," then to B. Held a fee in A, defeasible on event of her death without issue surviving her.) Shaw v. Erwin, 41 S. C. 209; Malona v. Schwing, 101 Ky. 56.

<sup>45</sup> Hutchins v. Pearce, 80 Md. 434; Trexler v. Holler, 107 N. C. 617.

<sup>46</sup> Daniel v. Daniel, 102 Ga. 181; Lafoy v. Campbell, 42 N. J. Eq. 34.

<sup>47</sup> Healy v. Healy, 70 Conn. 467; Hollister v. Butterworth, 71 Conn. 57; *In re Burrows* (1895), 2 Ch. 497.

person had a child, but the child died before such parent.<sup>48</sup> But where the devisee dies leaving a posthumous child, the condition is complied with.<sup>49</sup>

Where the evident intention of testator is to create an estate which will descend to the heirs of the first taker, the courts often allow considerable latitude in moulding the language of a condition to make it conform to such an intention. Thus it is not uncommon for testator to devise property to one and his heirs, and then provide that if such taker should die under a certain age the property given should pass to another. Unless the context clearly shows a contrary intention such a condition is construed to mean if the first taker shall die under age and without issue.<sup>50</sup>

This doctrine has been extended to a case where there was a gift to A without any reference in the will to his heirs, the statute making such gift carry a fee simple unless a contrary intention appears. In this case a devise was created in trust for the daughter of testator until she should become twenty-one, when the principal should be paid over to her absolutely. The will provided further that if she should die before she became twenty-one years of age the estate should go over to another. The court construed this condition as meaning if she should die under twenty-one and without issue; so, if she had married, had a child, and died under the age of twenty-one, such child took by descent from her.<sup>51</sup> So, where testator left real property to certain devisees with a gift over, if the devisees or "any of them" should die, it was held that this condition, though literally divesting all the devisees of their shares, applied only to the share of the one dying.<sup>52</sup> So, in a gift to a married woman for life, and

<sup>48</sup> *In re Hemingway*, L. R. 45 Ch. D. 453.

<sup>49</sup> *Smith's Estate*, 189 Pa. St. 587.

<sup>50</sup> *Spalding v. Spalding*, Cro. Car. 185; *Strong v. Cummin*, 2 Burr. 767; *Abbott v. Middleton*, 21 Beav. 143; 7 H. L. Cas. 68; *Phelps v. Bates*, 54 Conn. 11; *Young v. Har- kleroad*, 166 Ill. 318; *Janney v.*

*Sprig*, 7 Gill. (M. D.), 197; 48 Am. Dec. 557; *Prosser v. Hardesty*, 101 Mo. 593; *Nelson v. Combs*, 18 N. J. L. 27; *Liston v. Jenkins*, 2 W. Va. 62.

<sup>51</sup> *Baker v. McLeod*, 79 Wis. 534; so *Prosser v. Hardesty*, 101 Mo. 593.

<sup>52</sup> *Nichols v. Boswell*, 103 Mo. 151.

at her death to the heirs of her body, subject to her husband's life estate, with a gift over if she died without issue, it was held that the life estate of the husband was not affected by the condition.<sup>53</sup>

In a gift over if devisee died under age, or without issue and without having disposed of the property, it was held that the condition was complied with by a deed to the father of such beneficiary subject to a trust for beneficiary for life, and on his death for his wife and children.<sup>54</sup>

Whether the "death" referred to is death before or after testator's, the will provides for a substitution of the persons designated in the alternative for the first beneficiary named in the will.<sup>55</sup>

#### §677. Conditions as to birth of issue.

A condition dependent on the birth of issue is valid if not in violation of the rule against perpetuities, and is one of the commonest conditions imposed.<sup>56</sup>

Where the birth of issue is so remote as to violate the rule against perpetuities, the condition is, of course, invalid.<sup>57</sup>

Such a condition is usually held not to be broken until the death of the person indicated by the condition as the parent of the prospective issue, or the lapse of the time within which, by the provisions of the will, the issue are to be born. The fact that it is extremely improbable, or in fact impossible, as where the woman who is indicated as the mother of the issue is past the age of child-bearing, does not amount to a breach of the condition.<sup>58</sup>

In a recent English case, however, it was held where a fund was given to A unless B, a woman, should have a child, and B was childless and past the age of child-bearing, that the income might be paid to A.<sup>59</sup>

<sup>53</sup> *Hatchett v. Henderson Trust Co.* — (Ky.), 1897; 39 S. W. 235.

<sup>54</sup> *Miles v. Strong*, 68 Conn. 273.

<sup>55</sup> *Exton v. Hutchinson*, 53 N. J. Eq. 688; *Fahnestock's Estate*, 147 Pa. St. 327; *Mims v. Macklin*, 53 S. Car. 6.

<sup>56</sup> See Sec. 591 to Sec. 594 in-

clusive; see Sec. 676 for "dying without issue."

<sup>57</sup> *In re Bence* (C. A.), 1891, 3 Ch. 242.

<sup>58</sup> *Carney v. Kain*, 40 W. Va. 758.

<sup>59</sup> *In re Lowman* (C. A.) 1895, 2 Ch. 348.

### §678. Conditions as to support or services.

A condition that a devisee shall support a person named, or work for such person, is perfectly reasonable and consistent with the policy of the law, and is constantly upheld.<sup>60</sup> In most states such conditions are, wherever possible, held to be conditions subsequent.<sup>61</sup> And hence the gift is not avoided because the support is not given by reason of the fact that the person to be supported dies before testator;<sup>62</sup> or by the death of the person who is bound to furnish support and attention before that of the person who is to be supported.<sup>63</sup>

Where a part of a farm is devised to a son upon the condition that he should work the whole farm, taking two-thirds of the crops, and giving one-third to the wife of testator, and subsequently all the farm, except that devised to the son, was sold in a partition suit brought by the widow, it was held that the son was bound to pay to the widow one-third of the crops raised on the part devised to him, but nothing further.<sup>64</sup>

Where testator provides that certain devisees shall receive specified devises on condition of performing certain services for persons named, or for the estate of testator, it is held that the persons for whom the services are to be rendered can not avoid the devise by making the rendition of the services impossible.<sup>65</sup> Thus testator provided that if two former slaves

<sup>60</sup> *Gingrich v. Gingrich*, 146 Ind. 227; *Irvine v. Irvine* (Ky.), 15 S. W. 511; 12 Ky. L. Rep. 827; *Pearl v. Lockwood* (Mich.) (1900), 81 N. W. 1087; *Harris v. Wright*, 118 N. C. 422; *McCall v. McCall*, 161 Pa. St. 412; *McFadden v. Hefley*, 28 S. C. 317; 13 Am. St. Rep. 675.

<sup>61</sup> *Gingrich v. Gingrich*, 146 Ind. 227; *Allen v. Allen*, 121 N. Car. 328, criticising *Erwin v. Erwin*, 115 N. Car. 366. So a condition that before devisee takes possession of the realty devised to him, he shall pay a certain sum to his sisters, or secure the payment of such sum, does not entitle the sisters to retain possession of the realty until

the payment is made. *Barfield v. Barfield*, 113 N. Car. 230; *Thompson v. Hoop*, 6 O. S. 480; *Case v. Hall*, 52 O. S. 24.

<sup>62</sup> *Hoss v. Hoss*, 140 Ind. 551; *Burid v. Burdis*, 96 Va. 81.

<sup>63</sup> *McCall v. McCall*, 161 Pa. St. 412.

In Kentucky such conditions are treated as conditions precedent; *Irvine v. Irvine* (Ky.), 15 S. W. 511; 12 Ky. Law Rep. 827; *Hopper v. Harrod*, Ky. (1894), 24 S. W. 870.

<sup>64</sup> *Richards v. Richards*, 90 Io. 606.

<sup>65</sup> *Seeley v. Hincks*, 65 Conn. 1; *Harris v. Wright*, 118 N. C. 422.



should remain with his wife and nephew until the death of the wife, working for them, they should have each fifty acres of land. While this seems to have been treated as a condition precedent, it was held that such a will gave the slaves the right to remain upon the plantation, to use the land devised to them without rent, and that their devise could not be defeated by ejecting them from the plantation for non-payment of the rent, or by insisting that they leave the plantation, go to the city and there render the services indicated.<sup>66</sup> Like other devises, however, a devise of this sort may be void for uncertainty. Thus a devise to the one of A's sons who should live on the land devised, and support certain beneficiaries, was held to be void for uncertainty where the evidence disclosed that A had several sons, and did not disclose which, if any of them, had complied with the conditions of the devise.<sup>67</sup>

These conditions, while valid as far as the necessity for payment is concerned, may be otherwise unenforceable. Thus a devise to A was upon condition that he paid \$80 per acre for the land devised and gave a mortgage securing payment. A entered into possession of the land but did not give the mortgage. It was held that his interest was not thereby defeated, since the unpaid purchase money was a lien upon the realty by the provisions of the will itself.<sup>68</sup>

#### §679. Conditions as to reformation and conduct of beneficiary.

A condition that the estate given shall not pass to the devisee until he settles down and marries, or reforms from intemperate habits, and the like, is held to be valid.<sup>69</sup> Such conditions are as strictly construed as others, however. Thus where there was a gift over, if the first devisee became a vagabond and drunkard, it was held not to pass where he became a drunkard and not a vagabond.<sup>70</sup>

<sup>66</sup> *Harris v. Wright*, 118 N. C. 422. 660; *Markham v. Hufford* (Mich.), 82 N. W. 222; *Hawke v. Euyart*, 30

<sup>67</sup> *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675. Neb. 149; 27 Am. St. Rep. 149.

<sup>68</sup> *Hanes v. Munger*, 40 O. S. 493. 400.

<sup>69</sup> *Cassem v. Kennedy*, 147 Ill.

<sup>70</sup> *Forsyth v. Forsyth*, 46 N. J. Eq.

**§680. Conditions as to presenting claims against testator's estate.**

A condition that a devise shall be void if devisee presents a bill against the testator's estate, has been upheld as valid.<sup>71</sup>

Where a condition provided that a legacy given should be forfeited in case legatee presented a claim against testator's estate and there was no gift over, it was held to be a condition *in terrorem* only, and the representation of a valid claim is held not to work a forfeiture.<sup>72</sup>

Where a condition was imposed upon a life estate that the interest therein should cease if a claim held by some one other than devisee should be enforced, it was held that the interest of the life tenant was not ended but merely suspended until the claim was satisfied out of the rents and profits of the life estate.<sup>73</sup>

A will provided that the value of the services of a devisee should be added to the property given him by the will, if such claim should be recovered against testator's estate by "due course of law," it was held that a presentation of the claim to an estate and the allowance by the court was "due course of law" and was a sufficient compliance with the conditions of the will.<sup>74</sup>

**§681. Conditions in restraint of marriage.**

The validity of conditions in restraint of marriage involves a number of distinctions upon which the courts are not entirely harmonious. It seems well established that a condition in restraint of a second marriage of testator's widow is valid, and upheld by the courts.<sup>75</sup> So a condition in a will of tes-

<sup>71</sup> Rockwell v. Swift, 59 Conn. 289.

<sup>72</sup> Vandevort's Estate, 62 Hun (N. Y.), 612.

<sup>73</sup> Williams v. Jenkins (1893), 1 Ch. 700.

<sup>74</sup> Knauss's Estate, 148 Pa. St. 265.

<sup>75</sup> Trew v. Perpetual Trustee Co.

(P. C.) (1895), A. C. 264; 64 L. J. P. C. N. S. 49; 11 Rep. 423; Giles v. Little, 104 U. S. 291; Helm v. Leggett, 66 Ark. 23; Bennett v. Packer, 70 Conn. 357; Collins v. Burge (Ky.), 1899; 47 S. W. 444; Opel v. Shoup, 100 Ia. 407; Boyd v. Sachs, 78 Md. 491; Clark v. Tennison, 33 Md. 85; Nash v. Simp-

tatrix that her husband shall not remarry is undoubtedly valid.<sup>76</sup>

The doctrine that a condition in restraint of a second marriage is valid is not limited to conditions against the remarriage of the surviving spouse of the testator. Thus a condition avoiding a devise if testator's widowed daughter should marry again, was held to be valid.<sup>77</sup>

Where a condition in restraint of a first marriage is sought to be imposed, there is no question that a condition in general restraint of marriage which is imposed in order to cause the beneficiary to live unmarried, is contrary to public policy and void.<sup>83</sup> Thus a condition that a legacy should cease if the legatee, testator's niece, should cease to be member of the Society of Friends, was held void, there being no gift over, where the extrinsic evidence showed that there were only three unmarried men of that denomination in that neighborhood, and that marriage outside of the church forfeited membership.<sup>79</sup>

Restraints against marrying persons belonging to specified classes have been upheld,<sup>80</sup> and so have restraints against marrying a specified individual.<sup>81</sup>

Where the language of the whole will shows that testator's intention was to provide for a designated beneficiary as long as she should remain single, but upon her marriage he expected her husband to support her, and for that reason alone limited

son 78 Me. 142; *Knight v. Mahoney*, 152 Mass. 523; 9 L. R. A. 573; *In re Allen*, 151 N. Y. 243; *Redding v. Rice*, 171 Pa. St. 301; *Nash v. Simpson*, 78 Me. 142; *Boyer v. Allen*, 76 Mo. 498; *Martin v. Seigler*, 32 S. C. 267; *Wooten v. House* (Tenn.), Ch. App. (1896); 36 S. W. 932; *Duncan v. Philips*, 3 Head. (Tenn.), 415; *Lane v. Crutchfield*, 3 Head. 452.

<sup>76</sup> *Allen v. Jackson*, 1 Ch. Div. 399; *Stivers v. Gardner*, 88 Io. 307.

<sup>77</sup> *Herd v. Catron*, 97 Tenn. 662.

<sup>78</sup> *Moreley v. Rennoldson* (1895), 1 Ch. 449; 12 Rep. 158; *Stackpole v.*

*Beaumont*, 3 Ves. Jr. 89; *Mourning v. Missouri Coal Mining Co.*, 99 Mo. 320; *In re Denfield*, 156 Mass. 265; *Hogan v. Curtin*, 88 N. Y. 162; *Maddox v. Maddox*, 11 Gratt. (Va.), 804.

<sup>79</sup> *Maddox v. Maddox*, 11 Gratt. (Va.), 804.

<sup>80</sup> *Greene v. Kirkwood* (1895), 1 Ir. 130; (a condition against devisees marrying a man "below her social station"); *Hodgson v. Halford*, 11 Ch. Div. 959.

<sup>81</sup> *Finlay v. King*, 3 Pet. (U. S.), 346; *Graydon v. Graydon*, 23 N. J. Eq. 229.

the gift over, such limitation is held not to be void.<sup>82</sup> At one time the courts upon this point seemed disposed to make a distinction between a condition subsequent and a conditional limitation, and to hold that if the devise were to the beneficiary until the event of her marrying and then over, it would be void, but that if it were to her as long as she remained unmarried, it would be valid.<sup>83</sup> This distinction seems by modern authority to be repudiated, and where the intention of the testator is clearly to support the beneficiary until marriage, such intention is upheld, whether it tends to a form of a condition subsequent or to a conditional limitation.<sup>84</sup>

A condition precedent that upon marrying with consent of trustee an additional annuity shall be given to testator's son, is held to be valid.<sup>85</sup>

Where condition in restraint of marriage is a condition precedent to the vesting of the estate, it is held by some authorities to be valid.<sup>86</sup>

A condition in a will by which an inducement is offered to a married person to obtain a divorce, or to live separate and apart from the other spouse, is contrary to public policy, and held to be invalid.<sup>87</sup> However, where the husband and wife had lived apart and divorce proceedings were pending at the date of the will, a condition that certain property shall vest

<sup>82</sup> Mann v. Jackson, 84 Me. 400; 16 L. R. A. 707; Graydon v. Graydon, 23 N. J. Eq. 229; Courter v. Stagg, 27 N. J. Eq. 305; Hotz's Estate, 38 Pa. St. 422; Cornell v. Lovett, 35 Pa. St. 100; Bruch's Estate, 185 Pa. St. 194.

<sup>83</sup> Heath v. Lewis, 3 De. G. M. & G. 954.

<sup>84</sup> Jones v. Jones, L. R. 1 Q. B. Div. 279; Mann v. Jackson, 84 Me. 400; 16 L. R. A. 707; Bodwell v. Nutter, 63 N. H. 446; Morgan v. Morgan, 41 N. J. Eq. 235.

<sup>85</sup> *In re Nourse* (1899), 1 Ch. 63; 68 L. J. N. S. 15.

<sup>86</sup> Ransdell v. Boston, 172 Ill. 439. Phillips v. Ferguson, 85 Va. 509. (In the case last cited it was said

that conditions precedent in restraint of marriage were always valid in case of a devise no matter how restrictive, while in case of a bequest they were valid unless in general and unreasonable restraint of marriage. In this case a clause revoking a prior gift to any of testator's children who should marry into the family of A was held valid, and where such marriage took place before the death of testator it was treated as a condition precedent.)

<sup>87</sup> Brown v. Peck, 1 Eden, 140; Wrenn v. Bradley, 2 De Gex & S. 49; Conrad v. Long, 33 Mich. 78; Hawke v. Euyart, 30 Neb. 149; 27 Am. St. Rep. 149.

in the husband at the termination of the life estate, if he should have obtained a divorce from his wife, has been upheld as valid.<sup>88</sup> And where there was a devise to a married woman, the income to be paid to her while she remains married, and the principal to be paid to her upon the death of her husband, or upon her separation from him, such a condition is not void where it appears from the whole will to be the purpose of the testator to provide an annual income for the wife as long as her husband is supporting her, and to pay the principal when by reason of the cessation of such support, she may need the entire sum for her maintenance.<sup>89</sup>

### §682. Conditions as to religious belief.

In some jurisdictions conditions avoiding a devise, if the devisee should not be a member of a certain church, or avoiding a devise if he should be a member of a certain church, have been held to be contrary to public policy as interfering with the liberty of conscience.<sup>90</sup> Thus where a devise to relatives of testator was to be avoided if they should cease to be members of the Quaker Church, it was held that such condition was void.<sup>91</sup>

In other jurisdictions these conditions seem to be treated as valid, though very strictly construed.<sup>92</sup> Thus a devise to be void if the devisee turns Catholic, and after his majority acknowledges himself a member of that Church, is not avoided by secret change of belief, where there was no acknowledgment of membership.<sup>93</sup> And where some of the devisees of

<sup>88</sup> *Ransdell v. Boston*, 172 Ill. 439, citing *Cooper v. Remsen*, 5 Johns. Ch. 459.

<sup>89</sup> *Born v. Horstman*, 80 Cal. 452; 5 L. R. A. 577; *Thayer v. Spear*, 58 Vt. 327.

<sup>90</sup> *Maddox v. Maddox*, 11 Gratt. Va. 804.

<sup>91</sup> *Maddox v. Maddox*, 11 Gratt. Va. 804.

The court said: "I regard a restriction imposed by the terms of a

bequest requiring as a condition of its enjoyment that the legatee should be a member of any religious sect or denomination as directly violative of . . . policy and pregnant with evil consequences."

<sup>92</sup> *Laurence v. McQuarrie*, 26 N. S. 164; *McBride's Estate*, 152 Pa. St. 192.

<sup>93</sup> *Laurence v. McQuarrie*, 26 N. S. 164.

the class, in a devise to such children as were members of a given church, have complied with the conditions, the church can not object if some of the children were not members, since the church would not, under the will take the benefit of a failure of condition in such case, but it would inure to those children who had complied with the conditions.<sup>94</sup>

### §683. Conditions against contesting will.

The validity of conditions imposed by a will against contesting the validity of the will or interfering or trying to interfere with the administration of the estate or with the interests of the other beneficiaries, is a question, upon the details of which the courts are by no means uniform.

The weight of authority undoubtedly is that where there is a condition against disputing the validity of a will, followed by a gift over upon the performance of the condition, the condition must be given effect and the beneficiary who contests loses his rights under the will.<sup>95</sup>

Thus a condition attached to certain legacies that legatees "acquiesce" in the will is broken by attacking the devise of a specific tract of realty on the ground that it belonged to testator's wife.<sup>96</sup> In such cases, however, if the contest is successful, of course the conditions fall with the rest of the will.

The policy of allowing such a condition, where there is probable cause for contesting the will, is unquestionably a bad one. In cases of fraud and undue influence, they offer a most effective means of terrorizing the heirs and next of kin who are given any substantial benefits under the will, and thus preventing them from contesting the will. Some cases have sharply challenged the wisdom of enforcing these conditions where there is any reasonable cause for contesting. Where there is no gift over upon a breach of condition, the authorities are not harmonious as

<sup>94</sup> *McBride's Estate*, 152 Pa. St. 192.      *Schley*, 2 Gill. 181; 41 Am. Dec. 415; *Bradford v. Bradford*, 19 O. S. 546.

<sup>95</sup> *Smithsonian Institution v. Meech*, 169 U. S. 398; *Morrison v. Bowman*, 29 Cal. 337; *Beall v. Meech*, 169 U. S. 398.

to the validity of the condition. In some jurisdictions it is held that the condition is valid in devises of land where there is no gift over;<sup>97</sup> but that it is invalid in bequests of personality, the condition being, in such cases, held to be *in terrorem*.<sup>98</sup> A residuary clause has been held not to be such a gift over where there was no especial provision that this bequest should, upon the happening of the condition, pass into the residuum.<sup>99</sup>

In other jurisdictions the validity of these conditions has been assumed whether there is any gift over or not, and whether the property disposed of is realty or personality.<sup>100</sup>

These conditions are strictly construed. Thus where the condition is that a devise shall be forfeited if the devisee opposes the conditions of the will, such devise is not forfeited by his filing a bill to have the will construed,<sup>101</sup> nor by his cross examining at probate, and filing objections, and suing executor to recover property which was disposed of by the will.<sup>102</sup> However, a beneficiary under such a condition, who procures and obtains another heir to institute proceedings to contest a will, forfeits his interest thereon.<sup>103</sup>

#### §684. Conditions repugnant to the nature of the estate devised.

The law recognizes a certain number of classes of estates in real property, and will not allow the creation of new kinds of estates, nor will it allow a testator to take from existing classes of estates any necessary incident thereto; accordingly any attempt by will to create a new class of estate, or to pass a recognized estate without certain necessary incidents, is a nullity.<sup>104</sup> Thus a gift of land in fee, followed by a provision that devisee shall not sell this property during his life, can not

<sup>97</sup> *Adams v. Adams* (C. A.) (1892), 1 Ch. 369, affirming 45 Ch. Div. 426. (In this case the contest was groundless and malicious, and the forfeiture was enforced.)

<sup>98</sup> *Donegan v. Wade*, 70 Ala. 501; *Fifield v. Van Wyck*, 94 Va. 557.

<sup>99</sup> *Fifield v. Van Wyck*, 94 Va. 557.

<sup>100</sup> *Bradford v. Bradford*, 19 O. S. 546.

<sup>101</sup> *Black v. Herring*, 79 Md. 146.

<sup>102</sup> *In re Bratt*, 32 N. Y. Supp. 168.

<sup>103</sup> *Donegan v. Wade*, 70 Ala. 501.

<sup>104</sup> *Law v. Douglas*, 107 Ia. 606.

be entirely enforced, since the restraint upon alienation is repugnant to the nature of the estate conveyed. In such cases the intention to pass the property, being the paramount intention of testator, is enforced, and the restraint upon alienation is ignored, and held void.<sup>105</sup> Thus a condition that certain property devised in fee shall not be sold until the oldest of the children reaches the age of twenty-five,<sup>106</sup> and a condition that certain realty devised in fee should not be sold, mortgaged or encumbered for thirty years, was held void.<sup>107</sup> So a restraint on alienation for twenty-five years,<sup>108</sup> and a prohibition to sell or mortgage except to other devisees for ten years after the youngest devisee arrived at age,<sup>109</sup> have been held void.<sup>110</sup> Still more is a permanent restraint on alienation void. Hence attempts to devote realty to permanent uses which are not charitable in their nature, is void.<sup>111</sup>

Where the condition forbids the sale during minority, it

<sup>105</sup> *In re Thomas*, 30 Ont. 49; *McRae v. McRae*, 30 Ont. 54; *Potter v. Couch*, 141 U. S. 296; *Jones v. Port Huron Engine, etc., Co.*, 171 Ill. 502; *Hunt v. Hawes*, 181 Ill. 343; *Allen v. Craft*, 109 Ind. 476; *Conger v. Lowe*, 124 Ind. 368; *Pelizzaro v. Reppert*, 83 Ia. 497; *Halliday v. Slickler*, 78 Ia. 388; *McNutt v. McComb* (Kan.) (1899), 58 Pac. 965; *Fristoe v. Latham*, — Ky. — (1896); 36 S. W. 920; *Ernst v. Shinkle* (Ky.), 1894; 26 S. W. 813; *In re Bartlett*, 163 Mass. 509; *Cushing v. Spalding*, 164 Mass. 287; *Mandlebaum v. McDonell*, 29 Mich. 78; *Todd v. Sawyer*, 147 Mass. 570; *DePeyster v. Machiel*, 6 N. Y. 467; *Van Horn v. Campbell*, 100 N. Y. 287; *Kaufman v. Burgert*, 195 Pa. St. 274; *Jaureche v. Proctor*, 48 Pa. St. 466; *Nagle's App.* 33 Pa. St. 89; *Williams v. Leech*, 28 Pa. St. 89; *In re Van Horn*, 18 R. I. 389; *Williams v. Herrick*, 19 R. I. 197; *Zillmer v. Langduth*, 94 Wis. 607.

*Contra, In re Bell*, 30 Ont. 318 (condition against disposing of property or charging it except by will upheld. Mortgage forfeits estate).

<sup>106</sup> *Fowlkes v. Wagoner* (Tenn.), 46 S. W. 586; *Zillmer v. Langduth*, 94 Wis. 607.

<sup>107</sup> *Jones v. Port Huron Engine, etc., Co.*, 171 Ill. 502.

<sup>108</sup> *Fowler v. Duhme*, 143 Ind. 248.

<sup>109</sup> *Anderson v. Cary*, 36 O. S. 506.

<sup>110</sup> On the same point are *Mandlebaum v. McDonnell*, 29 Mich. 78; *Conger v. Lowe*, 124 Ind. 368; 9 L. R. A. 165; *DePeyster v. Michiel*, 6 N. Y. 467; 57 Am. Dec. 494; *Roosevelt v. Thurman*, 1 Johns. Ch., 220.

<sup>111</sup> *In re Bartlett*, 163 Mass. 509; *Cushing v. Spalding*, 164 Mass. 287; *Williams v. Herrick*, 19 R. I. These cases were attempts to create permanent trusts in realty for the benefit of testator's heirs or other beneficiaries.



has been said, in some jurisdictions, to be a valid condition. It may be questioned, however, whether under the statutes authorizing a guardian, upon proper proceedings had for that purpose, to sell real estate where necessary to support a minor, any condition may prevent this power of sale.

Where the restraint upon alienation is not general, but is partial, the authorities are not harmonious as to the extent to which conditions will be upheld. Courts also treat as void a provision that the devisee to whom a fee has passed can not dispose of the same without the consent of some designated person.<sup>112</sup> A similar view is taken of a provision that upon the sale of a fee by the devisee, certain sums were to be paid to designated persons out of the proceeds.<sup>113</sup>

It not infrequently happens that a testator disposes of property in fee, and then attempts to provide for the disposition of the property after the death of the devisee in fee simple. A provision of this sort is to be carefully distinguished from the cases where a fee simple is cut down to a life estate by a devise over after the death of the first taker.<sup>114</sup> The distinction between the two classes of cases, though not strongly marked, is well recognized by the courts. If the devise over upon the death of A is intended to pass the entire property, it is evident that the testator contemplated that A should take only a life estate, without any power of disposing of his property for a longer term than his own life.<sup>115</sup> But where the devise over upon the death of A shows that A was vested with a fee simple estate, and that testator wishes him to have such an estate, but to direct the course of its descent upon his death, the limitation over after the fee, is repugnant to the nature of the estate and void.<sup>116</sup> So an absolute devise of land for life

<sup>112</sup> *McRae v. McRae*, 30 Ont. Rep. 54; *Muhlke v. Tiedemann*, 177 Ill. 606.

<sup>113</sup> *In re Elliott* (1896), 2 Ch., 353.

<sup>114</sup> See Sec. 574.

<sup>115</sup> See Sec. 574.

<sup>116</sup> *Rowman v. Oram*, 26 N. S. 318; *Howard v. Carusi*, 109 U. S.

725; *Ewing v. Barnes*, 156 Ill. 61; *Wolfer v. Hemmer*, 144 Ill. 554; *Mulvane v. Rude*, 146 Ind. 476; N. E. 659; *Law v. Douglass*, 107 Ia. 606; *Barth v. Barth*, — Ky. —; 38 S. W. 511; *Ramsdell v. Ramsdell*, 21 Me. 288; *Backus v. Presbyterian Association*, 77 Md. 50; *Ide v. Ide*, 5 Mass. 500; *Burbank v.*

prevents the subsequent creation of a spendthrift trust, so that the life estate of the devisee can not be encumbered or made liable for any of his debts.<sup>117</sup> So a direction in a will that the devisee shall devise his fee simple estate to certain named persons is void for repugnancy.<sup>118</sup> So a condition that if devisee does not dispose of his property in any way during his lifetime, it shall pass to certain named persons, is held to be void.<sup>119</sup> So conditions annexed to a fee simple estate, that the beneficiaries shall not dispose of it by will to certain named persons, have been held to be void.<sup>120</sup> A similar view is taken of absolute gifts of personalty by will with restriction as to the methods of disposing of the same.<sup>121</sup>

Where the will provides that in case of alienation, or attempted alienation, the interest of the first taker shall cease, and this has been put in the form of a limitation, the validity of such a condition has been upheld in some cases.<sup>122</sup>

Where the estate given by will is less than a fee simple, as a life estate or an estate for years, there is also a lack of harmony as to the extent to which conditions in restraint of alienation should be upheld.<sup>123</sup> But such conditions are strictly con-

Whitney, 24 Pick. 146; *Burleigh v. Clough*, 52 N. H. 267; *Benz v. Fabian*, 54 N. J. Eq. 615; *McClellan v. Larcher*, 45 N. J. Eq. 17; *Annin v. Vandoren*, 1 McCart. 135; *Armstrong v. Kent*, 1 Zab. 509; *Hoxsey v. Hoxsey*, 10 Stew. Eq. 21; *Hall v. Palmer*, 87 Va. 354; 11 L. R. A. 610; *Robinson v. Ostendorff*, 38 S. C. 66.

<sup>117</sup> *Erhrisman v. Sener*, 162 Pa. St. 577; *Bank of Charleston v. Dowling*, 52 S. Car. 345.

<sup>118</sup> *Good v. Fitchthorn*, 144 Pa. St. 287; *Johnson v. Johnson*, 48 S. C. 408; 26 S. E. 722.

<sup>119</sup> *In re Gardner*, 140 N. Y. 122; *Clay v. Wood*, 153 N. Y. 134.

<sup>120</sup> *Ludlow v. Bunbury*, 35 Beav. 36; *Barnard v. Bailey*, 2 Har. (Del.), 56; *Morse v. Blood*, 68 Minn. 442.

<sup>121</sup> *Wilson v. Turner*, 164 Ill. 398.

<sup>122</sup> *Metcalfe v. Metcalfe* (C. A.) (1891), 3 Ch. 1, reversing L. R. 43 Ch. D. 633. *In re Porter* (1892), 3 Ch. 481 (a condition forfeiting a devise of a reversion upon assigning or attempting to assign, held valid and the interest forfeited by an attempted but ineffective post-nuptial settlement). However, an intestest is not forfeited by a previous nuptial contract to settle upon the wife of a devisee any further sums which he might receive under the will of his mother. *In re Crawshaw* (1891), 3 Ch. 176.

<sup>123</sup> *Butterfield v. Reed*, 160 Mass. 361 (a restraint on alienation of a life estate held invalid). *Roberts v. Stevens*, 84 Me. 325 (a restriction on alienating a trust estate for life held valid). *Paris v. Winterburn*, 6 Ohio C. C. 635 (a restraint on alienation upheld).

strued. Thus a life estate, conditioned to end on its being sold, encumbered or permitted to be sold for taxes by the life tenant, is not forfeited by a sale on execution.<sup>124</sup> Thus where the life estates were granted upon a condition that the life tenants should reside on the property given, such conditions have been held void.<sup>125</sup> In other jurisdictions they have been held to be valid.<sup>126</sup>

Where some collateral benefit is to cease if the beneficiaries remove from the land devised for life, the courts are not in accord as to the validity of the condition.<sup>127</sup>

A gift of the income of certain property to testator's wife for life was restricted by the condition that she should not dispose of any of such income by will. The condition was held void.<sup>128</sup>

The English and Canadian authorities, while in some confusion, are much more liberal to restraints on alienation than the United States authorities. Conditions against alienation except by will have been upheld.<sup>129</sup> And while conditions not to sell except to a member of the family have been upheld,<sup>130</sup> a better reasoned line of cases holds that such restraints on alienation are invalid.<sup>131</sup>

A devise to a bishop and his successors to use as he shall deem of the greatest advantage to his church in his diocese is not a restraint of alienation.<sup>132</sup>

<sup>124</sup> *Henderson v. Harness*, 176 Ill. 302; *Paris v. Winterburn*, 6 Ohio C. C. 635.

<sup>125</sup> *Eastman's Settled Estate*, 68 L. J. Ch. N. S. 122; *Howell v. Patry*, 50 N. J. Eq. 265.

<sup>126</sup> *Lowe v. Cloud*, 45 Ga. 481; *Marston v. Marston*, 47 Me. 495; *Harrison v. Foote*, 9 Tex. Civ. App. 576.

<sup>127</sup> Thus a condition that an annuity be given to a widow for life should be reduced if she removed from premises devised to her for life was held to be void. *Eastman's Settled Estate*, 68 L. J. Ch., N. S. 122. Where a condition that serv-

ices of certain persons should be rendered to the beneficiaries only as long as they lived upon the plantation devised to them, it was held to be valid. *Harris v. Wright*, 118 N. C. 422; so *In re Smith* (1899), 1 Ch., 331.

<sup>128</sup> *Levy's Estate*, 153 Pa. St. 174.

<sup>129</sup> *In re Bell*, 30 Ont. Rep., 318; *In re Winstanley*, 6 Ont. Rep., 315.

<sup>130</sup> *Doe v. Pearson*, 6 East., 173; *In re Macleay*, L. R. 20 Eq. 186.

<sup>131</sup> *Attwater v. Attwater*, 18 Beav. 330; *In re Rosher*, 26 Ch. Div. 801.

<sup>132</sup> *Lamb v. Lynch*, 56 Neb. 135.

**§685. Conditions against bankruptcy.—Spendthrift trusts.**

Conditions precedent that an estate shall not vest until the devisee has discharged certain obligations, are held to be valid.<sup>133</sup>

A condition that the devise shall vest when the devisee shall discharge "his present liabilities" is held to refer to the liabilities which were in existence at the date of the death of the testator.<sup>134</sup>

Where testator evidently intends that the estate shall vest free from a trust when the beneficiary named can no longer be held upon his debts, the fact that testator specified a discharge from the creditors or by proceedings in bankruptcy will not limit the release of beneficiary from his indebtedness to these two means.<sup>135</sup>

Conditions subsequent that interest shall cease upon the bankruptcy of the devisee are upheld as valid.<sup>136</sup> Where such conditions are imposed, the property is held forfeited where the bankruptcy exists at any time during which the gift vests or is payable, even though subsequently, before the gift is actually paid, the devisee is able to pay off his debts and terminate the bankruptcy;<sup>137</sup> or although the petition in involuntary bankruptcy was dismissed upon appeal.<sup>138</sup>

A condition that the interest of the first taker shall cease and that there shall be a gift over to another upon the taking of property devised on execution, subjecting it to the debts of the devisee, and the like, are also held to be valid.<sup>139</sup> And when the condition was that the trust should terminate, if the property were taken on execution, it was held that the appointment of a receiver to collect the rents and profits was a taking on execution within the meaning of the condition.<sup>140</sup>

<sup>133</sup> *St. John v. Dann*, 66 Conn. 401; *Johnson v. Gooch*, 116 N. Car. 64; *In re Ames* (R. I.), 46 Atl. 47.

<sup>134</sup> *St. John v. Dann*, 66 Conn. 401.

<sup>135</sup> *In re Ames*, (R. I.), 46 Atl. 47.

<sup>136</sup> *Metcalf v. Metcalf* (C. A.) (1891), 3 Ch., 1; *In re Loftus-Ot-*

*way* (1895), 2 Ch., 235; 13 Rep. 536.

<sup>137</sup> *Metcalf v. Metcalf* (C. A.) (1891), 3 Ch., 1.

<sup>138</sup> *In re Loftus-Otway* (1895), 2 Ch., 235; 13 Rep., 536.

<sup>139</sup> *Brandon v. Robinson*, 18 Ves. Jr. 429; *Thornton v. Stanley*, 55 O. S. 199.

<sup>140</sup> *Blackmann v. Fish* (C. A.) (1892), 3 Ch., 209.

Where, however, the condition on which the estate was to end was, in case it should be "subjected or sought to be subjected by process of law" to the debts of devisee, it was held that obtaining judgment and issuing an execution thereon which was returned "no property" was not such an attempt to take by process of law, although the judgment was a lien upon the land of the judgment debtor in the county.<sup>141</sup>

These conditions are not especially favored in construction. Thus where there was a condition that on the death of the life tenant an estate should pass to testator's son, unless at such time he should be under "any legal disability in consequence whereof he would be hindered in, or prevented from, taking the same for his own personal and exclusive benefit," it was held that while an act of bankruptcy might avoid his estate within the meaning of the gift, a judgment against him for a debt would not.<sup>142</sup>

Where the legal estate was devised for ninety-nine years, it was held that a condition that the property devised should not be taken for the debts of the devisee, was void.<sup>143</sup> Whether it is possible to devise equitable interests in such a way that the beneficial interest of the *cestui que trust* can not be reached by his creditors is a question upon which the courts are not unanimous. In the absence of restraining statutes the great weight of American authority is that if testator expresses his intention in apt and suitable language, it is possible to create such an estate in equity as to exclude the creditors of the beneficiary from reaching such estate and subjecting it to their claims.<sup>144</sup>

<sup>141</sup> Bryan v. Dunn, 120 N. Car. 36.

<sup>142</sup> *In re* Carew (1896), 2 Ch. 311.

<sup>143</sup> Hobbs v. Smith, 15 O. S. 419; Wallace v. Smith, 2 Handy, 78. The same will was involved in both cases. In these cases there was no gift over. The court said: "The general object of the testator seems to have been to give the devisee the absolute ownership of the land and yet shield it from the payment of

his debts. This is simply impossible."

<sup>144</sup> Nichols v. Eaton, 91 U. S. 716; St. John v. Dann, 66 Conn. 401; Leavitt v. Beirne, 21 Conn. 1; Barnett v. Montgomery, 79 Ga. 726; Steib v. Whitehead, 111 Ill. 247; Meek v. Briggs, 87 Ia. 610; Pope v. Elliott, 8 B. Mon. 56; Roberts v. Stevens, 84 Me. 325; Smith v. Towers, 69 Md. 77; Wemyss v. White, 159 Mass. 484; Sears v. Choate,

The form of devise necessary to express this intention in such a way that the courts will give it effect is a question upon which there is no unanimity of authority. The English decisions recognize and enforce such intent only when there is a provision that upon the insolvency of the beneficiary and the attempt of his creditors to reach his equitable interest, such interest shall thereupon cease and shall pass to another specified beneficiary; or when the estate created is a married woman's separate equitable estate; or where the trustees have a discretionary power to give or withhold the gift.<sup>145</sup>

The extent to which the English rule is enforced in this country is a matter of doubt. In some states the view is taken that where there is no discretionary power given to trustees and no limitation over upon the insolvency of the beneficiary, the interest of the beneficiary can be reached by his creditors.<sup>146</sup> In other states the addition of an express provision that the estate shall not be transferred by beneficiary during his lifetime, or that it shall not be taken for his debts, is sufficient to prevent such estate from being taken for his debts;<sup>147</sup> and in some jurisdictions the intention of testator that the gift shall not be liable for the debts of the beneficiary may be in-

146 Mass. 395; *Broadway National Bank v. Adams*, 133 Mass. 170; 43 Am. Rep., 504; *Leigh v. Harrison*, 69 Miss. 923; 18 L. R. A. 49; *Lampert v. Haydel*, 96 Mo. 439; 2 L. R. A. 113; 9 Am. St. Rep. 358; *Partridge v. Cavender*, 96 Mo. 452; *Handy's Estate*, 167 Pa. St. 552; *Seitzinger's Estate*, 170 Pa. St. 500; *Baeder's Estate*, 190 Pa. St. 606; *Jourolmon v. Massengill*, 86 Tenn. 81; *Patten v. Herring*, 9 Tex. Civ. App. 640; *Wales v. Bowditch*, 61 Vt. 23; *Barnes v. Dow*, 59 Vt. 530; *Garland v. Garland*, 87 Va. 758; 13 L. R. A. 212; 24 Am. St. Rep. 682.

<sup>145</sup> *Cooper v. Wyatt*, 5 Madd. 482; *Shee v. Hale*, 13 Ves. Jr. 404; *Brandon v. Robinson*, 18 Ves. Jr. 429.

The creditors of the beneficiary can not reach a legacy which the executor has discretion to pay or withhold. *Brinker v. Speer*, 9 W. L. B. 292.

<sup>146</sup> *Thornton v. Stanley*, 55 O. S. 199. (In this case a gift of income to A for life "for her education and support during the life" of A, was held subject to her debts. Some importance was given to the fact that the income was fixed at \$300 per year, as a minimum.)

<sup>147</sup> *Sears v. Choate*, 146 Mass. 395; *Sparhawk v. Cloon*, 125 Mass. 263; *Lampert v. Haydel*, 96 Mo. 439; 2 L. R. A. 113; 9 Am. St. Rep. 358; *Seitzinger's Estate*, 170 Pa. St. 500.

ferred from the fact that the gift is expressly stated to be for the support, maintenance and the like, of the beneficiary.<sup>148</sup>

Where a devise is for the support and maintenance of A and his family, the attempt to subject A's interest to the payment of his debts is open to the further objection that it is very difficult to sever A's share from that of his family. The weight of authority is that this can not be done.<sup>149</sup>

An absolute devise of income to one for life, however, does not of itself show testator's intention to create a spendthrift trust.<sup>150</sup>

Where the trustees have discretionary power to pay a certain fund to A on his arriving at a certain age, which fund is to be paid out of the principal settled on a spendthrift trust in favor of A, it was held that when A reached the age specified and the trustees decided not to pay such sum to A, it thereupon became fixed as part of such spendthrift trust and could not be reached by A's creditors.<sup>151</sup>

Even when the trustees have discretion in paying the income to the beneficiary, the income, when once paid over, may be seized for the debts of the beneficiary like any other property.<sup>152</sup>

<sup>148</sup> *Meek v. Briggs*, 87 Io. 610; *Leigh v. Harrison*, 69 Miss. 923; 18 L. R. A. 49.

*Contra*, *Raynolds v. Hanna*, 55 Fed. 783; *Thornton v. Stanley*, 55 O. S. 199, affirming 7 Ohio C. C. 455, citing *Slattery v. Wason*, 151 Mass. 266.

<sup>149</sup> *Godden v. Crowhurst*, 10 Sim. 642; *Hill v. McRea*, 27 Ala. 175; *St. John v. Dann*, 66 Conn. 401. In one federal case, however, such severance was permitted. *Raynolds v. Hanna*, 55 Fed. 783.

<sup>150</sup> *Kingman v. Winchell*, — Mo. —; 20 S. W. 296.

<sup>151</sup> *Baeder's Estate*, 190 Pa. St. 614.

On application for instructions by a trustee who was authorized to pay the principal to A in such sums as trustee should think proper and if A did not make proper use of the money, to furnish him with support merely, it was held that on A's arriving at the age of sixty and saving a thousand dollars out of an annual income of eight hundred, the trustee should pay him the principal even though A had failed in one or two business enterprises. *Pedrick v. Pedrick*, 50 N. J. Eq. 479.

<sup>152</sup> *Kruse v. Baeder*, 31 W. L. B. 112.

### §686. Conditions as to use of property.

Conditions that if the property given by will shall cease to be used for the purpose for which it is given the interest of the beneficiary shall cease, have been upheld where the gift was for a charitable use.<sup>153</sup>

Where a devise was made to a town, with a provision that the income from whatever source obtained should be kept as a perpetual fund guaranteed by the town with 6% forever, it was held that the gift was not conditioned upon the town's granting that rate of interest; nor could the gift be forfeited by reason of the town's borrowing the fund on interest.<sup>154</sup>

A devise of land to a town for "a common" was held to give the land subject to the same public uses as the original common, and there was no implied condition against using part of it for a school building.<sup>155</sup>

### §687. Implied condition against murder of testator by devisee.

The question whether devisee, who murders testator in order to take under the will, thereby forfeits his rights under the will as upon a breach of an implied condition, is fortunately a question which is rarely presented for adjudication and upon which precedents are few.

Where the question has been presented for adjudication, it was held that the devisee by such conduct forfeits his rights under the will and takes nothing.<sup>156</sup> This doctrine applies

<sup>153</sup> Keith v. Scales, 124 N. Car. 497.

(It has been held, however, that where a house was devised for use as a parsonage, with the condition that if it should be allowed to decay for one year, it should go to the town, it was held that under a subsequent statute the specific property might be sold and the proceeds reinvested in property to be used for the same purpose, provided that if vacant land were bought with the proceeds a parsonage

should be built thereon within one year.) *In re Van Horn*, 18 R. I. 389.

<sup>154</sup> Quincy v. Attorney General, 160 Mass. 431.

<sup>155</sup> Newell v. Hancock, 67 N. H. 244.

<sup>156</sup> Lundy v. Lundy, 24 Can. S. C. 650, reversing McKinnon v. Lundy, 21 Ont. App. 560; Riggs v. Palmer, 115 N. Y. 506. The grant upon which this holding rests is expressed by the Court of Appeals of New York in Riggs v. Palmer, *supra*. "Here there



alike whether the devisee is guilty of murder,<sup>157</sup> or of manslaughter only.<sup>158</sup> The forfeiture of a devise in such a case may be declared by the court of equity in a suit to have the will cancelled and annulled in so far as it conveys property to the murderer,<sup>159</sup> but it does not render the devise void. Hence the question of the title of the devisee can not be raised collaterally in a suit by an heir to partition land which was devised to the murderer.<sup>160</sup>

was no certainty that this murderer would survive testator or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He, therefore murdered testator expressly to vest himself with an estate. Under such circumstances what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime?" In this case testator had made a will in favor of his grandson, and was contemplating revising it. The grandson poisoned his grandfather in order to prevent such revocation. The court said that to allow him to take under such circumstances "would be a reproach to the jurisdiction of our state, and an offence against public policy."

<sup>157</sup> *Riggs v. Palmer*, 115 N. Y. 506.

<sup>158</sup> *Lundy v. Lundy*, 24 Can. S. C. R. 650.

<sup>159</sup> *Riggs v. Palmer*, 115 N. Y. 506.

<sup>160</sup> *Ellerson v. Westcott*, 148 N. Y. 149. This was a partition suit brought by a disinherited heir to partition real estate devised to the murderer. The question arose on his asking leave to amend so as

to show that the beneficiary poisoned the testator in order to obtain the benefit of the will. The Supreme Court held that this question might be thus raised. *Ellerson v. Westcott*, 88 Hun. 389, was reversed by the N. Y. Court of Appeals in *Ellerson v. Westcott*, 148 N. Y. 149. The court gave its reason for refusing to allow this question to be presented in a partition suit on the ground that if the facts alleged in the assignment were true "a court of equity will intervene and deprive her (the murderer) of the benefit of the devise. It would defeat the fraud by staying her hand and enjoining her from claiming under the will. But the devise took effect upon the death of the testator; and transferred the legal right and title given her by the will. The relief which may be obtained against her is equitable and injunctive. The court in a proper action, will, by forbidding the enforcement of the legal right, prevent her from enjoying the fruits of her iniquity. It will not and can not set aside the will that is valid but it will act upon the facts arising subsequent to its execution, and deprive her of the use of the property."

## §688. Miscellaneous conditions.

Testator devised land to one for life and provided that if, at his death, there should be pending litigation concerning the title, devisee should receive other lands in lieu thereof. At testator's death litigation was pending between testator and devisee concerning the title. It was held that devisee took the lands originally devised, the condition being inserted merely to prevent his receiving land under a doubtful title.<sup>161</sup>

A devise to a college upon condition that it change its name, failed where the trustees had instructed the president and secretary to obtain the legislation necessary to allow it to change its name, but the legislature had not changed such name.<sup>162</sup>

A condition that a legacy to a minor should be revoked if any attempt were made "at law or otherwise" to withdraw him from the control of the executors, is not broken by a surrender of such child by the executors to his father under direction of their attorney.<sup>163</sup>

A bequest to a son of testator's wife by her former marriage upon condition that the said wife should take under the will, and waive her rights under the statutes, was held to be valid.<sup>164</sup>

The testator devised a tannery to his son A, and a mill race to his son B, A to have the privilege of taking water from the mill race and B to have the privilege of having A tan every year two hides which B should furnish. It was held that this privilege was personal to B, and that A did not have to tan hides for remote heirs or alienees.<sup>165</sup>

A legacy to the executor, naming him, "over and above (his) legal fees and compensation" was held to be on condition that he qualify as executor.<sup>166</sup> So a gift conditional on the con-

<sup>161</sup> *Platt v. Withington*, 121 N. Y. 138, reversing 47 Hun, 558.

<sup>162</sup> *Merrill v. Wisconsin Female College*, 74 Wis. 415.

<sup>163</sup> *White's Estate*, 163 Pa. St. 388.

<sup>164</sup> *Carr's Estate*, 138 Pa. St. 352.

<sup>165</sup> *Mosser v. Leshner*, 154 Pa. St. 84.

<sup>166</sup> *Harris v. Harris* (Ky.), 49 S. W. 196; 20 Ky. L. Rep. 1313, rehearing refused, 50 S. W. 533; 20 Ky. L. Rep. 1911. (Hence the condition was broken when such person did not qualify and made no further effort to qualify than moving to revoke the appointment of an administrator *cum testamento an-*

tinued success of a certain business should not be paid where the profits in the years following testator's death do not average one twentieth of the profits for the year immediately preceding his death, and the profits for the ten years following his death would pay about one-eighth of the conditional legacies.<sup>167</sup>

*nexto*, which motion was overruled and no appeal was taken.) Com-  
pare with Sec. 673. <sup>167</sup> Patterson's Estate, 173 Pa. St. 185.

## CHAPTER XXXI.

## POWERS.

**§689. Definition.—Creation of power of sale.**

A power is “an authority whereby a person is enabled to dispose of an interest in real estate vested in himself or another.”<sup>1</sup>

While a power is often given in connection with an interest in realty, such as a life estate or an interest as trustee, this is not necessarily the case. From its definition it will be seen that a power does not itself confer any estate upon the donee of the power.<sup>2</sup>

A power of sale may be conferred by will without the employment of any technical words. Any expression of testator's intention to confer upon the designated persons the power to dispose of testator's property by deed of conveyance will be sufficient.<sup>3</sup> Thus a power of sale is often implied from a di-

<sup>1</sup> Hadley v. Hadley, 147 Ind. 423.

<sup>2</sup> Bernalack v. Richards, 116 Cal. 405; Todd v. Wortman, 45 N. J. Eq. 723.

It has been held, however, that power to the executors to “apportion and distribute” certain realty vests the legal title to such realty in them as trustees until such distribution. *Nimmons v. Westfall*, 33 O. S. 213; and in *Williams v. Burrows*, 4 W. L. J. 527 (Ohio Supreme Court), it

was held that a general power of sale to executors vests the fee in them.

<sup>3</sup> *Lee v. Simpson*, 134 U. S. 572; *Smith v. McIntire*, 83 Fed. Rep. 456. A power of disposition given by a gift of property to testator's wife “during her natural life (she, however, first disposing of a sufficiency to pay my just debts”).

*Chase v. Cartwright*, 53 Ark. 358. (Power to convey given by a power

rection to executors or trustees to divide property, where from the nature of the property or the context of the will it is evident that a division *in specie* is either impossible or is not contemplated by testator.<sup>4</sup>

An implied power of sale does not extend any further than the necessity from which the power arises.<sup>5</sup> A power of sale of realty may also be implied from a direction that some part

to executors to dispose of property devised to them in trust as they think best for the support of minors.)

Stoff v. McGinn, 178 Ill. 46; Mulligan v. Lamb, 178 Ill. 130. (Power of sale given by a devise of the whole estate to executor with direction to equalize advancements and divide equally among the beneficiaries.)

Trimble v. Lebus, — (Ky.) —; 22 S. W. 329; 15 Ky. L. R. 85; Bailey v. Fisher, — Ky. —, 1896, 38 S. W. 140. (A power of sale given by a devise to testator's son A with a provision that the other children should have an equal part out of the proceeds of the lands.)

Fink v. Leisman, — (Ky.) —, 38 S. W. 6; Hughes v. Rhodes, — Ky. — (1896), 37 S. W. 489; Hill v. Bean, 86 Me. 200.

Seeger v. Leakin, 76 Md. 500; Hughes v. Bank, 86 Md. 418. (A power of disposition given by a direction that certain bank stock should be transferred to A "in her own name to use the interest thereof as long as she may live, and at her death to be equally divided among her children.")

Stein v. Stein, 79 Md. 464. (A power of sale implied from a direction to hold property upon separate trust where such holding is impossible without a sale.)

Iasigi v. Iasigi, 161 Mass. 75; Lovejoy v. McDonald, 59 Minn. 393.

(A power of sale of land implied from a power to pay debts, funeral expenses, together with a power to make deeds which should be necessary therefor.)

Ness v. Davidson, 45 Minn. 424; Tomkins v. Miller. — N. J. Eq. — 27 Atl. 484. (A power of sale implied from a power to distribute, where the only property to be distributed consisted of one building, a sale being necessary to make the distribution possible.)

Story v. Palmer, 46 N. J. Eq. 1; Cruikshank v. Parker, 52 N. J. Eq. 310; Lindley v. O'Reilly, 50 N. J. L. 636, 7 Amt. St. Rep. 802; Cahill v. Russell, 140 N. Y. 402.

Pennsylvania Company for Insurance v. Leggate, 166 Pa. St. 147. (A power to sell implied from a power to convert unproductive land.)

Bilderbach v. Boyce, 14 S. Car. 528.

<sup>4</sup> Stoff v. McGinn, 178 Ill. 46; Mulligan v. Lamb, 178 Ill. 130; Iasigi v. Iasigi, 171 Mass. 75; Tompkins v. Miller, — N. J. Eq. —, 27 Atl. 484; Story v. Palmer, 46 N. J. Eq. 1; Wilson v. Wilson, 46 N. J. Eq. 321; Parker v. Seeley, 56 N. J. Eq. 110; Mimms v. Delk, 42 S. C. 195.

<sup>5</sup> Smith v. Hall, 20 R. I. 170. (An implied power of sale to equalize certain shares does not extend any further than sufficient to equalize such share.)

of testator's property, it not appearing clearly what, was to be sold and paid upon testator's debts, where the debts exceeded the amount of the personal property.<sup>6</sup> And where the devisees may take personalty but can not take realty, as where they are non-resident aliens, it was held that a general power of sale in the executor imposes on him a duty to convert realty into money and distribute.<sup>7</sup> A power of sale was implied from a devise of the use of certain realty "until the sale and conveyance of said premises by my executor as hereinafter provided," there being no subsequent provision.<sup>8</sup>

A power of sale expressly conferred to pay specific legacies and the residuum given after paying them, was held not to be revoked by subsequent revocation of the residuary clause, and the substitution therefor of specific gifts.<sup>9</sup> A power to divide property among the beneficiaries, where the division may be made in specie, does not impliedly give a power of sale;<sup>10</sup> and where the land is by statute liable for the payment of the debts of testator, a devise of land, after the payment of debts, does not impliedly create a power of sale.<sup>11</sup>

A direction to gather the estate into one fund does not of itself empower the executor to sell the realty.<sup>12</sup>

A power to executors to lease lands may be implied from a gift of a third of the net rents, after deducting costs of repair, expenses of collection and the like, followed by a power of sale to executors, though no specific provision is inserted directing the executors to lease the realty.<sup>13</sup>

<sup>6</sup> *Schroeder v. Wilcox*, — Neb. —; 57 N. W. 1031.

<sup>7</sup> *Greenwood v. Greenwood*, 178 Ill. 387, citing *Hunt's Appeal*, 105 Pa. St. 128; *Penfield v. Tower*, 1 N. D. 216; *Cook v. Cook*, 20 N. J. Eq. 375; *Frazer v. United Presbyterian Church*, 124 N. Y. 479; *Lent v. Howard*, 89 N. Y. 169; *Re Gantert*, 136 N. Y. 106.

*Cahil v. Russell*, 140 N. Y. 402. (To reach this conclusion the courts

rejected the words "as hereinafter provided.")

<sup>9</sup> *Seegar v. Leakin*, 76 Md. 500.

<sup>10</sup> *Gammon v. The Gammon Theological Seminary*, 153 Ill. 41; *Potter v. Ranlett*, 116 Mich. 454.

<sup>11</sup> *Crudup v. Holding*, 118 N. Car. 222; 24 S. E. 7.; *Worley v. Taylor*, 21 Or. 589.

<sup>12</sup> *Smalley v. Smalley*, 54 N. J. Eq. 591.

<sup>13</sup> *Peirce v. Peirce*, 195 Pa. St. 417.

### §690. How a power to devise may be created.

A donee of a power may be given power to dispose of his property by his will to take effect upon his death. This power may be given by such general words as give authority to dispose of the property described, if the grantee of the power should deem expedient.<sup>14</sup> A power to dispose of property by will may, of course, be given in specific terms, such as a devise of property to any one whom A should, by will, direct.<sup>15</sup> A power of disposition by will is not given, however, by a life estate coupled with power to sell.<sup>16</sup> This is especially true where the power of sale is evidently for the exclusive benefit of the life tenant to furnish support and maintenance for him.<sup>17</sup>

A power given by will to A to dispose of certain realty by his will, may be exercised by A's will even if A dies before the donor of the power.<sup>18</sup>

### §691. Construction of powers.

A power of sale for a specific purpose, such as for the payment of testator's debts and for the support of the donee of the power, does not confer a general power of sale for all purposes;<sup>19</sup> therefore, a power of sale to pay debts of testator can not be exercised if the personal property undisposed of is sufficient to pay the debts.<sup>20</sup> And such a power of sale can not be exercised where the debts of testator are barred by the Statute of Limitations.<sup>21</sup>

<sup>14</sup> *Burbank v. Sweeney*, 161 Mass. 490. (And under such a gift the power to devise is not taken away by a provision that, if the donee should not dispose of the property during her lifetime it should go to a designated person.)

<sup>15</sup> *Krause v. Klucken*, 135 Mass. 482; *Olney v. Balch*, 154 Mass. 318; *Austin v. Oakes*, 117 N. Y. 577; *Thurston v. Bissel*, 13 O. C. C. 293; 7 O. D. 235.

<sup>16</sup> *Wooster v. Fitzgerald*, 61 N. J.

L. 368; affirmed 61 N. J. L. 687, citing *Herring v. Barrow*, L. R. 13 Ch. Div.

<sup>17</sup> *Kemiston v. Mayhew*, 169 Mass. 166; *Ford v. Ticknor*, 169 Mass. 276.

<sup>18</sup> *Condit v. De Hart*, — N. J. —; 40 Atl. 776.

<sup>19</sup> *Griffin v. Griffin*, 141 Ill. 373.

<sup>20</sup> *Sweeney v. Warren*, 127 N. Y. 426; 24 Am. St. Rep. 468; *Seeds v. Burke*, 181 Pa. St. 281.

<sup>21</sup> *Hemphill v. Pry*, 183 Pa. St. 593.

A power to sell, to provide for the support of testator's widow in her lifetime, and for her burial, with a provision that the trustees shall divide the residue of the proceeds, does not authorize a sale for the mere purpose of dividing the property.<sup>22</sup>

Where an express power of sale is given, but the purpose for which it is to be used is not specified, it is held to be a power of sale in order to pay the proceeds to the devisees in lieu of the devise,<sup>23</sup> and, therefore, such a power of sale is not repugnant to the devise of the property in fee.<sup>24</sup>

A power of appointment among certain persons impliedly gives a power to make advances.<sup>25</sup> A power specifically given to make advancement on marriage is exhausted by an advancement made at that time, and can not be further exercised by making advancement thereafter.<sup>26</sup>

Where it appears from the will that testator's intention was to allow the donee of the power to select out of a given class, he can not appoint those not members of the class.<sup>27</sup> Ordinarily, however, a power to divide among a given class, as testator's children, gives the donee of the power a right to use his own discretion as to the proportions which each will receive, but does not allow him to disinherit any one of them absolutely.<sup>28</sup>

A power of apportionment which is given in terms to indicate that the proportions are to be left to the discretion of the donee of the power is limited by a subsequent provision that the shares of the children are to be made equal.<sup>29</sup>

<sup>22</sup> *Hammond v. Conkright*, 47 N. J. Eq. 447.

<sup>23</sup> *Ness v. Davidson*, 45 Minn. 424.

<sup>24</sup> *Sneer v. Stutz*, 93 Io. 62 (distinguishing *Halliday v. Strickler*, 78 Io. 388.); *Mellen v. Mellen*, 139 N. Y. 210.

<sup>25</sup> *Franke v. Auerbach*, 72 Md. 580; *In re Hocking* (C. A.) (1898). 2 Ch. 567.

<sup>26</sup> *In re Croft*, 162 Mass. 22.

<sup>27</sup> *Huber v. Free*, 5 O. C. D. 537; *Horwitz v. Norris*, 49 Pa. St. 213.

<sup>28</sup> *Hatchett v. Hatchett*, 103 Ala. 556; *Clay v. Smallwood*, 100 Ky. 212; *Faloon v. Flannery*, 74 Minn. 38; *Wright v. Wright*, 41 N. J. Eq. 382; *Thrasher v. Ballard*, 35 W. Va. 524.

<sup>29</sup> *McCamant v. Nuckolls*, 85 Va. 333.



Where the executors are given uncontrolled powers of appointment, they may appoint for themselves.<sup>30</sup>

A power to sell and convey if given to life tenants may be exercised by a partition by agreement among themselves.<sup>31</sup>

A power given for a specific purpose exists until the accomplishment of such purpose.<sup>32</sup>

In a devise to executors to sell realty and to divide the proceeds in four shares, one of which was to be held during the life of the beneficiary, the power of sale existed after division of the realty into four shares.<sup>33</sup>

A power of sale to be exercised under specific contingencies can not be exercised unless those contingencies exist.<sup>34</sup> Thus a power to sell under direction of the probate judge could not be exercised by a sale without such direction.<sup>35</sup> And where power of sale of certain described property under specific contingencies is given, it is not enlarged by a subsequent general power of sale of testator's property.<sup>36</sup>

<sup>30</sup> *Higginson v. Kerr*, 30 Ont. 62.

<sup>31</sup> *O'Rourke v. Sherwin*, 156 Pa. St. 285.

<sup>32</sup> *Johns Hopkins University v. Middleton*, 76 Md. 186. (A devise in trust for testator's children to terminate when each should reach the age of thirty, with power of sale to make a division of the property between the children, was held to confer a power which lasted after the first child reached the age of thirty.) *Hallum v. Silliman*, 78 Tex. 347. (A direction that, upon the arrival of the eldest son at majority, the balance of the property left after the exercise of a power of sale, the proceeds to be devoted to the support and education of the children, should be divided, was held to create a power of sale for the education of the minor children which did not ter-

minate with the arrival of the eldest son at majority.)

<sup>34</sup> *Petit v. Flint, etc.*, Ry. Co. 114 Mich. 362. (A power to sell land after it was platted does not authorize the exercise of sale before it is platted.) *Mersman v. Mersman*, 136 Mo. 244. (A power to sell a homestead when none of testator's unmarried children desire to reside there, does not authorize a sale to reinvest the proceeds in another dwelling to be used as a homestead by such children.)

<sup>35</sup> *Bates v. Leonard*, 99 Mich. 296; 58 N. W. 311.

<sup>36</sup> *Petit v. Flint, etc.*, Ry. Co. 114 Mich. 362. (A power to sell certain real estate when surveyed and platted can not be exercised before survey.) So *Rice v. Tavernier*, 8 Minn. 248; *Mersman v. Mersman*, 136 Mo. 244.

When the contingencies have been complied with, however, the power of sale may be exercised.<sup>37</sup>

A power of sale in a certain time is not destroyed by failure to exercise it within the time limited.<sup>38</sup>

Where a power of sale is given solely as a means of accomplishing some purpose which the law will not permit, the power itself is invalid.<sup>39</sup> However, an absolute power of sale, given without any reference to its purpose, is not avoided by the fact that the disposition of its proceeds may be in part invalid.<sup>40</sup>

A power to executor to mortgage testator's realty, the proceeds to be used to pay testator's debts, is not prejudicial to the rights of the creditors and is valid.<sup>41</sup> Such power may be implied and need not be expressly given.<sup>42</sup> On the other hand, a life estate to testator's widow, with a power to sell real

<sup>37</sup> *Harp v. Wallin*, 93 Ga. 811. (A power to sell lands in case devisee saw fit to send testator's widow to an insane asylum may be exercised validly, and will pass good title if in good faith where the devisee decides to send testator's widow to an asylum and gets an order adjudging her insane, even though she may not actually be sent.)

<sup>38</sup> *Fahnestock v. Fahnestock*, 152 Pa. St. 56; *Marsh v. Love*, 42 N. J. Eq. 112; *Hale v. Hale*, 137 Mass. 168.

<sup>39</sup> *In re Piercy* (1898), 1 Ch. 565; 67 L. J. Ch. N. S. 297; 78 Law T. Rep. 277; *Dana v. Murray*, 122 N. Y. 604; *Petit v. Flint*, etc., Ry. Co. 114 Mich. 362. (In the above cases the power of sale was void as given in order to carry out a scheme which involved an invalid restraint of alienation.) *Hudekoper v. Perry*, 14 O. C. C. 68; 7 Ohio Dec. 326.

<sup>40</sup> *Pearson's Estate*, 98 Cal. 602.

<sup>41</sup> *Aimes v. Holderbaum*, 44 Fed. 224.

<sup>42</sup> *In re Bellinger* (1898), 2 Ch. 534; 67 L. J. Ch. N. S. 508 (a power to trustees to lease the premises pending a sale, and to expend money necessary to improve them so that they can be leased authorizes them to mortgage the property in order to raise such money). *Faulk v. Dashiell*, 62 Tex. 642, 50 Am. Rep. 542; *Lardner v. Williams*, 98 Wis. 514 (power to testator's widow to carry on a business, and to hold the property by the same right as testator had done, together with an express power to sell, gives her the power to mortgage the property. The court expressly declined, in this case, to decide whether a simple power of sale would include a power to mortgage).

estate and pay testator's debts, does not give her authority to mortgage more than her life interest.<sup>43</sup>

The weight of authority apparently is that power to sell and convey does not carry with it the power to mortgage.<sup>44</sup> A power to sell and convey real estate to pay testator's debts can not be exercised by a conveyance to one of the heirs who is to mortgage it to secure money for the executors and then reconvey it to the executors subject to the mortgage.<sup>45</sup>

A power given to dispose of property in some specified way can not be validly exercised in an entirely different way.<sup>46</sup> Thus a power to dispose of property by will can not be validly exercised by deed.<sup>47</sup>

A power to distribute after a life estate "by cash sale or division" does not give a power to confirm a lease made by the life tenant.<sup>48</sup> A power of sale can not be exercised by an exchange.<sup>49</sup>

A restriction of power, whether to one who is merely a donee

<sup>43</sup> *Columbia Ave., etc., Co. v. Lewis*, 190 Pa. St. 558 (in this case the mortgagee knew that the money was raised in order to enable testator to carry on a business).

<sup>44</sup> *Hoyt v. Jaques*, 129 Mass. 286; *Arlington State Bank v. Paulsen*, 57 Neb. 717; but see same case, 80 N. W. 263, in which, on rehearing, the judgment in 57 Neb. 717 was set aside on the ground of estoppel, without apparently modifying the provisions of the text; *Ferry v. Laible*, 31 N. J. Eq. 566; *Bloomer v. Waldron*, 3 Hill, 361; *Quisenberry v. Watkins Land Mortgage Company*, 92 Tex. 247; question left undecided in *Lardner v. Williams*, 98 Wis. 514. In Pennsylvania, however, it is held that a general power of sale includes a power to mortgage: *Zane v. Kennedy*, 73 Pa. St. 182.

<sup>45</sup> *Arlington State Bank v. Paulsen*, 57 Neb. 717; but see same case

in 80 N. W. 263, in which on rehearing the devisees and general creditors were held to be estopped to deny the validity of the mortgages.

<sup>46</sup> *Wooster v. Fitzgerald*, 61 N. J. L. 368; affirmed, 61 N. J. L. 687.

<sup>47</sup> *Gaskins v. Finks*, 90 Va. 384 (in this case it was held that this was not even a defective exercise of a power which equity would aid, but was no exercise at all). In *Franke v. Auerbach*, 72 Md. 580, it was held that a gift to A for life, with a power to indicate by appointment which of the testator's children should take and in what shares implies if the donee of the power wishes so to do, a power to convey to a child of testator's by way of advancement.

<sup>48</sup> *Johnson v. Grantham*, 104 Ga. 558.

<sup>49</sup> *Taylor v. Galloway*, 1 Ohio, 232.

of a power, or to one who is also a trustee, is not held to extend to the disposition of property after the purpose for which the power was created is at an end.<sup>50</sup>

Whether a power of sale terminates with other rights given by the will or whether it may be exercised independently of them, is entirely a question of the intention of testator. A power given solely for a designated purpose can not be exercised after that purpose has ceased.<sup>51</sup>

Power to dispose of the income indefinitely is held to include power to dispose of the principal.<sup>52</sup>

Where the power is to be exercised in the personal discretion of the donee of the power, such discretion can not be controlled.<sup>53</sup>

The donee of a power sometimes attempts to exercise the power so as to obtain some advantage from the beneficiary of such power. Where the power is exercised upon such conditions, it is treated as fraudulent and a nullity;<sup>54</sup> but where the power is exercised only in the hope that the beneficiary will provide for others, without any express agreement to that effect, the gift is valid.<sup>55</sup>

A power clearly given is not limited except by clear lan-

<sup>50</sup> *Attorney General v. Newberry Library*, 150 Ill. 229; 51 Ill. App. 166 (in this case a restriction upon a power of making leases, to leases for twenty years, was held to apply only to the power of executors during distribution, and not to the power of the ultimate beneficiaries); *Harvard College v. Weld*, 159 Mass. 114.

<sup>51</sup> *Heard v. Read*, 171 Mass. 374 (a power of sale which, from the context, was evidently given for the purpose of reinvestment during a trust ends with the termination of the trust). (On the other hand when the power of sale is independent and for other purposes,

it will not be terminated); *Cotton v. Burkelman*, 142 N. Y. 160 (a power to a life tenant to sell and reinvest as she might deem best for the benefit of the remainderman does not terminate with the death of the remainderman).

<sup>52</sup> *In re L'Herminier* (1894), 1 Ch. 675; *Johnson v. Childs*, 61 Conn. 66.

<sup>53</sup> *Beers v. Narramore*, 61 Conn. 13.

<sup>54</sup> *In re Perkins* (1893), 1 Ch. 283 (a devise to A if he would resign certain benefits under the will); 3 Rep. 40.

<sup>55</sup> *In re Crawshay*, L. R. 43 Ch. D. 615.

guage.<sup>56</sup> Thus a direction to convert certain real estate into other property at "schedule prices" was held to be an absolute power of sale, the price being advisory only.<sup>57</sup>

### §692. Who may exercise power.

Where a power of sale is clearly given, but the will does not provide who is to exercise it, the omission may be supplied by construction. Thus if the context of the will shows that the executors are to receive and expend the proceeds of the sale, it is held that the power of sale is given to them.<sup>58</sup>

"Where a testator directs that his real estate shall be sold and the proceeds of the sale are to be disbursed or distributed by the executors, the power to sell is an implication of law."<sup>59</sup> But a gift in trust for the use of the children of testatrix for seven years, providing that the property might be sold within such time if a majority of the children should elect, does not confer a power of sale upon the trustee. "The legal estate in the property here devised is clearly vested in the children of the testatrix, and they can exercise control over the transfer of title."<sup>60</sup> While if the proceeds are to be expended by trustee, the power of sale may be exercised by such trustee.<sup>61</sup>

Where no interest or estate is given to the donee, and discretionary power is given to several in such a way as to show that their united discretion is relied upon by testator, it is

<sup>56</sup> Pope v. Sullivan, 156 Mass. 585; Cochran v. Elwell, 46 N. J. Eq. 333.

<sup>57</sup> Ford v. Ford, 80 Mich. 42.

<sup>58</sup> Rathbone v. Hamilton, 4 App. D. C. 475; Van Brocklin's Estate, 74 Io. 412; Mandlebaum v. McDonnell, 29 Mich. 78; O'ne v. Reynolds, 75 Md. 145; Porterfield v. Porterfield, 85 Md. 663; Belcher v. Belcher, 38 N. J. Eq. 126; Vaughan v. Farmer, 90 N. Car. 607;

Collier v. Grimesey, 36 O. S. 17; Wood v. Hammond, 16 R. I. 98.

<sup>59</sup> Ogle v. Reynolds, 75 Md. 150, quoted in Porterfield v. Porterfield, 85 Md. 663.

<sup>60</sup> Porterfield v. Porterfield, 85 Md. 663.

<sup>61</sup> Lindley v. O'Reilly, 50 N. J. L. 636; 7 Am. St. Rep. 802; Lawton v. Lawton, 5 O. N. S. 441; 7 O. D. 493.

held that no number less than all of them can exercise the power.<sup>62</sup>

A power of sale given to the executor is substantially complied with by a sale by the devisee of the property subject to such power of sale, when the proceeds of the sale are given to the executor and are applied by him to the purposes set forth in the will.<sup>63</sup>

A power coupled with an interest may be exercised by the survivors of the donees of the power, unless expressly provided otherwise by will.<sup>64</sup>

In South Carolina a statute provides that powers conferred upon several executors may be exercised by the survivors.<sup>65</sup>

When all the trustees or executors, to whom the power of sale was originally given, have died or resigned, the question is presented whether this power of sale may be exercised by their successors as such, or whether the power of sale is terminated. In the latter case, if it is necessary to sell the real estate to pay the testator's debts, it can be done in most jurisdictions by a suit for that purpose in the court having probate jurisdiction. The question, as to the right of the successors, or executors, or trustees to exercise the power, turns entirely upon the intention of the testator as manifest in the will. If he absolutely directs a power of sale, and leaves the executors or trustees only to the ministerial duty of carrying this mandatory power into execution, it is generally held that the successors may ex-

<sup>62</sup> Wardwell v. McDowell, 31 Ill. 364; Hadley v. Hadley, 147 Ind. 423; Gamble v. Trippe, 75 Md. 252; 32 Am. St. Rep. 388; Shelton v. Homer, 5 Met. 462; Wilder v. Ranney, 95 N. Y. 7; Crowley v. Hicks, 72 Wis. 539.

<sup>63</sup> Dean v. Loewenstein, 6 Ohio C. C. 587.

<sup>64</sup> Robinson v. Allison, 74 Ala. 254; Bredenburg v. Bardin, 36 S. C. 197. (The court said in this case: "If it be a power coupled with a trust, it survives and may be executed by one executor where

the others die or renounce the office.")

<sup>65</sup> Bredenburg v. Bardin, 36 S. Car. 197. In O'Rourke v. Sherwin, 156 Pa. St. 285, this question was raised, but was not decided. Estates with power of disposition had been devised to A, B and C, and A and B had died, devising their interests to C. It was held that C could exercise the power under the wills of A and B, whether he could without such wills or not.

ercise this power without any suit for that purpose, or without the authority of the court.<sup>66</sup>

Where the power of sale is given absolutely and unconditionally, the fact that the executrix is to sell when she thinks it most advantageous, does not make such a discretionary power as can be exercised by her successor in office.<sup>67</sup> So where a will directed that the executors should pay certain sums of money to testator's relatives for their support in executors' best judgment and discretion, and administrator with the will annexed might, in his reasonable discretion, fix the sum thus to be paid.<sup>68</sup> But if the power of sale conferred is not absolutely and unconditionally, but is entirely discretionary with the person to whom it is given, his successors in office can not exercise it.<sup>69</sup> Interesting questions are sometimes presented where a power of sale is given to one who is at once life tenant, executor and trustee, and the will does not clearly specify in which capacity the sale is to be made. The question is one of the testator's intention which must often be determined by the careful study of the whole will. If the power of sale is to be exercised for trust purposes, the donees of the power may sell as trustees without qualifying as executors.<sup>70</sup> While, on the other hand, if the power of sale is for the purpose of settling the estate, the power is to be exercised by the donees as executors, and upon their discharge as executors their power to sell determines.<sup>71</sup> So in jurisdictions where the power of an executrix

<sup>66</sup> *Meddis v. Bull* (Ky.), 18 S. W. 6; *Bay v. Posner*, 78 Md. 42; 26 Atl. 1084; *Venable v. Mercantile Trust Co.*, 74 Md. 187; *Schroeder v. Wilcox*, 39 Neb. 136; 57 N. W. 1031; *Potts v. Breneman*, 182 Pa. St. 295; *O'Rourke v. Sherwin*, 156 Pa. St. 285; *Boutelle v. Bank*, 17 R. I. 781; *In re Blakely*, 19 R. I. 324; *Smith v. Hall*, 20 R. I. 170; *Bredenburg v. Bardin*, 36 S. Car. 197.

<sup>67</sup> *Potts v. Breneman*, 182 Pa. St. 295.

<sup>68</sup> *Allen v. Barnes*, 5 Utah, 100 (in this case there was no dis-

cretion as to paying the support, but only as to fixing the amount, and the view taken by the court was the one best designed to carry testator's general intention into execution).

<sup>69</sup> *Chambers v. Tulane*, 9 N. J. Eq. 146; *Farrar v. McCue*, 89 N. Y. 139.

<sup>70</sup> *Green v. Alden*, 92 Me. 177; *Hall v. Bliss*, 118 Mass. 559; 19 Am. Rep. 476; *Mordecai v. Schirmer*, 38 S. C. 294.

<sup>71</sup> *Goad v. Montgomery*, 119 Cal. 552; 63 Am. St. Rep. 145.

terminates by marriage, a power of sale to testator's widow, to be exercised for purposes of settling the estate, terminates upon her second marriage.<sup>72</sup> A general power of disposition may be exercised by the attorney in fact of the donee of such power.<sup>73</sup>

#### §693. Powers to be exercised with the consent of designated persons.

A testator may create a power of sale to be exercised only with the consent of all of a certain number of persons. In such a case any number of the designated persons, less than the whole, can not exercise such power.<sup>74</sup> Thus authority to sell in case widow, son and daughter should agree can not be exercised by the widow and daughter alone.<sup>75</sup>

Where some of the persons whose consent is to be obtained die before the sale, it has usually been assumed by the court that the surviving members might authorize the sale.<sup>76</sup> However, a power to sell upon the request of a majority of certain children of testator was held, after the death of some, to be capable of exercise in case a majority of the whole number concurred.<sup>77</sup> And a power of sale to be exercised, providing the widow would sign the deed, was held to be incapable of exercise after the death of the widow.<sup>78</sup>

#### §694. Effect of failure to exercise power.

Testator may, by will, give power of appointment in such terms that the donee of the power may exercise his own discretion in selecting the persons to be benefited by the power.

<sup>72</sup> *Bartels v. Froehlich* (Ky.), 16 S. W. 358.

<sup>73</sup> *Coates v. L. & N. Ry. Co.* (Ky.), 17 S. W. 564; 13 Ky. L. R. 557.

<sup>74</sup> *Poole v. Anderson*, 80 Md. 454; *Porterfield v. Porterfield*, 85 Md. 663; *McDonald v. O'Hara*, 144 N. Y. 566; *Gordon v. Gordon* (Tenn. Ch. App.), 46 S. W. 357.

<sup>75</sup> *Goebel v. Thieme*, 85 Wis. 286.

<sup>76</sup> *Hackett v. Milnor*, 156 Pa.

St. 1; *Carney v. Byron*, 19 R. I. 283; 36 Atl. 5.

<sup>77</sup> *Crane v. Bolles*, 49 N. J. Eq. 373.

<sup>78</sup> *Piersol v. Roop*, 56 N. J. Eq. 739.

*Contra* in *Marshall v. Wheeler*, 7 Mack. 414, it was held a power to trustee to sell with consent of testator's father, who was to join in the deed, could be exercised after the death of the father.



The class from which they are to be selected is generally, however, indicated by testator. In such case the members of the class can not assert any interest in the property covered by the power unless the donee of the power exercises such power.<sup>79</sup>

A power to devise may be mandatory, in which case it will be held to create an interest in the beneficiary of the power, which equity will protect even if the donee of the power does not exercise it.<sup>80</sup> If the power of appointment is not exercised, and the testator's intention is clearly that the beneficiaries named shall receive the property, it is to be divided equally among them.<sup>81</sup>

### §695. Power of sale given to life tenants.

A power of sale of the remainder may be given to one to whom a life estate in the property, covered by the power, is devised.<sup>82</sup> This power may be given expressly.<sup>83</sup> Such a power may also be implied from a gift to one for life, and a gift over of the unexpended portion at the death of the life

<sup>79</sup> *Drake v. Drake*, 134 N. Y. 220; 17 L. R. A. 664 (a power of appointment to all, or any, or either of the testator's sisters, or to all, or any, or either of the issue of such sisters was held to give the donee of the power a right of appointment either to the sisters or to their issue, in his discretion); *Boyle v. Boyle*, 152 Pa. St. 108 (a power to testator's wife, "any remainder at her decease to be disposed of by her as she may think just and right among my children," is held to give the wife the power of excluding one of testator's children); *Hillen v. Iselin*, 144 N. Y. 365.

<sup>80</sup> *Smith v. Floyd*, 140 N. Y. 337, affirming 71 Hun, 56 (a life estate to A "with the right and privilege of disposing of the same by will or devise to his children if any" was held mandatory); so *Adams v. Mason*, 85 Ala. 452.

<sup>81</sup> *In re Jack* (1899), 1 Ch. 374, 68 L. J. Ch. N. S. 188. (In this case the donee of the power did not exercise it as to part of the property, but expressed a desire that it should go to two of the three children. It was held, however, that it should be equally divided among the three.)

<sup>82</sup> See Sec. 575, *et seq.*

<sup>83</sup> *Security Co. v. Pratt*, 65 Conn. 161 (a power to life tenant to sell any part of "said life estate" and use or invest the proceeds, was held to give the power to pass in fee); *Larsen v. Johnson*, 78 Wis. 300 (a devise to A for life with "power to dispose of the same if it should be necessary for her support and comfort" was held to give power to dispose of the fee).

tenant to another.<sup>84</sup> So a power of sale may be implied from a gift for life with general power to possess and enjoy the property as if it belonged to the life tenant, especially where the gift is for a specific purpose, such as the support of the life tenant or the education of children, where the principal may not be sufficient.<sup>85</sup> This power may also be implied from the context of the will.<sup>86</sup>

Power given to life tenant to dispose of property for his own use must be clearly given. Thus a gift of real and personal property to one for life, to have full control of the same, and after her death "what is left" to go to beneficiaries named, was held to convey only a life estate without power to sell, the expression "what is left" being used only to show that the life tenant was not to be charged with necessary loss of perishable personal property.<sup>87</sup>

A power clearly given to a life tenant, who is also an executor, may be exercised by such life tenant without qualifying as executor.<sup>88</sup> And when such a power is exercised, the life tenant does not have to account for the proceeds as executor.<sup>89</sup>

<sup>84</sup> Attorney General v. Hall, Fitz, 314; Howard v. Carusi, 109 U. S. 725; Gaffield v. Plumber, 175 Ill. 521; Pfingst v. Dolfinger (Ky.), 20 S. W. 534; 14 Ky. L. R. 489; Ide v. Ide, 5 Mass. 500; Burbank v. Whitney, 24 Pick. 146; Hale v. Marsh, 100 Mass. 468; Bowen v. Dean, 110 Mass. 438; Ladd v. Chase, 155 Mass. 417 (a devise to a widow for her use forever, with a devise over of the unexpended portion upon her death to another, was held to give a life estate with power of sale); Bramell v. Cole, 136 Mo. 201; Pierce v. Simmons, 17 R. I. 545.

<sup>85</sup> Gold's Estate, 133 Pa. St. 495; Martin's Estate, 160 Pa. St. 32;

Davis v. Kirksey, 14 Tex. Cir. App. 380; King v. Bock, 80 Tex. 156.

<sup>86</sup> Offutt v. Divine (Ky.), (1899), 49 S. W. 1065 (an extreme case in which a provision that the capital should not be diminished was ignored in order to carry out testator's general intention to support his daughter and her children, and by reason of depreciation of the property the income was entirely insufficient for such purpose).

<sup>87</sup> Bramell v. Cole, 136 Mo. 201.

<sup>88</sup> Smith v. Beardsley, 51 Fed. 122.

<sup>89</sup> Mercur's Estate, 151 Pa. St. 49.

### §696. Exercise of power of sale by life tenants.

Where a power of sale is given to a life tenant to sell for a specified purpose, the vendee, if he buys in good faith, takes an absolute title which can not be set aside upon the application of the remainderman.<sup>90</sup> And the *bona fide* purchaser takes a title, the validity of which is not dependent upon actual necessity for the sale.<sup>91</sup>

Whether the power of sale for purpose of support, when used for that purpose alone and in good faith, is subject to control, is a matter in which the courts seem somewhat at variance. It has been held that the life tenant is the only person to determine the necessity of the sale.<sup>92</sup> On the other hand, it has been held that where the life tenants have been authorized to use as much of the principal as is necessary for their comfort, the amount to be taken by them is under the control of the court considering their situation, condition in life, and amount of property available.<sup>93</sup> Whether the life tenant who has power to sell the principal and dispose of the proceeds for her support is authorized to convey the property, covered by a power, in consideration of services to be rendered to her by the grantee, is another question upon which the courts are at variance.<sup>94</sup>

It is, however, well settled that a power to resort to the principal, where necessary for the support of the life tenant, can

<sup>90</sup> Clark v. Clark, 172 Ill. 355; Harp v. Wallin, 93 Ga. 811; Hardy v. Sanborn, 172 Mass. 405 (especially where realty was sold at appraised value).

<sup>91</sup> Griffin v. Griffin, 141 Ill. 373; Doran v. Piper, 164 Pa. St. 430.

<sup>92</sup> Paxton v. Bond (Ky.), 15 S. W. 875; 12 Ky. L. R. 949.

<sup>93</sup> Peckham v. Lego, 57 Conn. 553; 7 L. R. A. 419.

<sup>94</sup> In Barnard v. Stone, 159 Mass. 224, it was held that a conveyance of the entire property of the life tenant in consideration of support

for life and a payment of funeral expenses was valid. So in Gadd v. Stoner, — Mich. — (1897), 71 N. W. 1111, a conveyance by the widow in consideration of an agreement to support her for life was held not to convey the fee, but to give the grantee a lien on the land for the value of the support furnished less the value of the use and occupation of the land. The power in this case was to the widow to convey the fee, but to have a life estate only in the proceeds.

not be exercised for the purpose of making presents, and a conveyance for that purpose is unauthorized.<sup>95</sup>

Where A, the owner of a life estate and donee of a power, transferred the realty to B for a purpose on its face authorized, but not so in reality, and B mortgaged the land to C, a mortgagee in good faith, it was held that C could enforce the mortgage upon the whole of the realty as far as that part of the money loaned which was applied to the support of the widow and payment of her debts, while as to the rest of the money, which B retained, it could be enforced on that part of the realty descending to B.<sup>96</sup>

And where the life tenant was expressly authorized to use the principal "for her necessary and comfortable support and for charitable and benevolent purposes and contributions for worthy objects," it was held that that did not authorize her to make gifts of the principal in return for kindnesses done her.<sup>97</sup>

The exercise of a power of sale by a life tenant is held to terminate the life estate and convey the property free from the liens of any judgments obtained against the life tenant.<sup>98</sup> The power is not exercised by an appointment by a will which is made conditional that the death of the testatrix during coverture, where such testatrix outlived her husband, and the will is not republished subsequently to the death of such husband.<sup>99</sup>

A power to a life tenant to convey a certain number of separate tracts of land in fee-simple, is not exhausted by the conveyance of a part of such tracts, it not being necessary that the donee of the power should select or convey all of the tracts at one time.<sup>100</sup>

#### §697. Rights of creditors of the donee of a power.

Where authority is given to use the principal for the support of the beneficiary, if the income is insufficient, the power

<sup>95</sup> *Lehnard v. Specht*, 180 Ill. 208; *Griffin v. Griffin*, 141 Ill. 373; *Greene v. Smith*, 17 R. I. 28.

<sup>96</sup> *Griffin v. Griffin*, 141 Ill. 373.

<sup>97</sup> *Park v. American Home Missionary Society*, 62 Vt. 19.

<sup>98</sup> *Rose v. Hatch*, 125 N. Y. 427, affirming 55 Hun. 457.

<sup>99</sup> *In re Cuno*, L. R. 43 Ch. D. 12.

<sup>100</sup> *Hunt v. Hawes*, 181 Ill. 343.

may be exercised after the support is furnished as well as before.<sup>101</sup> So where the life tenant, in pursuance of a power of sale of the principal for her maintenance, had directed such a sale and died before completing it, it was held that one who had furnished her with support upon credit had a right to have such property sold for the payment of his claim.<sup>102</sup> But where the donee of the power has not ordered such sale in her lifetime, a sale can not be had at the instance of her creditors, the power being purely a personal one.<sup>103</sup>

In the absence of statute, the donee of a power can not charge the estate with his debts,<sup>104</sup> and a judicial sale of the life tenant's property passes no more than his life interest.<sup>105</sup> By statute in some jurisdictions, a donee of an absolute power of appointment may exercise such power so as to pay his debts.<sup>106</sup>

### §698. Necessity of reference to power.

In the absence of statute it is well settled that in order to constitute a valid exercise of power, the instrument by which it was to be exercised must refer specifically to the power, or must, from the nature of its provisions, show testator's intention to exercise the power conferred.<sup>107</sup>

The donee of the power, however, may exercise the power without referring in express terms to the instrument by which it is created.<sup>108</sup> Where the instrument exercising such power

<sup>101</sup> *Smith v. Greeley*, 67 N. H. 377; *Luckenbach's Estate*, 175 Pa. St. 484.

<sup>102</sup> *Luckenbach's Estate*, 175 Pa. St. 484.

<sup>103</sup> *Ryan v. Mahan*, 20 R. I. 417.

<sup>104</sup> *Roundtree v. Dickson*, 105 N. C. 350.

<sup>105</sup> *Ritchie v. Ritchie*, 171 Mass. 504.

<sup>106</sup> *In re Hodgson* (1899), 1 Ch. 666; 68 L. J. Ch. N. S. 313. (Under such statute a married woman may exercise such power of appointment so as to pay her hus-

band's debts where the debt is accurately ascribed.)

<sup>107</sup> *Shore v. Shore*, 21 Ont. 54; *Lee v. Simpson*, 134 U. S. 572; *Harvard College v. Balch*, 171 Ill. 275 (general residuary clause); *South v. South*, 91 Ind. 221; 46 Am. Rep. 591; *Cotting v. De Sartes*, 17 R. I. 668.

<sup>108</sup> *Coxen v. Rowland* (1894), 1 Ch. 406 (a devise of all property which testatrix was competent to dispose of by any power was said to be a good exercise of a power of appointment).

shows that the donee of the power describes the property as "my property," or in some other way showing an assumption of absolute ownership, this does not prevent the instrument from executing the power.<sup>109</sup>

This rule in actual practice often defeated the exercise of the power. A donee of a power, especially if he has a life estate in the property covered by the power, is very likely to think and speak of the property as his own, and to attempt to exercise the power by giving the property without any specific description and without any reference to the power to be exercised. In order to prevent this failure of intention, statutes have been passed in some states providing that a devise or bequest shall extend to property over which testator has a power of appointment, unless a contrary intention shall appear in the will. Under such statute a general gift of all the property of testator, or his entire estate, or any similar form of words, will pass property over which he has a power of appointment.<sup>110</sup>

So under such statutes a general residuary clause will be a valid exercise of a power of appointment.<sup>111</sup> And a power

<sup>109</sup> Bullerdict v. Wright, 148 Ind. 477, citing Powell v. Roake, 2 Bing. 497; Madison v. Andrew, 1 Ves. S. R. 57; Blaggs v. Miles, 1 Story, 427; Amory v. Meredith, 7 Allen, 397; White v. Hicks, 33 N. Y. 383; Andrews v. Brumfield, 32 Miss. 107; Cooper v. Haines, 70 Md. 282; Lee v. Simpson, 134 U. S. 572; White v. Hicks, 33 N. Y. 383; Keefer v. Schwartz, 47 Pa. St. 503.

<sup>110</sup> *In re* Harmon (1894), 3 Ch. 607; compare *In re* Huddleston (1894), 3 Ch. 595; Henderson v. Smith, 62 Fed. 708; Funk v. Eggleston, 92 Ill. 515; 34 Am. Rep. 136; Payne v. Johnson, 95 Ky. 175, 186 (a gift of "what little property remains" held to pass property covered by power); Ladd v. Chase, 155 Mass. 417; New York

Life Ins., etc., Co. v. Livingston, 133 N. Y. 125; Kimball v. New Hampshire Bible Society, 65 N. H. 139; Forsythe v. Forsythe, 108 Pa. St. 129; Dillon v. Faloan, 158 Pa. St. 468; Weir v. Smith, 62 Tex. 1; Machir v. Funk, 90 Va. 284.

"It does not appear that she was so familiar with legal views of her husband's will as to understand the difference between a fee and her rights of holding, using and managing property as she saw fit during her life and deciding who should have it afterwards." Kimball v. New Hampshire Bible Society, 65 N. H. 139.

<sup>111</sup> *In re* Milner (1899), 1 Ch. 563; Hassam v. Hazen, 156 Mass. 93; Lockwood v. Mildeberger, 159 N. Y. 181; Emery v. Haven, 67 N. H. 503; Machir v. Funk, 90 Va. 284.

has been held to be exercised validly by a will made by the donee of the power before the power was given.<sup>112</sup>

In other states statutes of narrower types are in force. Thus, it is in some states provided that a conveyance of property, which grantor would have no right to convey but by power, shall be deemed a valid exercise of the power, even though there was no reference to such power in the conveyance.<sup>113</sup> Under such a statute, where a grantor has both an interest and a power in the property, it is held that a conveyance, or a devise without reference to the power, will pass only the interest of the grantor, and will not be deemed a valid exercise of the power.<sup>114</sup>

<sup>112</sup> *Burkett v. Whittemore*, 36 S. C. 428.

<sup>114</sup> *Mutual Life Insurance Co. v. Shipman*, 119 N. Y. 324; *Lardner*

<sup>113</sup> *Hutton v. Benkard*, 92 N. Y. 295.

*v. Williams*, 98 Wis. 514.

## CHAPTER XXXII.

### CONVERSION.

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#### §699. Conversion in general.

It is a doctrine well recognized in equity that under proper circumstances an agreement or direction to change property from one legal class to another, as from real to personal or personal to real, will have the effect in equity of changing the legal character of such property at once before it is in fact changed. This doctrine rests upon the maxim that equity looks upon that as done which ought to be done, and is known as the doctrine of Conversion.

The forms which conversion assumes, where the direction to convert is found in a will, are the only ones to be considered here. In determining questions of conversion by will, the fundamental principle is that conversion is effected only by a clear and unequivocal direction to convert. Equity looks upon that as done which is clearly required to be done, not that which may be done.

Where provisions of the will with reference to the power of sale are conflicting, the property is ordinarily treated as not converted.<sup>1</sup> So an alternative direction to convert, as where the will provides that a fund should be used to purchase realty, or else it should be put out at interest, does not effect a conversion.<sup>2</sup>

<sup>1</sup> *Beadle v Beadle*, 40 Fed. 315;  
*Forsyth v. Forsyth*, 46 N. J. Eq. 400.

<sup>2</sup> *Becker's Estate*, 150 Pa. St. 524.



### §700. Power of sale without discretion.

This doctrine finds frequent application in the law of wills. Thus a positive and unqualified direction to the executors or trustees to sell realty operates as a conversion of such realty; and for purposes of distribution as indicated by the will, the real property or its proceeds will be treated as personal property.<sup>3</sup>

### §701. Power of sale with limited discretion.

Where the direction to sell is absolute, the fact that some discretion is given as to time and place does not prevent the direction to sell from working a conversion.<sup>4</sup> Nor does discretionary power to pay outright to beneficiaries or to hold in trust prevent the direction to sell from working a conversion.<sup>5</sup>

### §702. Discretionary power of sale.

A direction to change the class of property must, however, be both absolute and effective in order to work a conversion.<sup>6</sup> A power of sale, which is not peremptory and absolute, but

<sup>3</sup> Tyrrell v. Painton (1895), 1 Q. B. 202; 64 L. J., P. D. A., N. S., 33; *In re Richerson* (1892), 1 Ch. 379; Allen v. Watts, 98 Ala. 384; Duffield v. Pike, 71 Conn. 521; Gross v. Sheeler (Del.), 7 Houst. 280; Ebey v. Adams, 135 Ill. 80; 10 L. R. A. 162; Creerar v. Williams, 145 Ill. 625, affirming 44 Ill. App. 492; Glover v. Con-dell, 163 Ill. 566; Abell v. Abell, 75 Md. 44; Johnson v. Conover, 54 N. J. Eq. 333; Roy v. Monroe, 47 N. J. Eq. 356; Jones v. Jones, 46 N. J. Eq. 554, affirming Dut-ton v. Pugh, 45 N. J. Eq. 426; Fisher v. Banta, 66 N. Y. 468; Fraser v. United Presbyterian As-soc., 124 N. Y. 479, modifying 58 Hun, 30; Hope v. Brewer, 136 N.

Y. 126; 18 L. R. A. 458; McDon-ald v. O'Harra, 144 N. Y. 566; Collier v. Grimesey, 36 O. S. 17; Helfrich v. Helfrich, 25 O. L. J. 313; Fahnestock v. Fahnestock, 152 Pa. St. 56; Thomman's Estate, 161 Pa. St. 444; Klotz's Estate, 190 Pa. St. 152; Newport Water Works v. Sisson, 18 R. I. 411; *In re Hol-der*, 21 R. I. 48; 21 R. I. (Part 1), 49; Brown v. Miller, 45 W. Va. 211; McHugh v. McCole, 97 Wis. 166; 40 L. R. A. 724.

<sup>4</sup> Underwood v. Curtis, 127 N. Y. 523; Crane v. Bolles, 49 N. J. Eq. 373; Bell v. Bell, 25 S. Car. 149.

<sup>5</sup> Marshall's Estate, 147 Pa. St. 77.

<sup>6</sup> Goodier v. Edmunds (1893), 3 Ch. 455; see Sec. 699.

may be exercised entirely at the discretion of the executors or trustees, does not, of itself, work a conversion.<sup>7</sup> So a power to sell land with the consent of certain heirs does not effect a conversion.<sup>8</sup>

A discretionary power of conversion does not affect a conversion unless actually exercised. Title to realty to be sold under such power descends, therefore, to the heir at law until the sale.<sup>9</sup> The heir at law may, accordingly, sue to recover possession of the property.<sup>10</sup> A judgment against the legatees may become a lien upon such property,<sup>11</sup> and a mortgage given by the beneficiary is a lien upon his interest in such property, and the mortgagee will be protected upon the sale of the property.<sup>12</sup>

Where testator by will directed that the executors sell certain real estate to A, at a fair price to be fixed by certain persons to be agreed upon by A and the executors, such a provision was held to work a conversion where the sale is in fact made.<sup>13</sup>

### §703. Implied power of sale.

A conversion may be effected by an implied power of sale as well as an express one. Thus a direction to executor to loan out at interest a certain amount of testator's property, which consisted of both personalty and realty, was held to

<sup>7</sup> *Mills v. Harris*, 104 N. C. 626; *Clift v. Moses*, 116 N. Y. 144; *Sheridan v. Sheridan*, 136 Pa. St. 14. (In *Pyott's Estate*, 160 Pa. St. 441, testator devised realty to his wife with a power to her to sell if she thought advantageous. This was held not to affect a conversion until the sale was made.)

<sup>8</sup> *Greenough v. Small*, 137 Pa. St. 128; *Sill v. Blaney*, 159 Pa. St. 264; *Irvin v. Patchen*, 164 Pa. St. 51.

<sup>9</sup> *Walters v. Maunde*, 19 Ves. 424; *Estep v. Armstrong*, 91 Cal. 659; *Eneberg v. Carter*, 98 Mo.

647; *Mills v. Harris*, 104 N. C. 626; *Guarantee Trust and Safe Deposit Company v. Maxwell*, 53 N. J. Eq. 194; 30 Atl. 339; *Bleight v. Bank*, 10 Pa. St. 131; *Dominick v. Michael*, 4 Sand. (N. Y.), 374; *Pratt v. Taliaferro*, 3 Leigh. (Va.) 419.

<sup>10</sup> *Estep v. Armstrong*, 91 Cal. 659.

<sup>11</sup> *Eneberg v. Carter*, 98 Mo. 647.

<sup>12</sup> *Lawton v. Lawton*, 5 O. N. S. 441; 7 O. Dec. 493.

<sup>13</sup> *Benbow v. Moore*, 114 N. C. 263.

work a conversion in equity, since the provisions of the will could be complied with only by converting the realty into personalty.<sup>14</sup>

#### §704. What sales do not effect a conversion.

Where testator's real property is sold, not by virtue of any direction in his will, but in order to pay his debts, under proceeding prescribed by law for that purpose,<sup>15</sup> or upon foreclosure proceedings,<sup>16</sup> such a sale does not alter the legal character of the property. And a sale made by trustees, entirely for the convenient management of the trust and not under a peremptory direction of the will, does not change the legal title of the proceeds of the will as far as distribution is concerned.<sup>17</sup>

An oral unenforceable contract made by the executors to sell real estate, over which they have discretionary power of sale, does not amount to a conversion.<sup>18</sup>

#### §705. Double conversion.

A double conversion is also recognized by courts of equity. Thus, where testator directs that certain real estate be sold and that the proceeds be used in purchasing other real estate, the property is treated as realty, even at the time when it exists in the form of money.<sup>19</sup>

The doctrine of conversion is intended as a means of carrying out the intention of testator. Accordingly, if in his will he makes it clear that, although the property is to be converted, he desires it to pass in its converted form as if it were still in its original form, full effect will be given to this intention.<sup>20</sup>

<sup>14</sup> *Davenport v. Kirkland*, 156 Ill. 169; see Sec. 689.

<sup>15</sup> *Pence v. Pence*, 11 O. St. 290.

<sup>16</sup> *In re Jamieson*, 18 R. I. 385.

<sup>17</sup> *Hovey v. Dary*, 154 Mass. 7; *Rhode Island Hospital Trust Company v. Harris*, 20 R. I. 408.

<sup>18</sup> *Mills v. Harris*, 104 N. C. 626.

<sup>19</sup> *Ford v. Ford*, 80 Mich. 42.

<sup>20</sup> *In re Bingham*, 127 N. Y. 296.

Thus a devise of the residuum to the "heirs and next of kin in the same proportion" as the property would have been distributed had testator died intestate, together with a power of sale of such property, the residuum to be distributed in cash, was held to show testator's intention that the proceeds of realty should pass as realty, since he used the word "heirs" with reference thereto.<sup>21</sup>

#### §706. Conversion of personalty into realty.

Personal property may also be converted into realty, as by an absolute direction to purchase land with a certain fund or with the proceeds of the personalty.<sup>22</sup>

#### §707. Effect of failure of purpose upon conversion.—Re-conversion.

Where testator, in his will, directs a conversion of his property for certain specific purposes, the property will not be regarded in equity as converted, any further than necessary for carrying such purposes into effect, and a failure of such purposes prevents a conversion.<sup>23</sup> And, unless the specific purpose is assigned in the will, it will be presumed that the power of sale is given in order to carry into execution the remaining provisions of the will, and if those remaining provisions fail, the property is not converted.<sup>24</sup>

In case of a total failure of conversion, the property to be converted descends according to its original and inherent character, unaffected by conversion.<sup>25</sup> But where conversion was directed by will for the purpose of paying testator's debts, the balance to be distributed as personalty, in a large part

<sup>21</sup> *In re Bingham*, 127 N. Y. 296.

<sup>22</sup> *Roy v. Monroe*, 47 N. J. Eq. 356; *Holmes v. Pickett*, 51 S. C. 271.

<sup>23</sup> *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Roy v. Monroe*, 47 N. J. Eq. 356; *Read v. Williams*, 125 N. Y. 560; *Gallagher v. Rowan*, 86 Va. 823; *Fifield v. Van Wyck*, 94 Va. 557; 27 S. E. 446; *McHugh*

*v. McCole*, 97 Wis. 166; 40 L. R. A. 724.

<sup>24</sup> *Ackroyd v. Smithson*, 1 Bro. Ch. Cas. 503; *Moore v. Robbins*, 53 N. J. Eq. 137; *Luffberry's Appeal*, 125 Pa. St. 513.

<sup>25</sup> *Ackroyd v. Smithson*, 1 Bro. Ch. Cas. 503; *Luffberry's Estate*, 125 Pa. St. 513.

as intestate property, it was held that the creditors and legatees could not effect a reconversion by releasing their debts and legacies.<sup>26</sup>

Where there is a partial and not a total failure of the purposes for which the power of sale was conferred, the property must be treated as converted, and must descend as property of the class to which it was, by will, to be converted.<sup>27</sup>

Where a power of sale fails of execution, the property to be converted passes to the beneficiary in its unconverted form, if the gift itself is valid.<sup>28</sup> So by agreement between the beneficiaries, the property to be converted may be taken in its unconverted form.<sup>29</sup>

### §708. Effect of conversion.

The effect of conversion of property is to impress the property converted with the character of the property into which it is to be converted, even before a change in form. Thus, where there is a conversion of realty, the realty to be converted will be distributed as if it were personalty.<sup>30</sup> And where the Rule in Shelley's Case applies to the devises of realty, but does not apply to bequests of personalty, conversion may prevent the application of the rule.<sup>31</sup> And in jurisdictions where bequests of personalty can be made at an earlier age than devises of realty, it has been held where a testator directs that his realty be converted into personalty, and the proceeds given to certain designated individuals, that one of these individuals can dispose of his interest thus given as soon as he is old enough to dispose of personal property.<sup>32</sup>

<sup>26</sup> Adam's Estate, 148 Pa. St. 394, on rehearing, 148 Pa. St. 399 (accordingly the realty covered by the direction to convert was added to the residuum of personalty).

<sup>27</sup> *In re Richerson* (1892), 1 Ch. 379.

<sup>28</sup> *In re Bingham*, 127 N. Y. 296; *Parker v. Linden*, 113 N. Y. 28; *Chamberlain v. Taylor*, 105 N. Y. 185; *Gourley v. Campbell*, 66 N. Y. 169.

<sup>29</sup> *Howell v. Mellen*, 169 Pa. St. 139; see Sec. 718.

<sup>30</sup> *In re Richerson* (1892), 1 Ch. 379; *Hand v. Marcy*, 28 N. J. Eq. 59; *Ingersoll's Estate*, 167 Pa. St. 536; *Lackey's Estate*, 149 Pa. St. 7; *Newport Water Works v. Sisson*, 18 R. I. 411.

<sup>31</sup> *Gross v. Sheeler*, 7 Houst. (Del.), 280.

<sup>32</sup> *Allen v. Watts*, 98 Ala. 384.

**§709. Time at which conversion takes effect.**

Where a will contains a direction to convert, in terms so positive as to effect a conversion, and no time is fixed at which such conversion shall take effect, the general rule is that the property is to be regarded as converted from the death of testator, and not from the time when the property is actually sold.<sup>33</sup> But where conversion is discretionary with the trustees or donees of the power of sale, no conversion takes place in law until the character of the property is changed in fact.<sup>34</sup>

<sup>33</sup> *Ebey v. Adams*, 135 Ill. 80; — N. J. Eq. —; 24 Atl. 365.  
10 L. R. A. 162; *Snover v. Squire*, <sup>34</sup> See Sec. 702.

## CHAPTER XXXIII.

### ELECTION.

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#### §710. Election in general.

There is a broad principle originating in equity and running through many different subjects of law to the effect that one upon whom inconsistent rights are conferred has his choice as to which he will take, but can not have both. This right to choose between these inconsistent rights is known as election. The abandonment of the other right when the one is elected is known as a waiver. This general principle of the necessity of election between inconsistent rights, finds many applications in the law of wills. In many different forms testators attempt to dispose of property which belongs, either in whole or in part, to others. Where nothing is given in place of such property rights thus defeated, the doctrine of election does not, strictly speaking, apply, there not being any inconsistent rights between which the owner must elect.<sup>1</sup> But

<sup>1</sup>Hall v. Smith, 103 Mo. 289; Jacob v. Jacob, 78 Law T. 825, affirming 78 Law T. 451; Sumerel v. Sumerel, 34 S. Car. 85; Cook v. Couch, 100 Mo. 29; Burgess v. Bowles, 99 Mo. 543; Bennett v. Harper, 36 W. Va. 546.

"Election in the sense that applies to the present contention,

means a choice between two courses of action, acquiescence by the widow in her husband's disposition of his property or disregard of it and assertion of the rights the law gives her. There is no third course." Cunningham's Estate, 137 Pa. St. 621.

where the will gives some right to the person whose property interest is sought to be defeated, a case for election arises.<sup>2</sup>

Wherever the rights conferred are not inconsistent, no case for election arises. Thus a gift of the income of a fund to testator's widow, together with the right to use any part of the principal upon three months' notice, does not require the widow to elect between her right to use the income and the principal. But after using the income as long as she thinks necessary, she may on demand have the principal paid over.<sup>3</sup>

The intention of testator must ordinarily be clear to put the devise to his election.<sup>4</sup> Thus, where the property devised did not exceed that given by the law, no election is necessary in the absence of statute.<sup>5</sup>

In determining whether an election is necessary or not, the test is, is the property right given by law so inconsistent with that devised by will that both can not stand.<sup>6</sup>

The right of election, however, is a unit, unless the will specifically provides otherwise; that is, the person having the

<sup>2</sup> Clark v. Clark, 132 Ind. 25; Smith's Estate, 60 Mich. 136; Haack v. Weiken, 118 N. Y. 67; Melick v. Darling, 11 Ohio, 343; White v. Brocaw, 14 O. S. 339; Huston v. Cone, 24 O. S. 11; Cunningham's Estate, 137 Pa. St. 621.

<sup>3</sup> Smith v. Jackman, 115 Mich. 192 (of course upon payment of the principal, her right to the income ceased. The doctrine stated in the text is worked out in detail in the application of the general principle of election of particular rights which follows in this chapter); Cook v. Couch, 100 Mo. 29 (a provision that testator's property shall go to his wife and children, that his wife shall retain her lawful dower and may will her portion as she pleases, gives her her dower and an equal share in the fee with the children).

<sup>4</sup> Jacob v. Jacob (C. A.), 78 Law T. 825 (affirming 78 Law T. 451).

<sup>5</sup> Burgess v. Bowles, 99 Mo. 543. (In this case testator devised to his wife as long as she remained his widow certain property to which she was entitled under the homestead law. She occupied the property and remarried. It was held that no case for election existed, and that she could still claim her rights under the law).

<sup>6</sup> Hair v. Goldsmith, 22 S. Car. 566; Callahan v. Robinson, 20 S. Car. 249; Sumerel v. Sumerel, 34 S. Car. 85. An express provision that a bequest to testator's wife was not intended to be in lieu of dower was held ineffective where testator had disposed of all his property by will. Parker v. Parker, 13 O. S. 95.



right of election may elect either of the inconsistent rights, but can not take both nor can he take a part of each.<sup>7</sup>

The doctrine of election and waiver can apply only to rights given for the sole benefit of the person who seeks to make the election. If they are given for any other purpose they can not be waived.<sup>8</sup>

These principles, in so far as they affect the law of wills, are better illustrated by a discussion of the types of cases in which they are applied than by discussion of them in the abstract.

**§711. Election between dower and devise under the will, where testator intends devise to be in lieu of dower.**

The surviving husband or wife of a decedent is given by law certain rights in the real and personal property of such decedent. The right of dower at common law was a right to a surviving widow to a life interest in a third part of the real estate which her husband had owned by such title that her children by him might have inherited.<sup>9</sup>

Curtesy was the right of her husband to a life estate in the whole of his wife's real property which she owned by such title that a child born to that marriage might have inherited it, provided that a child had been born alive capable of inheriting the property.<sup>10</sup> These rights have been greatly modified by modern statute law. The nature and extent of these rights belong rather to real property than to the law of wills, and will not be considered here any further than it may be necessary to explain the application of the principles of election to these cases.

Where it is clear, either from specific provisions in a will, or from the will as a whole, that testator intends a provision for the surviving spouse to be in lieu of the curtesy or dower

<sup>7</sup> *Hainer v. Iowa Legion of Honor*, 78 Io. 245; *Welch v. Adams*, 152 Mass. 74; 9 L. R. A. 244; *Bird v. Hawkins* (N. J.), 42 Atl. 588; *Haack v. Weicken*, 118 N. Y. 67; *Jones v. Lloyd*, 33 O. S. 572; *Cunningham's Estate*, 137 Pa. St.

621; *Eichelberger's Estate*, 135 Pa. St. 160.

<sup>8</sup> *Leonard v. Haworth*, 171 Mass. 496.

<sup>9</sup> See Sec. 23 and Sec. 137.

<sup>10</sup> See Sec. 23 and Sec. 137.

rights of such surviving spouse full affect is given to such intention, and the surviving spouse must then elect between the two provisions.<sup>11</sup>

The intention to put the surviving spouse to an election between the dower interest and the provisions of the will may be by using express language, such as "in lieu of dower."<sup>12</sup>

Necessity of election may also be created by necessary implication from the context of the will, as where it is impossible to carry the provisions of the will into effect if both the property devised by the will and the dower interest are given to the surviving spouse. Such a will makes the case which exists wherever the doctrine of election becomes material; one, namely in which testator makes a gift to A, and also gives some right of A's to B, in which case A must elect whether to take under the will and allow B to take A's property or whether to repudiate the will and stand upon his own rights.<sup>13</sup>

Thus where all the real estate, except that devised to the widow, is specifically disposed of by the will in such way as to show testator's intention that it should pass free from her dower, it is sufficient to put her to her election.<sup>14</sup>

### §712. Common law rule that devise was presumed to be in addition to dower.

Where testator does not in his will either expressly or impliedly indicate whether the devise is given in addition to

<sup>11</sup> *Bennett v. Packer*, 70 Conn. 357; *Clark v. Clark*, 132 Ind. 25; *Von Phul v. Hay*, 122 Mo. 300; *Hovey v. Hovey*, 61 N. H. 599; *Cooper v. Cooper*, 56 N. J. Eq. 48; *Helme v. Strater*, 52 N. J. Eq. 591; *Griggs v. Veghte*, 47 N. J. Eq. 179; *Bannister v. Bannister*, 37 S. C. 529; *Stokes v. Norwood*, 44 S. C. 424.

<sup>12</sup> *Von Phul v. Hay*, 122 Mo. 300; *Brown v. Brown* 55 N. H. 106; *Stokes v. Norwood*, 44 S. C. 424.

<sup>13</sup> *Bennett v. Packer*, 70 Conn. 357; *Clark v. Clark*, 132 Ind. 25; *Hovey v. Hovey*, 61 N. H. 599; *Cooper v. Cooper*, 56 N. J. Eq. 48; *Helme v. Strater*, 52 N. J. Eq. 591; *Griggs v. Veghte*, 47 N. J. Eq. 179; *Cunningham's Estate*, 137 Pa. St. 621; *Bannister v. Bannister*, 37 S. Car. 529; *Callahan v. Robinson*, 30 S. Car. 249.

<sup>14</sup> *Cooper v. Cooper*, 56 N. J. Eq. 48; *Bannister v. Bannister*, 37 S. C. 529.

dower or in lieu of dower, it is necessarily an arbitrary rule of law that determines which of these two possible intentions it should be assumed that testator entertained. At the common law it is held that where testator's intention was not apparent upon the will, the devise would be presumed to be in addition to dower.<sup>15</sup>

The fact that testator in his will declared his intention to dispose of his entire estate does not prevent the application of this common law rule where the assignment of dower will not interfere with any provision of the will;<sup>16</sup> nor in a jurisdiction where dower is an estate in fee-simple does a devise to the widow for life, of testator's entire realty, show his intention to deprive her of the remainder in fee of one third of such realty.<sup>17</sup>

### §713. Statutory rule that devise is presumed to be in lieu of dower.

By statute this common law rule has been abridged in many states, and the opposite rule established, to the effect that a provision in a will for the benefit of the surviving spouse shall be presumed to be in lieu of dower or curtesy rights, unless it appears to be testator's intention that such provision shall be in addition to such rights.<sup>18</sup>

Under such a statute a devise to testator's widow is presumed to be in lieu of dower in any real estate which she might

<sup>15</sup> *Parker v. Hayden*, 84 Io. 493; *Herr v. Herr*, 90 Io. 538; *Richards v. Richards*, 90 Io. 606; *Bare v. Bare*, 91 Io. 143; *Sutherland v. Sutherland*, 102 Io. 535; *Proctor's Estate*, 103 Io. 232; *Hunter v. Hunter*, 95 Io. 728; 64 N. W. 656; *Watson v. Watson*, 98 Io. 132; 67 N. W. 83; *Frankes v. Weigand*, 66 N. Y. 918; *McGowan v. Baldwin*, 46 Minn. 477; *Cook v. Couch*, 100 Mo. 29; *Hiers v. Gooding*, 43

S. C. 428; *Hatch's Estate*, 62 Vt. 300.

<sup>16</sup> *Hatch's Estate*, 62 Vt. 300.

<sup>17</sup> *Proctor's Estate*, 103 Io. 232.

<sup>18</sup> *Stunz v. Stunz*, 131 Ill. 210; *Stone v. Vandermark*, 146 Ill. 312; *Warren v. Warren*, 148 Ill. 641; *Like v. Cooper*, 132 Ind. 391; *Huhlein v. Huhlein*, 87 Ky. 247; *Kelly v. Ball* (Ky.), 1892, 19 S. W. 581; *Luigart v. Ripley*, 19 O. S. 24; *Bolling v. Bolling*, 88 Va. 524.

claim, including real estate sold testator previous to his death, by deed in which the wife did not join.<sup>19</sup>

Since the statutes requiring written election are strictly construed, the statute may not require election if the widow seeks to claim dower in land conveyed by her husband before his death. Thus a statute requiring election between a devise by will and dower in land of which the husband "died seized," has been held not to apply to dower rights in land conveyed by the husband before his death, in which the widow did not release her dower right.<sup>20</sup>

In Virginia this rule does not apply to wills executed by testator domiciled in other jurisdictions. Accordingly, where, by the law of the jurisdictions of the domicile, a gift to a widow would *prima facie* be in addition to her dower, it will not bar her dower in Virginia.<sup>21</sup>

And a devise of the use of testator's real property to his widow until his son reaches majority, at which time testator's property is to be distributed, but in case testator's widow should remarry before such distribution, the executor of the estate was to collect the rents from the real estate and pay the widow only her dower interest therein, shows testator's intention to give to the widow, in addition to her dower rights therein, the use of the real estate until her second marriage, or until the son came of age.<sup>22</sup>

Even where this statute is in force a devise which necessarily includes dower, as an absolute devise of all testator's

<sup>19</sup> Sanders v. Wallace, 118 Ala. 418; Haynie v. Dickens, 68 Ill. 267; Warren v. Warren, 148 Ill. 641; Fairchild v. Marshall, 42 Minn. 14; Buffinton v. Fall River National Bank, 113 Mass. 246; Spalding v. Hershfield 15 Mont. 253; Nelson v. Brown, 144 N. Y. 384; Corry v. Lamb, 45 O. S. 203; Evans v. Pierson, 9 Rich. (S. Car.), 9. *Contra*, Borland v. Nichols, 12 Pa. St. 38; 51 Am. Dec. 576; Westbrook v. Vanderburgh, 36 Mich. 30.

So where the will devised certain

property to testator's widow in lieu of all her rights in testator's estate, and she elects to take under the will, she is estopped from suing to recover property conveyed away by her husband as being in fraud of her rights. Cooke v. Fidelity Trust, etc., Company (Ky.), 47 S. W. 325; 20 Ky. L. Rep. 667.

<sup>20</sup> Hall v. Smith, 103 Mo. 289.

<sup>21</sup> Bolling v. Bolling, 88 Va. 524.

<sup>22</sup> Kelly v. Ball (Ky.), (1892), 19 S. W. 581.

realty to his wife for her life, is presumed to be in addition to dower.<sup>23</sup> If, however, the devise does not necessarily include dower, as a devise of all realty to the wife during her widowhood, under the statute it is presumed to be in lieu of dower.<sup>24</sup>

#### §714. Election between life insurance and gifts under the will.

A testator frequently attempts by will to dispose of the proceeds of life insurance policies, payable to certain designated beneficiaries, and not subject to his disposition by will. In such a case if testator makes some other provision by his will for the beneficiaries under the life insurance policy, a case for election is created, and the beneficiaries under the will have their choice between taking the life insurance and accepting the benefits of the will, and their election of either waives their right to the other.<sup>25</sup> But if the policy is payable to one not a beneficiary no case for election arises. Thus, where the bequest was made to A, testator's grandson, and the policy was payable to B, testator's son, there was no necessity of election, even though B had died, since the policy was payable to B's administrator.<sup>26</sup> Testator's intention to dispose of a policy which belongs to another must appear clearly upon the will and can not be inferred from ambiguous expressions.<sup>27</sup>

#### §715. Election between community rights and gifts by will.

In some states a wife acquires a vested interest in a fraction, generally one-half, of all property accumulated by the

<sup>23</sup> *Baxter v. Bowyer*, 19 O. S. 490. Hence the widow who takes under the will is protected from the claims of her husband's creditors to the extent of her dower right.

<sup>24</sup> *Lingart v. Ripley*, 19 O. S. 24. If the widow takes under the will and then remarries, her dower is therefore lost.

<sup>25</sup> *Hainer v. Iowa Legion of Honor*, 78 Ia. 245; *Van Schaack v. Leonard*, 164 Ill. 602; *Hartwig v. Schiefer*, 147 Ind. 64.

<sup>26</sup> *Hartwig v. Schiefer*, 147 Ind. 64 (modifying on rehearing 42 N. E. 471).

<sup>27</sup> *Charch v. Charch*, 57 O. S. 561.

husband subsequent to marriage. If the husband in his will attempts to dispose of the entire ownership of the property thus accumulated, and in his will makes some provision for his wife, a case of election is created, and the wife may take the property given to her by the will, or may stand upon her rights as part owner of the community property.<sup>28</sup>

But where testator's will refers only to his own property rights, and does not attempt to dispose of those of the widow, no case for election is created.<sup>29</sup>

### §716. Election between homestead rights and gifts by will.

Under modern statutes property rights in real estate used as a residence or homestead are recognized and enforced. Where a homestead is treated as a peculiar form of property, a surviving widow is put to an election between the provisions of the will and her homestead rights only where the provisions of the will will be defeated, in whole, or in part, by setting off the homestead to her.<sup>30</sup> Thus a devise to widow, of testator's real estate,<sup>31</sup> or of "one-half of all I own,"<sup>32</sup> does not put the widow to her election between her homestead rights and the provisions of the will, where the remaining provisions of the will can be carried into effect after giving the widow both.<sup>33</sup> Nor does a devise to the widow of specific real

<sup>28</sup> *Smith's Estate*, 108 Cal. 115; *Smith v. Butler*, 85 Tex. 126; *Mayo v. Tudor*, 74 Tex. 471; *Chace v. Gregg*, Tex. Civ. App. (1895), 31 S. W. 76.

<sup>29</sup> *Haby v. Fuos*, — Tex. Civ. App. (1894), 25 S. W. 1121.

<sup>30</sup> *Helm v. Leggett*, 66 Ark. 23; *Stokes v. Pillow*, 64 Ark. 1; *Nichols v. Lancaster*, — Ky. —, 1896; 32 S. W. 676; *McGowan v. Baldwin*, 46 Minn. 477; *Schorr v. Etling*, 124 Mo. 42; *Konvalinka v. Schlegel*, 104 N. Y. 125; *Wells v. Congregational Church*, 63 Vt. 116; *Nelson v. Kownslar*, 79 Va. 468; *Lewis v. Lichty*, 3 Wash. 213.

<sup>31</sup> *Stokes v. Pillow*, 64 Ark. p. 1.

<sup>32</sup> *McGowan v. Baldwin*, 46 Minn. 477.

<sup>33</sup> (An apparent conflict which can possibly be reconciled has arisen on this point.

In *Stokes v. Pillow*, 64 Ark. 1, a devise of all of testator's real estate to his widow was held not to be inconsistent with her homestead right, so that by using the property she did not lose her homestead rights, and might subsequently assert them as against her husband's creditors.

In *Carr v. Carr*, 177 Ill. 454, it

property, and all of testator's mixed and personal property, followed by a provision that all the property of any kind which she may own at her death is to be equally divided between her heirs and the heirs of testator, show such intention to exclude her from the homestead and after-acquired real estate to put her to an election between the two.<sup>34</sup>

But where testator has so disposed of his property by will that some provision of the will will be defeated if the widow is given both the property devised to her by will and the homestead, the widow must elect between her rights under the homestead law and her rights under the will.<sup>35</sup>

### §717. Election between general property rights and devises by will.

While election generally arises in cases where testator has attempted to deprive his surviving spouse of dower, courtesy, community interests, homestead rights, or other estates or interests in property, growing out of the marriage relation, it may arise in any case where testator disposes of property by will to A, and gives A's property to B. Thus, a co-tenant in certain real estate by devising such real estate to some one other than his co-tenant, and then giving such co-tenant other property by will, puts co-tenant to an election between retaining his original interest in such real estate or accepting the benefits of the will.<sup>36</sup>

Such title is, however, an equitable title merely, and under the recording statutes can not be asserted against a *bona fide* purchaser or mortgagee who relies upon the state of the legal title as the same appears on the record.<sup>37</sup>

was held that the widow's acceptance under the will gave her an estate in property which differed from her prior homestead estate, in that it was not terminated by her abandoning it.)

The latter view was taken in *Nichols v. Lancaster* (Ky.) 1896, 32 S. W. 676.

<sup>34</sup> *Schorr v. Etling*, 124 Mo. 42.

<sup>35</sup> *Warren v. Warren*, 148 Ill.

641; *Carr v. Carr*, 177 Ill. 454; *Burgess v. Bowles*, 99 Mo. 543; *Wells v. Congregational Church*, 63 Vt. 116; *Blackmer's Estate*, 66 Vt. 46.

<sup>36</sup> *Brossenne v. Schmitt*, 91 Ky. 465; *Brown v. Brown*, 42 Minn. 270; *Ide v. Clark*, 5 Ohio C. C. 239; *Huston v. Cone*, 24 O. S. 11; *Hibbs v. Insurance Company*, 40 O. S. 543.

So a devise of property to the husband of testatrix, together with a devise after his death of her estate and his to their heirs in equal shares, makes it necessary for the husband to elect whether to retain his own property or to take under the will.<sup>38</sup>

Where a trustee bequeaths his own property to the *cestui que trust*, and bequeaths trust property to another, the *cestui que trust* must elect whether to assert the trust or take under the will.<sup>39</sup>

A provision that designated persons may purchase from testator's estate certain property at a designated price,<sup>40</sup> or a provision that the devisee of certain property shall care and provide for another,<sup>41</sup> creates a case for election.

But where the provisions of the will are not inconsistent with the assertion by the beneficiary of property interests in testator's estate, such beneficiary can not be put to an election between waiving his pre-existing interests in testator's estate and taking under the will.<sup>42</sup>

And the necessity for the election must appear upon the face of the will and can not be shown by any extrinsic evidence.<sup>43</sup> Thus a devisee of certain lands of testator may claim an interest in part or all of such land under a contract of sale with testator,<sup>44</sup> or under a deed from testator.<sup>45</sup>

And a son of testator whose debts to his father have been released by will may claim that certain land transferred by him to his father, by an instrument on its face, a deed, was in reality mortgaged to secure the debts which were released by

<sup>37</sup> Hibbs v. Insurance Company, 40 O. S. 543.

<sup>38</sup> Allen v. Boomer, 82 Wis. 364.

<sup>39</sup> Hyatt v. Vanneck, 82 Md. 465.

<sup>40</sup> Bayer v. Walsh, 166 Pa. St. 38; (in such a case if the beneficiaries elect to purchase the property they take under the will and not as vendees).

<sup>41</sup> Huhlein v. Huhlein, 87 Ky. 247.

<sup>42</sup> Sherman v. Lewis, 44 Minn.

107; Hitchcock v. Genesee Probate Judge, 99 Mich. 128; Tompkins v. Merriman, 155 Pa. St. 440; Beirne v. Beirne, 33 W. Va. 663.

<sup>43</sup> Sherman v. Lewis, 44 Minn. 107.

<sup>44</sup> Mills v. McCaustland, 105 Io. 187; Brownfield v. Brownfield, 151 Pa. St. 565.

<sup>45</sup> Hattersley v Bissett, 50 N. J. Eq. 577.



will, where such property is not specifically conveyed by the will.<sup>46</sup>

A bequest of the same amount as that provided for in an ante-nuptial contract, has been held to be in lieu of such ante-nuptial contract, and to put the widow to her election.<sup>47</sup>

But where the will gave much less than the ante-nuptial contract, and testator's estate had increased considerably after his marriage, the bequest was held to be in addition to the ante-nuptial contract, and the widow was not put to her election.<sup>48</sup>

### §718. Election to take property in specie free from power of sale.

Where a power of sale or conversion is given for the benefit of certain designated persons, such persons may, at their election, take the property in specie, where the rights of others will not be interfered with.<sup>49</sup> And where the executor, upon whom a discretionary power of sale was conferred, the proceeds to go to the children of testator, decided not to exercise such power, the children acquired such an interest in the property covered by the power that they might convey the same to one of their co-tenants.<sup>50</sup>

The control and management of the realty for three years after the death of testator, and the commencement of a partition suit, are not such acts as show an election to take free from the power of sale;<sup>51</sup> nor is an incomplete and unexecuted agreement between the beneficiaries to take the property without sale such election.<sup>52</sup>

<sup>46</sup> *Tompkins v. Merriman*, 155 Pa. St. 440.

<sup>47</sup> *Graves v. Mitchell*, 90 Wis. 306.

<sup>48</sup> *Taft v. Taft*, 163 Mass. 467.

<sup>49</sup> *People v. Lease*, 71 Ill. App. 380; *Bowen v. Swander*, 121 Ind. 164; *Mellen v. Mellen*, 139 N. Y.

210; *Huber v. Donoghue*, 49 N. J. Eq. 125.

<sup>50</sup> *Battersby v. Castor*, 181 Pa. St. 555.

<sup>51</sup> *Mellen v. Mellen*, 139 N. Y. 210.

<sup>52</sup> *Baldwin v. Vreeland*, 43 N. J. Eq. 446.

### §719. Who may elect.

The right of election is ordinarily purely a personal right, and can be exercised only by the party entitled thereto in person. A widow's right of election can not be exercised after her death by her personal representatives or her heirs.<sup>53</sup>

Thus, where a father had, under a will, the right to take certain property as realty, or to take the proceeds thereof, it was held that where he did not exercise such right during his lifetime his legatee can not exercise it.<sup>54</sup> Nor can a creditor of the beneficiary elect for him, as by levy and sale of property.<sup>55</sup>

Under special circumstances, however, the right of election has been exercised by others than the beneficiary to whom it primarily belonged. As for instance, where such beneficiary is mentally incapable of making such election, it is usually provided that his guardian may elect for him, subject to the approval of the court appointing such guardian, or that such court itself may elect.<sup>56</sup>

Where guardian, who was also executor, petitioned the court for direction in making election for his ward, was advised to act as if he were not executor, and at once elected not to take under the will, it was held that this was a sufficient approval of such election by the court, and omission to record such approval formally might be supplied by a *nunc pro tunc* order.<sup>57</sup>

Where one who had a right of election to purchase certain real estate at a designated price, and orally expressed his in-

<sup>53</sup> Foshier v. Guilliams, 120 Ind. 172; Penhallow v. Kimball, 61 N. H. 596; Page v. Eldredge Public Library Association (N. H.), 45 Atl. 411; Millikin v. Welliver, 37 O. S. 460; Anderson's Estate, 185 Pa. St. 179; Church v. McLaren, 85 Wis. 122.

<sup>54</sup> Howell v. Craft, — N. J. — (1894); 27 Atl. 485. (In this case, however, the right of election had been exercised to some extent by

the original legatee in his lifetime. It was held that his executors could not change such election by their own acts.)

<sup>55</sup> Cunningham v. Simpson, 1 Cincinnati L. B. (Ohio), 173; so Carter v. Harvey (Miss.), 25 So. 862.

<sup>56</sup> Bassett v. Durfee, 87 Mich. 167; Penhallow v. Kimball, 61 N. H. 596.

<sup>57</sup> Bassett v. Durfee, 87 Mich. 167.

tention to take such purchase, but did not make formal election by reason in part of continued ill health, it was held that his children might elect upon his death.<sup>58</sup> Where by accident the will was concealed during the life of the widow, and she had no opportunity for election, a court of election has exercised the right of election for her after her death.<sup>59</sup>

This result is reached occasionally by a somewhat different reasoning. It is expressed by saying that the person having the right of election, who dies before making any election in fact, will be presumed to have elected the more valuable right, where one is clearly more valuable than the other.<sup>60</sup>

Where by reason of the incapacity of the beneficiaries to make election, the court elects for them, the court will look only to the benefit of those who are incapacitated to make the election, and will not consider what election will be beneficial to other parties in interest.<sup>61</sup> A right of election which may be exercised by the option of several can not be exercised by the concurrence of any less than that number.<sup>62</sup> Thus, where the will provides for the conversion of certain real estate into money for the benefit of certain designated persons, the court will not allow any number less than all of the whole to take such property as real estate.<sup>63</sup> A gift to be divided among several conferring separate and distinct interests may be accepted or rejected by each individual separate from the others.<sup>64</sup>

## §720. How election is effected at common law.

In the absence of a statute requiring the filing of a written election, and making such a mode of election exclusive, it is well settled that a party who has right of election, may ex-

<sup>58</sup> *Parker v. Seeley*, 56 N. J. Eq. 110.

<sup>59</sup> *Spruance v. Darlington*, 7 Del. Eq. 111 (1895), 30 Atl. 663.

<sup>60</sup> *Merrill v. Emery*, 10 Pick. Mass. 507; *Yawger v. Yawger*, 10 Stew. Eq. 216.

<sup>61</sup> *Spruance v. Darlington*, 7 Del. Eq. 111 (1895), 30 Atl. 663.

<sup>62</sup> *Brown v. Miller*, 45 W. Va. 211.

<sup>63</sup> *Howell v. Craft*, — N. J. Eq. (1894), 27 Atl. 485; *Brown v. Miller*, 45 W. Va. 211.

<sup>64</sup> *Webster v. Wiggin*, 19 R. I. 73; 28 L. R. A. 510.

ercise such right as well by his conduct as by any written election filed in the proper court.<sup>65</sup> What facts and what conduct constitute an election is, however, a question upon which there is considerable diversity of judicial opinion.<sup>66</sup>

Where the beneficiary attempts to retain and enforce both inconsistent rights, such conduct does not operate as an election of either.<sup>67</sup> But where his conduct is such as is inconsistent with the assertion of one of the two conflicting rights he is held to have thereby made an election to take the other.<sup>68</sup> The question of what conduct is inconsistent with one of the conflicting rights is taken up in detail in the following sections.

### §721. Effect of qualifying as executor.

In some jurisdictions it is said that one who offers a will for probate and qualifies as executor has thereby elected to take under the will; and that such acts are so final and definite an election that he can not claim any interests in opposition to the will.<sup>69</sup> Where qualification as executor operates as election the reason given for the doctrine is that the executor takes oath to execute the provisions of the will, and thereby renders it impossible for him to elect to take in opposition to its provisions.<sup>70</sup> In some states this doctrine is entirely repudiated, and the acts of causing a will to be probated and qualifying as executor do not constitute an election.<sup>71</sup>

<sup>65</sup> *Cunningham's Estate*, 137 Pa. St. 621.

<sup>66</sup> In *Defreese v. Lake*, 109 Mich. 415; 32 L. R. A. 744, it was said to be a question of fact whether an occupant of property had taken possession of the property under a devise or under a tax deed.

<sup>67</sup> *Huston v. Cone*, 24 O. S. 11.

<sup>68</sup> *Nimmons v. Westfall*, 33 O. S. 213; *Cunningham's Estate*, 137 Pa. St. 621.

<sup>69</sup> *Stone v. Vandermark*, 146 Ill.

312; *Allen v. Allen*, 121 N. Car. 328; *Mendenhall v. Mendenhall*, 8 Jones, 287; *Syme v. Badger*, 92 N. Car. 706; *Allen v. Boomer*, 82 Wis. 364.

<sup>70</sup> *Allen v. Allen*, 121 N. Car. 328.

<sup>71</sup> *In re Atkinson* (1898), 1 Ch. 637; 67 L. J. Ch. N. S. 349; 78 Law T. Rep. 317; *Proctor's Estate*, 103 Io. 232; *Haby v. Fuos*, Tex. Civ. App. 1894; 25 S. W. 1121.

### §722. Taking part in litigation.

One who acts in litigation over the subject matter, claiming title thereto under the will, is held to make his election thereby to take under the will and to waive rights inconsistent therewith.<sup>72</sup> Where the part taken in litigation is such as to show clearly that no election is intended, the court will not arbitrarily treat such conduct as an election.<sup>73</sup>

An election may also be shown by the report of the executor, who is also the beneficiary to exercise the election, recommending a disposition of testator's property, which necessarily involves the enforcement of all of the provisions of the will.<sup>74</sup>

### §723. Election by taking possession of property.

Where the beneficiary has no right to the possession and occupation of certain property, except by virtue of the provisions of testator's will, his conduct, in entering into possession of such property and using and occupying it as his own,

<sup>72</sup> *Hunkypillar v. Harrison*, 59 Ark. 453. (The election was held in this case to be made by filing an answer in a suit to set aside a conveyance of real estate by testatrix, claiming title to such real estate as her devisee and receiving the proceeds of such suit without accounting therefor.) *Gullett v. Farley*, 164 Ill. 566; *Davis v. Badlam*, 165 Mass. 248; (election effected by appealing as devisee from an award for damages for taking the realty devised under proceedings in eminent domain). *Smith v. Butler*, 85 Tex. 126; (election effected by applying to have the property delivered to the custody of such person as beneficiary). In *Gullett v. Farley*, 164 Ill. 566, the court said that filing a bill for partition as devisee was "the very best and most notorious election."

<sup>73</sup> *Carpenter v. Strange*, 141 U. S. 87. (Where testator devised to *cestui que trust* a tract of land upon condition that she renounce all claims upon his estate for the trust funds, and the *cestui que trust* brought suit against testatrix to have the land devised declared to be hers free from any condition, and to have other property of testator subjected to the trust, it was held that such act did not amount to an election.)

<sup>74</sup> *Craig v. Conover*, 80 Io. 355. (So an executor's report which shows that the property disposed of by will was surrendered by the grantee of the widow, may be used to show the election of such widow to take under the will.) *Pellizzarro v. Reppert*, 83 Io. 497.

will be held to be a sufficient indication of his purpose to take under the will to constitute an election.<sup>75</sup>

Where the beneficiary has subsequently sold such property,<sup>76</sup> or leased such property,<sup>77</sup> such conduct still more clearly shows an election. An election may also be made by a refusal to occupy the property given by will, especially where such occupancy is made a condition to the enjoyment of the devise.<sup>78</sup> Where, however, the occupancy of the property by the beneficiary is not necessarily referable to the will, but may be referred as well to his pre-existing title, such occupancy will not constitute an election either to take under the will<sup>79</sup> or against it.<sup>80</sup> So the receipt of property not disposed of by will, which the recipient would have taken if testator had died intestate, is not an election to take under the will.<sup>81</sup>

Where different pieces of property are given to one by will, his acceptance of one does not bind him to accept the others. Hence, where testator gave a legacy to A without restriction, and some realty charged with the payment of legacies to others, A's acceptance of the legacy was not an election to take the realty and pay the legacies.<sup>82</sup>

<sup>75</sup> *Smith's Estate*, 108 Cal. 115; *Bennett v. Packer*, 70 Conn. 357; (property used and enjoyed for ten years). *Fry v. Morrison*, 159 Ill. 244; (property used for six years). *Wilson v. Wilson*, 145 Ind. 659; (property used for ten years). *Davidson v. Davis*, 86 Mo. 440; *Hovey v. Hovey*, 61 N. H. 599; (property used for nine years). *Hill v. Hill*, 62 N. J. L. 442; *Davison v. Davison*, 15 N. J. L. 235; *Baxter v. Bowyer*, 19 O. S. 490; *Cannon v. Apperson*, 14 Lea, 553; (property used for twelve years). *Chace v. Gregg*, 88 Tex. 552; *Meech v. Meech*, 37 Vt. 414; *Wells v. Congregational Church*, 63 Vt. 116; *Drake v. Wild*, 70 Vt. 52; (property occupied for thirteen years).

<sup>76</sup> *Smith's Estate*, 108 Cal. 115; *Chace v. Griggs*, 8 Tex. 552.

<sup>77</sup> *Wilson v. Wilson*, 145 Ind. 659.

<sup>78</sup> *Grindem v. Grindem*, 89 Io. 295.

Such conduct was held to be an election to take a designated sum of money which was given as an alternative to the homestead.

<sup>79</sup> *Smith's Estate*, 108 Cal. 115; *Hunter v. Hunter*, 95 Io. 728; 64 N. W. 566; *Mayo v. Tudor*, 74 Tex. 471.

<sup>80</sup> *Frankes v. Wiegand*, 97 Io. 704; 66 N. W. 918; *Mellon v. Mellon*, 139 N. Y. 210.

<sup>81</sup> *Pryor v. Pendleton*, 92 Tex. 384; (not affected on this point by reversal on rehearing); 49 S. W. 212; *Williams v. Emberson* (Tex. Civ. App.), 55 S. W. 595; see Sec. 326.

<sup>82</sup> *Collett v. Cook*, 3 Ohio C. C. 119.

### §724. Receipt of money as election.

A receipt of money given by a will may be unquestionably an election where such money is retained and where its payment can be referred only to the provisions of the will.<sup>83</sup> But a payment of money which might as well be referred to some other obligation,<sup>84</sup> or to a gift,<sup>85</sup> will not, of itself, constitute an election to take under the will. It is even held that the mere receipt of money paid as a legacy does not constitute an election, since the party receiving the money may, by repaying the same, put all parties in interest in *statu quo*.<sup>86</sup> And where a widow accepted from one who was named as executor, but not qualified as such, his promissory note for a legacy which was given in the will in lieu of her dower, it was held that this did not amount to such an election as to prevent her from claiming her dower if she did not receive the legacy.<sup>87</sup> Acquiescence in the sale of realty in accordance with the provisions of the will operates as an election.<sup>88</sup>

### §725. Effect of election.—Where election not necessary.

It sometimes happens that through a misapprehension as to the legal rights of the parties in interest some party who is entitled to two or more distinct rights will think that he is bound to elect between them, and will, accordingly, make a statutory or a common law election. In such a case, where no *bona fide* purchaser has been misled by such conduct, the

<sup>83</sup> *Martien v. Norris*, 91 Mo. 465; *Bryant v. McCune*, 49 Mo. 546.

<sup>84</sup> *Thorne v. Thorne* (1893), 3 Ch. 196.

<sup>85</sup> *May v. Jons*, 87 Io. 188. (A will was executed giving a legacy to the husband of testatrix. Before the execution of the will, testatrix gave her husband a check for the same amount as the legacy. The check was not presented for payment until after the execution

of the will. It was held that the conduct of the husband in accepting the check and presenting it for payment did not amount to an election to take under the will.)

<sup>86</sup> *English v. English*, 3 N. J. Eq. 504; *Young v. Young*, 51 N. J. Eq. 491.

<sup>87</sup> *Hill v. Hill*, 88 Ga. 612.

<sup>88</sup> *Cunningham's Estate*, 137 Pa. St. 621.

election to take one of these rights will have no effect as a renunciation of the other.<sup>89</sup>

This doctrine rests upon the obvious reason that even an express promise on the part of the person assuming to make such election to waive all of his property rights except such as he elects to take, would be without consideration, and void. There is nothing in the conduct of the parties to affect a transfer title directly; and where no innocent third person has acted in reliance upon such conduct there is no ground for alleging an estoppel.

### §726. Where election necessary.

In cases where inconsistent rights vest in a designated person, and the doctrine of election applies, the effect of such election upon the part of such person to take a specified right operates as a renunciation of the inconsistent right, and is a bar to any subsequent assertion of any legal right inconsistent therewith.<sup>90</sup>

A partial election is of course an impossibility; that is, the beneficiary can not accept in part the benefits of the will

<sup>89</sup> *Richards v. Richards*, 90 Io. 606; *Baldwin v. Hill*, 97 Io. 586; 66 N. W. 89; *Hall v. Smith*, 103 Mo. 289; *Sumerel v. Sumerel*, 34 S. Car. 85.

<sup>90</sup> *Baldwin v. Hill*, 97 Io. 586; 66 N. W. 889; *Huhlein v. Huhlein*, 87 Ky. 247; *Brossenne v. Schmitt*, 91 Ky. 465; *Knight v. Mahoney*, 152 Mass. 523; 9 L. R. A. 573; *In re Smith*, 60 Mich. 136; *Brown v. Brown*, 42 Minn. 270; *Fairchild v. Marshall*, 42 Minn. 14; *In re Marchemer's Estate*, 140 Pa. St. 544; *Colvert v. Wood*, 93 Tenn. 454. Thus where testator devised land to his wife, and gave by will to another an insurance policy payable to his wife, it was held that her acceptance of the devise precluded her from collecting the policy. *Huhlein v. Huhlein*, 87 Ky.

247; and where the widow elects to take a provision in lieu of dower, it bars her right to enforce dower in property which her husband had disposed of by warrant deed during coverture, although of course such property was not conveyed by will. *Fairchild v. Marshall*, 42 Minn. 14; nor can a widow to whom several pieces of property are given by will, one of which was stated to be in lieu of dower, take her dower and the pieces of property given her by the will other than the one which was expressly stated to be in lieu of dower. *In re Smith*, 60 Mich. 136. So where a husband accepts under his wife's will, he is barred of rights of courtesy inconsistent with such will. *Weller v. Noffsinger*, 57 Neb. 455.



and in part retain inconsistent rights.<sup>91</sup> Thus, a widow can not take under the will as to the real property and reject the will as to personal property;<sup>92</sup> nor reject the will as to testator's own property and take under it as to property over which he had power of appointment.<sup>93</sup> But the complicated question presented in discussing the effect of election really involves the same principle as that of the necessity of election; that is, whether the several rights are so inconsistent that the claims can not be all insisted upon.

**§727. Full knowledge of rights necessary in common law election.—Right to revoke election.**

In a common law election the party whose acts and conduct are relied upon as an election binds himself only when he acts with adequate knowledge of his rights and the surrounding circumstances which modify and effect their value.<sup>94</sup>

"Nothing but unequivocal acts will prove an election, and they must be done with knowledge of the party's rights as well as of the circumstances of the case."<sup>95</sup>

One who has elected without full knowledge of the material facts may subsequently change his original intention and alter his election unless the situation has so changed that this can not be done without prejudice to the subsequently acquired rights of others.<sup>96</sup>

Where an election is made at common law under a mistake of fact it may be revoked "unless the situation has so changed since her election that it can not be done without prejudice

<sup>91</sup> *Codrington v. Lindsay*, L. R., 8 Ch. App. 578; *Bristow v. Warde*, 2 Ves. Jr. 336; *Cooper v. Cooper*, L. R. 7 Eng. & Io. A. C. 53; *Herbert v. Wren*, 7 Cranch (U. S.), 370; *Schley v. Collis* (U. S. C. C.) Ga. 47 Fed. Rep. 250; 13 L. R. A. 567; *In re Smith*, 60 Mich. 136; *Farnum v. Bryant*, 34 N. H. 9; *Allen v. Boomer*, 82 Wis. 364.

<sup>92</sup> *Bloss's Estate*, 114 Mich. 204.

<sup>93</sup> *Fiske v. Fiske* 173 Mass. 413.

<sup>94</sup> *Clark v. Hershy*, 52 Ark. 473; *Goodrum v. Goodrum*, 56 Ark. 532; *Spangler v. Dukes*, 39 O. S. 642; *Medill v. Snyder* (Kan.), 58 Pac. 962; *Geiger v. Geiger* (S. C.) (1900), 35 S. E. 1031.

<sup>95</sup> *Woodburn's Estate*, 138 Pa. St. 606; so *Bierer's Appeal*, 92 Pa. St. 266; *Cox v. Rogers*, 77 Pa. St. 160.

<sup>96</sup> *Wake v. Wake*, 1 Ves. Jr. 335; *Hill v. Hill*, 62 N. J. L. 442; *Young v. Young*, 51 N. J. Eq. 491.

to the subsequently acquired rights of others."<sup>97</sup> Where, however, property is accepted under the will the person receiving it is bound to show that he did so under a mistake of fact. In the absence of such explanation his conduct amounts to an election.<sup>98</sup> In order, however, to change an election once made the other parties in interest may be placed in *statu quo*. This can be done either by returning the property or by making adequate compensation therefor.<sup>99</sup>

In jurisdictions where formal written election is not required by statute the filing of a written election is only valuable as preserving evidence of the fact of the common law election; and a beneficiary who signs such an election under a misapprehension of facts may alter such election.<sup>100</sup> Where, however, a beneficiary receives and retains property given by the will, without any explanation of his conduct in so doing, it is treated as a final election.<sup>101</sup> Mere delay in inquiring into one's rights does not amount to a final election, at least where a valid excuse can be shown for such a delay.<sup>102</sup>

#### §728. Statutory election.—When necessary.

In many states the method of election between rights of dower or curtesy and rights given by the will of a deceased spouse is controlled largely by statute. These statutes are usually held to require an election only in cases when by the prin-

<sup>97</sup> *Macknet v. Macknet*, 29 N. J. Eq. 54, quoted in *Hill v. Hill*, 62 N. J. L. 442.

<sup>98</sup> *Davison v. Davison*, 15 N. J. L. 235.

<sup>99</sup> *Young v. Young*, 51 N. J. Eq. 491; (in this case the court said in speaking of the beneficiary who wished to change his election: "He is permitted, after having claimed under the will, to claim against the will if out of the claim against the will he will make compensation for what he has claimed under the will.")

<sup>100</sup> *Bradford v. Kents*, 43 Pa. St. 474; *Kennedy v. Johnston*, 65 Pa.

St. 451; *Cunningham's Estate*, 137 Pa. St. 621; *Woodburn's Estate*, 138 Pa. St. 606; (in this case there was no fraud or misrepresentation of any kind, the parties in interest being equally ignorant of their respective rights. The widow was held not to be bound by her written election made in ignorance of such facts).

<sup>101</sup> *Hill v. Hill*, 62 N. J. L. 442.

<sup>102</sup> *Clark v. Hershey*, 52 Ark. 473; (delay in this case was caused by the Civil War in consequence of which the courts were closed and the husband of devisee fled from his home).

ciples of equity an election is necessary; that is, when the devisee is required to choose between rights given by the will and inconsistent rights by the law.<sup>103</sup>

A question occasionally discussed, but not settled by decisions of courts of last resort, arises under the peculiar wording of some of the statutes on the subject of election. By the terms of some of these statutes a widow or widower for whom "any provision" is made by the will is required to elect whether to take under the will or under the law. Does such a provision make election necessary where the will gives rights in addition to those given by the law, and not in lieu of them? The literal wording of such statutes seems to require a written election in any case, although an election to take both the rights given by the will and those given by the law is an absurdity upon its face. Of course in the absence of statute, equity did not recognize the doctrine of election as applying to such a case.<sup>104</sup> So the New Jersey statute, requiring written election, does not apply where the devise is to one in trust for the widow.<sup>105</sup>

#### §729. At what time statutory election must be made.

The statutes which require written election generally require that a notice or citation issue to the person upon whom the duty to make the election is cast; and the time within which the election is made runs from the service of the citation.<sup>106</sup>

In some states the time within which the written election is to be made runs from the death of testator or admission of the will to probate, the surviving spouse being required to take notice of the necessity for election without any citation.<sup>107</sup>

<sup>103</sup> *Burgess v. Bowles*, 99 Mo. 543.

<sup>104</sup> In *Hall v. Smith*, 103 Mo. 289, it was said that if the will showed testator's intention to give property in addition to dower, no election is necessary. In this case, however, written election was unnecessary for other reasons. *Pemberton v. Pemberton*, 29 Mo. 408.

<sup>105</sup> *Hill v. Hill*, 62 N. J. L. 442; *Van Arsdale v. Van Arsdale*, 26 N. J. L. 404.

<sup>106</sup> *Whited v. Pearson*, 90 Io. 48, 756 (and) 87 Io. 513; *Bowen v. Bowen*, 34 O. S. 164; (the refusal of the widow to elect does not waive the issuing and service of the citation; *Bowen v. Bowen*). *Spren v. Sandman*, 2 Ohio C. C. 441.

<sup>107</sup> *Akin v. Kellogg*, 119 N. Y. 441.

A written election to take under the will or to take under the law must be filed by the party upon whom the duty of election is cast within the time limited by statute. The effect of the failure of such an election depends, of course, upon the statutory provisions. Under perhaps a majority of the statutes a failure to file a written renunciation of the provisions of the will and election to take dower operates as a waiver of dower and an election to take under the will.<sup>108</sup>

Under other statutes a failure to file a written election to take under the will is a waiver of rights under the will and an election to take the rights given by the law.<sup>109</sup>

### §730. What is "filing" under statutes.

Under these statutes the written election is required to be filed with some designated court or official, usually with the court of probate powers before which the estate is being administered. An execution of renunciation in writing has no legal effect without actual filing.<sup>110</sup>

Where such renunciation is not in fact filed, attaching it to a pleading as an exhibit is not a compliance with the statute,<sup>111</sup> nor is the act of depositing it in a post-office, sealed, stamped and properly addressed to the probate judge a sufficient filing, where such written election was not in fact received and filed by the probate judge.<sup>112</sup>

<sup>108</sup> *Sanders v. Wallace*, 118 Ala. 418; *Cribben v. Cribben*, 136 Ill. 609; *Warren v. Warren*, 148 Ill. 641; *Fosher v. Williams*, 120 Ind. 172; *Draper v. Morris*, 137 Ind. 169; *Archibald v. Long*, 144 Ind. 451; (1896) 43 N. E. 439; *Morse v. Hayden*, 82 Me. 227; *Chadwick v. Tatem*, 9 Mont. 354; *Bassett v. Duffee*, 87 Mich. 167; *Jones's Estate*, 75 Minn. 53; *Cooper v. Cooper*, 56 N. J. Eq. 48; *McGlaughlin v. McGlaughlin*, 43 W. Va. 223. Even under such statutes it has been held, however, that the widow may withhold her election until a suit by which her husband's interests

in certain realty were determined, where such suit was pending at his death, even though the time of making election is thereby postponed beyond that fixed by statute. *Tracy's Estate (Minn.)* (1900) 82 N. W. 635.

<sup>109</sup> *Everett v. Croskery*, 92 Io. 333; *Stilley v. Folger*, 14 O. 610.

<sup>110</sup> *Draper v. Morris*, 137 Ind. 169; *Allen v. Harnett*, 116 Mo. 278; *Church v. McLaren*, 85 Wis. 122.

<sup>111</sup> *Draper v. Morris*, 137 Ind. 169.

<sup>112</sup> *Allen v. Harnett*, 116 Mo. 278.

**§731. Can a written election be revoked?**

After a surviving spouse has filed a written election, either to take under the will or to take under the law, can such an election be withdrawn before it is acted upon, or is the mere act of the filing conclusive? Upon this subject there is some difference of judicial opinion, chiefly owing to the language of the different statutes. The written election can certainly not be withdrawn without an order of the court before which it was filed.<sup>113</sup>

In some jurisdictions it is held that such an election may be withdrawn by order of the court before which it was filed upon showing good reason therefor, if the application is made before the election has been so acted upon as to estop the party electing from withdrawing such an election.<sup>114</sup>

Where this view of the right of the party electing to withdraw the election is entertained, the question of what is a good ground for withdrawing is quite important. In some states false statements as to the effect and consequences of election made by parties interested adversely to the widow, are held to be less sufficient reasons for permitting her to withdraw her election.<sup>115</sup>

In other states such false statements are not treated as sufficient grounds for allowing an election to be withdrawn, especially where the party electing made no effort to assert her rights from independent sources.<sup>116</sup>

In other jurisdictions the election is a finality, and after it is once made and entered upon the journal of the court, cannot be withdrawn.<sup>117</sup>

<sup>113</sup> *Coles v. Terrell*, 162 Ill. 167.

<sup>114</sup> *Garn v. Garn*, 135 Ind. 687;  
*Dudley v. Pigg*, 149 Ind. 363.

<sup>115</sup> *Garn v. Garn*, 135 Ind. 687.

<sup>116</sup> *Akin v. Kellogg*, 119 N. Y. 441.

<sup>117</sup> *Davis v. Davis*, 11 O. S. 386.  
(In this case application was made to the judge of probate powers before the time within which the widow might have made election had

expired. The court held that the probate judge rightly refused to entertain the right of application which was made upon the ground of mistake, intimating that such relief could be had only in a court of equity powers, and that, if sufficient circumstances of fraud or mistake should be shown to exist such court might order the entry of election to be cancelled, even

### §732. Estoppel to deny written election.

Even where the election is required to be in writing the parties interested may estop themselves from denying that such election was properly made, by conduct inconsistent with the absence of a proper election.<sup>118</sup> Thus where a party upon whom the duty of election devolves takes possession of the property given by will and enjoys the same in accordance with the terms of the will and inconsistent with any other claim such party is conclusively bound by his election in fact, and can not take advantage of the fact that no written election was filed,<sup>119</sup> nor can others who have acquiesced in such enjoyment deny that election has in fact been made.<sup>120</sup> But enjoyment of realty devised within the time allowed by law for an election does not work an estoppel,<sup>121</sup> nor does other conduct not inconsistent with a subsequent election operate as an estoppel.<sup>122</sup>

### §733. Effect of election upon rights as heir.

Under modern statutes of descent and distribution a surviving spouse is often an heir in case there are no children of decedent or descendants of such children. Where such statutes are in force, an election to take the dower or to take under the will does not affect the rights of the party electing, as heir to property undisposed of by the will.<sup>123</sup>

after the time limited for the original election had expired, provided that new interests had not intervened.)

<sup>118</sup> Rowley v. Sanns, 141 Ind. 179; Franke v. Weigand, 97 Io. 704; 66 N. W. 918; Reville v. Dubach, 60 Kan. 572; Watson v. Watson, 128 Mass. 152; Thompson v. Hoop, 6 O. S. 480; Stockton v. Wooley, 20 O. S. 184; Spreen v. Sandman, 2 Ohio C. C. 441.

<sup>119</sup> Franke v. Weigand, 97 Ia. 704; 66 N. W. 418; Nimmons v. Westfall, 33 O. S. 213; Baxter v. Bowyer, 19 O. S. 490.

<sup>120</sup> Stockton v. Wooley, 20 O. S. 184.

<sup>121</sup> Millikin v. Welliver, 37 O. S. 460.

<sup>122</sup> Kunnen v. Zurline, 2 C. S. C. R. (Ohio), 440; Cameron v. Cameron, Goebel (Ohio), 157.

<sup>123</sup> Sutton v. Reid, 176 Ill. 69; Collins v. Collins, 126 Ind. 559, 564; Wall v. Dickens, 66 Miss. 655; Bane v. Wick, 14 O. S. 505; Carder v. Fayette County, 16 O. S. 353; Alexander v. Mendenhall, 32 O. L. J. 173; 1 O. Dec. 655.

### §734. Effect of election upon rights to allowance.

In some states the statutes providing for the settlement of decedent's estate give the widow as an allowance for temporary support a sum of money either fixed by statute or to be ascertained by the appraisers. Where such right is given, it is not waived by an election between the provisions of the will and the right of dower, unless the will is in its terms either expressly or impliedly inconsistent with the granting of such right.<sup>124</sup> But where such an allowance will defeat the provisions of the will, as where the entire estate is specifically disposed of, it was held that her election to take under the will is a waiver of her right to this fixed allowance.<sup>125</sup>

### §735. Effect of accepting a provision in lieu of dower upon the right to a distributive share in personalty.

Where the will provides that a certain bequest is in lieu of dower, and it is clear from the context that the word "dower" is used in its technical sense, and refers exclusively to the widow's life estate in testator's realty, the acceptance of such a bequest does not preclude the widow from asserting her right to the distributive share of testator's personal property.<sup>126</sup> The word "dower," however, is popularly used with reference both to the life interest in realty and to the distributive share of personalty. Unless it clearly appears from the will that the technical use was employed, a gift by will is assumed to be in lieu of the interest of the surviving spouse in both the real and personal estate of testator, and an election to take under the will bars the rights of such spouse both as to realty and as to personalty.<sup>127</sup>

<sup>124</sup> *Shipman v. Keyes*, 127 Ind. 353; *Pierce v. Pierce*, 21 Ind. App. 184; *Whisnand v. Fee*, 21 Ind. App. 270; *Richards v. Hollis*, 8 Ind. App. 353; *Collier v. Collier*, 3 O. S. 369.

<sup>125</sup> *Shaffer v. Shaffer*, 129 Ind. 394; *McDonald v. Moak* (Ind. App.) (1900), 57 N. E. 159.

<sup>126</sup> *Nelson v. Pomeroy*, 64 Conn. 257. (The right was upheld in this case only as to personal property of which testator died intestate.)

<sup>127</sup> *Schwatken v. Daudt*, 53 Mo. App. 1; *In re Smith's Estate*, 60 Mich 136; *Hazard v. Hazard*, 19 R. I. 374; 34 A. 150.

**§736. Effect of election upon rights of dower in intestate property.**

Whether a surviving spouse who accepts a gift in lieu of dower is barred from asserting an interest in the nature of dower or curtesy, or a right to distributive share of personal property in the whole of testator's estate, or only that part of which testator makes disposition by will, is a question upon which there seems to be some divergence of judicial opinion. The question becomes a practical one of course only when testator dies intestate as to some portion of his real or personal property. The question in such a case is, can dower be asserted in such intestate property? In some jurisdictions, aided in part by the provisions of the will under discussion, the courts have held that the surviving spouse is not excluded from a distributive share in personal property.<sup>128</sup> In other jurisdictions, however, it is held that a devise, if clearly in lieu of dower and distributive share of personalty, is a bar to the assertion of such rights not only in the property disposed of by will, but in the entire estate of testator, including his intestate property.<sup>129</sup>

**§737. Effect of election upon estates dependent upon interest given by will.**

When testator by will gives to his surviving spouse a particular estate in property which is either expressly or impliedly in lieu of dower and gives to other beneficiaries remainders

<sup>128</sup> *Pickering v. Stamford*, 3 Ves. 355; *Nelson v. Pomeroy*, 64 Conn. 257; *Pinckney v. Pinckney*, 1 Brad. (N. Y.) 269; *McDonald's Estate*, 2 Ohio N. S. 232; 4 Ohio Dec. 396.

<sup>129</sup> *Leake v. Watson*, 60 Conn. 498; *In re Benson*, 96 N. Y. 499; *Lee v. Tower*, 124 N. Y. 370; *In re Hodgman*, 140 N. Y. 421, affirming 69 Hun, 484; *Swihart v. Swihart*, 7 O. C. C. 338; (the Connecticut cases cited in the last two notes are in no sense inconsistent with each other); *Leake v. Watson*, 60

Conn. 498, establishing the general Connecticut rule, and *Nelson v. Pomeroy*, 64 Conn. 257, being a case where testator evidently intended only to bar the dower in real estate; and it was accordingly held that the rights of his widow in his intestate personalty were unaffected.

The Ohio cases are, however, in absolute conflict; *McDonald's Estate*, 2 O. N. S. 232, expressly refusing to follow *Swihart v. Swihart*, 7 O. C. C. 338.



in such property dependent upon the determination of the particular estate given to the spouse, election of such spouse to take under the law and not under the will prevents a literal execution of the provisions of the will. The question, then, presented for judicial determination, is what is the effect of such election upon the rights of the remainder men?

Where the enjoyment of possession by such remainder men is postponed until after the determination of the particular estate of the widow, solely for the benefit of such widow and for no other purpose, the election of the widow to take under the law accelerates the remainders, and the beneficiaries enter into enjoyment at once.<sup>130</sup> The fact that the will contains a provision that the heirs of any legatee who may be dead at the time of the decease of the wife shall take the legacy bequeathed to such legatee does not prevent distribution of the legacies at once, in case the widow elects not to take under the will.<sup>131</sup> Where a trust is created for the life of the widow for the benefit of the widow and the children, and upon her death it is to be paid to the children as they become of age or marry, it is held that the refusal of the widow to take under the will was for purposes of distribution equivalent to her death; for, although the trust was created for the benefit of others than the widow, such others were the remainder men.<sup>132</sup> But where a trust is created for the benefit of the widow and others, her share to be in lieu of dower, it is held that her election not to take under the will does not defeat the operation of the trust for the benefit of other parties in interest.<sup>133</sup> So where the remainder is created in such terms that the class of beneficiaries

<sup>130</sup> Rawling's Estate, 81 Ia. 701; Marvin v. Ledwith, 111 Ill. 144; Slocum v. Hagaman, 176 Ill. 533; Allen v. Hannum, 15 Kan. 625; Randall v. Randall, 85 Md. 430; 37 Atl. 209; Small v. Marburg, 77 Md. 11; Schultz's Estate, 113 Mich. 592; Lilly v. Menke, 143 Mo. 137; Cunningham's Estate, 137 Pa. St. 621; Woodburn's Estate, 151 Pa. St. 586; Ferguson's App. 138 Pa. St.

208; Vance's Estate, 141 Pa. St. 201; 12 L. R. A. 227; McIntosh's Estate, 158 Pa. St. 528; Coover's App. 74 Pa. St. 143.

<sup>131</sup> Schultz's Estate, 113 Mich. 592.

<sup>132</sup> Randall v. Randall, 85 Md. 430; 37 Atl. 209.

<sup>133</sup> Portuondo's Estate, 185 Pa. St. 472.

can not be determined until the time of the death of the widow, her refusal to take under the will does not accelerate the distribution of the estate.<sup>134</sup> Where the surviving spouse refuses to take under the will and takes under the law instead, the property given to such spouse is almost always taken from devises or legacies to others. Where this is the case, the beneficiaries, whose rights under the will are thus defeated, should be compensated, if possible, by giving them the property which was devised to such spouse in lieu of dower.<sup>135</sup> If such disappointed beneficiaries can not be compensated out of the property devised in lieu of dower, he is then entitled to be compensated out of the residuary estate.<sup>136</sup> If there is no property out of which to compensate the disappointed beneficiaries, they are, at all events, entitled to take the property devised subject to dower rights thus asserted.<sup>137</sup>

On the other hand, the election of the widow to take under the law can not increase the estate given to others by the will.<sup>138</sup> Thus where a devise of one-half was given to the widow for life, the residue to be equally divided between the heirs and a specified church, it was held that upon the widow's election to take under the law, the church could, in no case, get more than one-fourth of the estate given by the will.<sup>139</sup> And where testator disposed of his entire estate, giving his wife certain property for life in lieu of dower, remainder to others, and she elected to take her dower, it was held that the remainder men whose interests were affected by such election could not be compen-

<sup>134</sup> *Muirhead v. Muirhead*, L. R. 15 App. Cas. 289. (In this case the share of any beneficiary dying before the widow was to lapse. On this ground this case can be distinguished from *Randall v. Randall*, 85 Md. 430; 37 Atl. 209, in which the share of any beneficiary dying before the widow, was to pass to the heirs of such beneficiary.)

<sup>135</sup> *Everett v. Croskrey*, 92 Ia. 333; *Jennings v. Jennings*, 21 O. S. 56; *Maskell v. Goodall*, 2 Dis. (Ohio) 282; *Batstone's Appeal*, 136

Pa. St. 307; *Sherman v. Baker*, 20 R. I. 613; 20 R. I. (Part 3) 446; *Latta v. Brown*, 96 Tenn. 343.

<sup>136</sup> *Treasy v. Treasy*, — Ky. — (1896); 36 S. W. 3; *Chamberlain v. Berry* (Ky.) (1900), 56 S. W. 659.

<sup>137</sup> *Rawling's Estate*, 81 Io. 701.

<sup>138</sup> *Lilly v. Menke*, 126 Mo. 190. *Gallagher's Appeal*, 87 Pa. St. 200; *Sherman v. Baker*, 20 R. I. 613; 20 R. I. (Part 3) 446; *McReynolds v. Counts*, 9 Gratt. (Va.) 242.

<sup>139</sup> *Lilly v. Menke*, 126 Mo. 190.

sated out of funds from which certain legacies were to be paid at once; but that they must wait till the death of the widow and receive compensation out of the property in which she had a dower interest.<sup>140</sup> So one to whom an annuity is given, to be paid by a legatee of specific property, may, if the legatee refuses to pay, have satisfaction out of the property specifically bequeathed.<sup>141</sup> Where the widow refuses to take under the will, her rights are not in any way affected by it; hence, where the will provides for a conversion of realty into personalty, and the widow refuses to take under the will, she takes her dower in realty as realty, and not as personalty.<sup>142</sup>

<sup>140</sup> *Sherman v. Baker*, 20 R. I. 613; 20 R. I. (Part 3), 446.

<sup>141</sup> *Hurd v. Shelton*, 64 Conn. 496.

<sup>142</sup> *Cunningham's Estate*, 137 Pa.

St. 621. (Hence if the property is in fact sold the widow has only a life estate in one-third of the proceeds of such sale.)

## CHAPTER XXXIV.

## LAPSED AND VOID LEGACIES AND DEVISES.

## §738. Lapsed legacies and devises in general.

A lapsed legacy or devise is one which was originally valid, so that if testator had died immediately upon the execution of his will such devise or legacy would have taken effect, but which fails because the beneficiary in some way becomes incapable of taking under the will before the devise or legacy vests.<sup>143</sup> A legacy or devise is also said to lapse where the beneficiary, though competent to take under the will, refuses to do so.<sup>144</sup> Naturally this rarely happens except in cases where beneficiary would be deprived by the operation of the will of certain legal rights, and elects to stand upon those rights and not to take under the will.

## §739. Lapse at common law by death of beneficiary.

A lapse most frequently occurs by reason of the death of beneficiary before that of testator. At common law it was well settled that in such a case as this, the devise or legacy lapsed.<sup>145</sup> Lapse might occur by reason of the death of the

<sup>143</sup> *Hibler v. Hibler*, 104 Mich. 274; *Murphy v. McKeon*, 53 N. J. Eq. 406; *Shadden v. Hembree*, 17 Ore. 14; *Waln's Estate*, 189 Pa. St. 631.

<sup>144</sup> *Hall v. Smith*, 61 N. H. 144;

*Sawyer v. Freeman*, 161 Mass. 543.

<sup>145</sup> *In re Atkinson* (1892), 3 Ch. 52; *In re Rees*, L. R. 44 Ch. Div. 484; *Morse v. Hayden*, 82 Me. 227; *Wood v. Seaver*, 158 Mass. 411; *Bryson v. Holbrook*, 159 Mass. 280;

beneficiary after testator, but before the gift vested.<sup>146</sup> Where a legacy or devise vests upon testator's death it does not lapse because the beneficiary dies before the devise or legacy vests in possession.<sup>147</sup> A devise in trust or in the nature of a trust did not of course lapse by reason of the death of the trustee before the beneficiary.<sup>148</sup> Thus a gift to a designated priest, to be expended in masses for the repose of the soul of testatrix, was held not to lapse by reason of the death of the priest before that of testatrix, since another trustee might be appointed.<sup>149</sup> Where a legacy was given upon a valuable consideration in payment of a debt of testator's, it did not lapse at common law.<sup>150</sup>

#### §740. Lapse at common law by dissolution of corporation.

So a legacy to a private corporation will lapse by the dissolution of such corporation and the transfer of its property to other corporations of different scope of activity before the death of testator.<sup>151</sup> However, a devise to public corporations does not lapse because of the consolidation of such corporations,<sup>152</sup> nor does a devise to one such corporation lapse because of its subdivision into several.<sup>153</sup>

#### §741. Lapse prevented at common law by testator's intention.

This rule, however, was only a *prima facie* one, designed to carry out the intention that testator probably would have

Hall v. Smith, 61 N. H. 144; Murphy v. McKeon, 53 N. J. Eq. 406; Gordon v. Jackson (N. J.), 43 Atl. 98; Shadden v. Hembree, 17 Ore. 14; Waln's Estate, 189 Pa. St. 631.  
<sup>146</sup> Powers v. Egelhoff, 56 Ill. App. 606; Wilson v. Hall, 6 Ohio C. C. 570.

<sup>147</sup> Hibler v. Hibler, 104 Mich. 274; *In re Gardner*, 140 N. Y. 122; Goebel v. Wolfe, 113 N. Y. 405; Elliott's Estate, 58 N. Y. Supp. 603, distinguishing Vincent v. Newhouse, 83 N. Y. 505; Shipman v.

Rollins, 98 N. Y. 311; Delaney v. McCormack, 88 N. Y. 174.

<sup>148</sup> See Sec. 610.

<sup>149</sup> Kerrigan v. Tabb (N. J.), 39 Atl. 701.

<sup>150</sup> Ward v. Bush (N. J.) (1900), 45 Atl. 534.

<sup>151</sup> Merrill v. Hayden, 86 Me. 133.

<sup>152</sup> Sheldon v. Stockbridge, 67 Vt. 299.

<sup>153</sup> Board of Education v. Ladd, 26 O. St. 210.

had if such a contingency had occurred to him as that of the death of the beneficiary before his own. Accordingly, if testator clearly showed his intention that the legacy should not lapse in case beneficiary died before testator, but should pass to the heirs or next of kin of such beneficiary, such intention will be given full force and effect.<sup>154</sup> Thus, where testator clearly intends that his gifts shall pass to the beneficiaries as a class, there is no lapse by reason of the death of any one of them before the class is determined; that is, the entire gift passes to the members of the class in existence when the class is to be determined.<sup>155</sup> Nor is there a lapse where testator specifically provides for the gift over in case of the death of the first beneficiary.<sup>156</sup> So where, after the death of certain beneficiaries, testator added to their names the words "deceased," and interlined "or to their legal heirs," and re-executed the will, it was held that this prevented lapse.<sup>157</sup>

A provision in a codicil that "in the final division of my estate I desire that the grandchildren shall be taken into consideration, and that the estate shall be so divided that the grandchildren shall have equal shares," is not a gift to the grandchildren whose parents are living, but a provision to prevent lapse.<sup>158</sup> The common law favored such reasonable construction of the will as would prevent lapse.<sup>159</sup>

#### §742. Effect of modern statutes upon the common law doctrine of lapse.

In many jurisdictions statutes have been passed which modify the common law doctrine of lapse of a devise or legacy in case of the death of the beneficiary before the devise or legacy

<sup>154</sup> *In re Pinhorne* (1894), 2 Ch. 276; *Kerrigan v. Tabb* (N. J.), 39 Atl. 701; *Gilmore's Estate*, 154 Pa. St. 523; *McGovran's Estate*, 190 Pa. St. 375; *Rivers v. Rivers*, 36 S. C. 302; *Brice v. Horner*, — Tenn. — (1896), 38 S. W. 440.

<sup>155</sup> *Gordon v. Jackson* (N. J.) 43 Atl. 98; *McGovran's Estate*, 190 Pa. St. 375.

<sup>156</sup> *Rivers v. Rivers*, 36 S. C. 302; *Brice v. Horner*, — Tenn. — (1896), 38 S. W. 440.

<sup>157</sup> *Gilmore's Estate*, 154 Pa. St. 523.

<sup>158</sup> *McDowell's Estate* (Pa.) (1900), 45 Atl. 419.

<sup>159</sup> *In re Smith*, L. R. 35, Ch. D. 559; *Vanderzee v. Slingerland*, 103 N. Y. 47.

vests. These statutes are by no means uniform, and for the purpose of convenience may be divided into three groups.

In jurisdictions of the first group lapse is prevented only where the beneficiary is a lineal descendant of the testator. In jurisdictions of this class, if the legatee or devisee is a descendant of testator, and dies before interest vests, leaving issue which survive at the death of testator, the devise or legacy does not lapse in the common law sense of the term, but passes to such issue.<sup>160</sup>

In jurisdictions of the second class the statute prevents lapse where the beneficiary is a child or other relative of testator, and dies leaving issue surviving testator.<sup>161</sup> The South Carolina statutes on the subject of lapse apply only where the beneficiary is a "child" of testator; and have no application where the beneficiary is a grandchild or greatgrandchild.<sup>162</sup> In some states of this group the statute applies only to certain classes of relatives who are clearly named in the statute.<sup>163</sup>

Statutes of the first and second groups leave the common law of lapse unmodified, except in cases where the devisee or legatee stands in one of the designated classes of relationship to testator. In states of the third group, however, the statute provides that devises or legacies should not lapse where the devisee or legatee dies before testator, if such devisee or legatee leaves children or lineal descendants alive at testator's death.<sup>164</sup> This statute, however, modifies the common law only where beneficiary left issue surviving testator. Accordingly, where the beneficiary dies without leaving issue surviving, the statute has no application, and the common law rule of lapse applies.<sup>165</sup>

In some states the statutes on the subject of lapse are so broad that they prevent lapse in any case, no matter what re-

<sup>160</sup> *Morse v. Hayden*, 82 Me. 227.

<sup>161</sup> *Woolley v. Paxson*, 46 O. S. 307.

<sup>162</sup> *Logan v. Brunson*, 56 S. Car. 7.

<sup>163</sup> See Sec. 743.

<sup>164</sup> *Williams v. Knight*, 18 R. I. 333; *Wildberger v. Cheek*, 94 Va. 517.

<sup>165</sup> *Stetson v. Eastman*, 84 Me. 366; *Smith v. Smith*, 141 N. Y. 29.

lation the beneficiary is to the testator, and entirely irrespective of whether beneficiary leaves surviving descendants or not.<sup>166</sup> These statutes do not ordinarily, in their terms, apply where the beneficiary died before the will was executed.<sup>167</sup> Nor do they apply where the interest has vested in the beneficiary upon testator's death, and he dies before taking possession of the property devised.<sup>168</sup>

### §743. "Relations" or "descendants" under the statute.

Where the statute against lapse applies only where the beneficiary is a "relation" of testator, a relation by marriage is not a relation within the meaning of the statute;<sup>169</sup> nor is a wife a "relative" of her husband in this sense;<sup>170</sup> nor is a husband a "relative" of his wife.<sup>171</sup> Where the statute prevents lapse, and in case beneficiary leaves a "lineal descendant," it is held that a mother of beneficiary is not a "lineal descendant";<sup>172</sup> nor indeed are any of the heirs not in the descending line from the beneficiary;<sup>173</sup> nor is an adopted child a descendant so as to prevent lapse.<sup>174</sup> Under statutes preventing lapse, the beneficiary who died before testator can not, by his will, alter the devolution of the gift from that indicated by statute.<sup>175</sup>

<sup>166</sup> *Garrison v. Hill*, 81 Md. 206; *Halsey v. Convention of the Protestant Episcopal Church*, 75 Md. 275; *Wallace v. Du Bois*, 65 Md. 153; *Glenn v. Belt*, 7 G. & J. (Md.) 362.

<sup>167</sup> *Williams v. Knight*, 18 R. I. 333. It is held to apply where the beneficiary died before the will was executed. *Wildberger v. Cheek*, 94 Va. 517; *Nutter v. Vickery*, 64 Me. 490; *Taylor v. Conner*, 7 Ind. 115; *Minter's Appeal*, 40 Pa. St. 111; *Darden v. Harrill*, 10 Lea, 421.

<sup>168</sup> *Patton v. Ludington*, 133 Wis. 629.

<sup>169</sup> *Horton v. Earle*, 162 Mass. 448; (a brother-in-law held not to be a relation in this sense). *Bramell v. Adams*, 146 Mo. 70.

<sup>170</sup> *Renton's Estate*, 10 Wash. 533.

<sup>171</sup> *Norwood v. Mills*, 1 O. N. S. 314.

<sup>172</sup> *Morse v. Hayden*, 82 Me. 227.

<sup>173</sup> *Loveren v. Donaldson* (N. H.), 45 Atl. 715.

<sup>174</sup> *Phillips v. McConica*, 59 O. S. 1.

<sup>175</sup> *Halsey v. Convention of P. E. Church*, 75 Md. 275.



### §744. Disposition of lapsed legacies and devises.

If testator has expressed his intention in his will as to disposition of lapsed legacies and devises, such disposition will, if legal, be given full effect.<sup>176</sup> Where testator has expressed his intention, however, the legacy or devise is not always spoken of as lapsed. It is rather a case of a substitutional gift.

Where testator does not express his intention as to the disposition of his devise or legacy, and there is no general residuary clause in the will, the legacies or devises pass as intestate property.<sup>177</sup> The persons taking are those who were designated by the statutes of distribution to take at testator's death if he had died intestate, even though the lapsed gift was not to be paid till the termination of two lives in being at testator's death.<sup>178</sup> If there is a general residuary clause in the will, a lapsed legacy given by any part of the will other than such residuary clause becomes a part of residuum upon the lapse, and passes to the residuary legatee.<sup>179</sup> If, however, the lapsed legacy is given by a residuary clause, it does not become part of the residuum upon such lapse. Of course, if there is only one residuary legatee, the proposition that if the legacy to him lapses it must go to the next of kin as intestate property is so clear as to need no discussion. But where the residuum of estate is given to two or more, and the gift to one of them lapses, it has often been questioned whether such lapse should pass under the residuary clause to the remaining residuary legatees, or whether it should be regarded as intestate property. It is now well settled that a lapsed share of the residuum is not a part of the residuum, but is intestate prop-

<sup>176</sup> *Leake v. Watson*, 60 Conn. 498; *McGreevy v. McGrath*, 152 Mass. 24; *Smith v. Secor*, 157 N. Y. 402; *Hoopes' Estate*, 185 Pa. St. 172.

<sup>177</sup> *Collins v. Collins*, 126 Ind. 559; *Hunter's Succession*, 45 La. App. 262; *Clark v. Cammann*, 160 N. Y. 315.

<sup>178</sup> *Clark v. Cammann*, 160 N. Y. 315.

<sup>179</sup> *Crerar v. Williams*, 44 Ill. App. 497, affirmed 145 Ill. 625; 21 L. R. A. 454; *New Orleans v. Hardie*, 43 La. Ann. 251; *Dulaney v. Middleton*, 72 Md. 67; *Pollock v. Farnham*, 156 Mass. 388; *Roy v. Monroe*, 47 N. J. Eq. 356.

erty.<sup>180</sup> So where gifts were made to A and B separately, and the residuary estate was given to them, and A died without descendants before the testator, it was held that the specific legacy to A became a part of the residuum; and that the residuum, as increased by this lapsed legacy, was to be divided equally between B and those who would take if testator had died intestate.<sup>181</sup>

As in a case of lapse because of the death of the beneficiary, legacies which fail because of the refusal of the beneficiary to take pass to the residuary legatee if no provision in the will is found providing for such contingency.<sup>182</sup> Thus, a testator gave legacies to three charitable corporations, but provided that if these corporations ever "in any manner gave any support and sympathy or countenance to what I consider the pernicious fallacy of prohibition or its bantling local option," the legacies should be forfeited, and the amounts given should pass to a public library. The trustees of these charitable corporations refused to adopt the legacies because of their affiliation with their religious body, whose principles were opposed to traffic in intoxicating liquors. It was held that, upon these facts, the legacies passed to the public library.<sup>183</sup>

At common law it seemed well settled that a lapsed devise of real estate descended to the heir as intestate property.<sup>184</sup> In deciding thus, the courts practically held that every devise of real estate, even though residuary in form, was in legal effect a specific devise, and could pass only such property as corresponded to that description at the time the will was made.

The reason given for the distinction between the devolution of lapsed legacies and lapsed devises is hardly a satisfac-

<sup>180</sup> *Buffinton v. Maxam*, 152 Mass. 477; *Gray's Estate*, 147 Pa. St. 67; *Gorgas's Estate*, 166 Pa. St. 269; *Kimball's Will*, 20 R. I. 619; 20 R. I. (Part 3) 688.

<sup>181</sup> *Stetson v. Eastman*, 84 Me. 366.

<sup>182</sup> *Sawyer v. Freeman*, 161 Mass. 543. (This rule, of course, applies only where such legacy is not neces-

sary to compensate those who are disappointed by the refusal of the widow to take under the will.)

<sup>183</sup> *White's Estate*, 174 Pa. St. 642.

<sup>184</sup> *Thomas v. Thomas*, 108 Ind. 576; *Prescott v. Prescott*, 7 Met. (Mass.) 141; *Williams v. Neff*, 52 Pa. St. 326; *Stonestreet v. Doyle*, 75 Va. 356.

tory one. The courts placed the distinction upon the ground that a residuary clause of personalty could pass all the personalty owned by testator at his death, while a residuary clause of realty could pass only such realty that testator owned at the time of the execution of the will.<sup>185</sup>

In most states, as we have seen already, statutes have been passed making it possible for testator to devise after-acquired real estate. Where statutes of this sort have been passed they destroy the common law reason for holding that a lapsed devise descends to the heir, and does not pass to the residuary devisee. Accordingly, in most states it is held that where such statutes are in force a lapsed devise passes to the residuary devisee, and not to the heir.<sup>186</sup>

#### §745. Void legacies and devises in general.

A void legacy or devise is one which never could have taken effect upon testator's death.<sup>187</sup> Void legacies may, for purposes of convenience, be divided into two general classes: those which are void by reason of some condition in testator's will which is not complied with, and those which are void by reason of the existence of some positive rule of law which prevents testator from making the disposition of his property which he contemplates.

<sup>185</sup> "At common law whenever a devise lapsed by the death of a devisee before the death of testator, the property passed to the heirs-at-law, while lapsed legacies, instead of passing to the next of kin, fell in the residuum and so passed under a will to the residuary legatees. This distinction between the course taken under the same condition of affairs by lapsed devises and lapsed legacies, seems to have sprung from the fact that no real estate acquired by the testator after the execution of his will, passed under the residuary clause, while such a clause included all personal property owned by tes-

tator at the time of his death not otherwise given, no matter when acquired." *Molineaux v. Reynolds*, 55 N. J. Eq. 187.

<sup>186</sup> *Drew v. Wakefield*, 54 Me. 291; *Lovering v. Lovering*, 129 Mass. 97; *Shreve v. Shreve*, 2 Stock, 385 (N. J.). (This question was raised in this case but not decided.) *Smith v. Curtis*, 5 Dutch. 345; *Molineaux v. Reynolds*, 55 N. J. Eq. 187; *Cruikshank v. Home*, etc., 113 N. Y. 337.

<sup>187</sup> *Potter v. Couch*, 141 U. S. 296; *Ketchum v. Corse*, 65 Conn. 85; *State v. Holmes*, 115 Mich. 456.

Legacies which are void by reason of some condition in testator's will which is not complied with have already been discussed under the heading of Conditions.<sup>188</sup> Legacies which are void by reason of the existence of some positive rule of law may be illustrated by gifts of remainders over on breach of a condition in restraint of alienation,<sup>189</sup> or by gifts which are void as being in contravention of the rule against perpetuities.<sup>190</sup> So a gift may be void, because the description of the property given is so ambiguous that it is impossible to tell to which part of testator's estate it applies.<sup>191</sup> A gift may also be void because the legatee never had the capacity to take the gift.<sup>192</sup>

#### §746. Devolution of void legacies and devises.

The rules which govern the devolution of void legacies are substantially the same as those which control in case of lapsed legacies. In the absence of a residuary clause the property which is the subject of a void gift descends as in case of intestacy.<sup>193</sup> Where there is a valid general residuary clause void legacies pass under such residuary clause to the residuary legatees.<sup>194</sup> While at common law void devises descended to the heir, they pass now under a residuary clause which contains apt words to pass such property.<sup>195</sup> But where the residuary clause passes only the property "not hereinbefore dis-

<sup>188</sup> See Chapt. XXXI. *Harris v. Harris* (Ky.), L. R. 1313, rehearing refused, 50 S. W. 533; 20 Ky. L. R. 1911; *Wilson v. Hall*, 6 O. C. C. 570; *Starke v. Conde*, 100 Wis. 633.

<sup>189</sup> *Potter v. Couch*, 141 U. S. 296.

<sup>190</sup> *Perkins v. Fisher*, 59 Fed. 801; *Ketchum v. Corse*, 65 Conn. 85; *State v. Holmes*, 115 Mich. 456; *Kelly v. Nichols*, 17 R. I. 306.

<sup>191</sup> *Asten v. Asten* (1894), 3 Ch. 260.

<sup>192</sup> *House of Mercy v. Davidson*, 99 Tex. 529; 39 S. W. 924.

<sup>193</sup> *Levy v. Levy*, 33 N. Y. 97; *State v. Holmes*, 115 Mich. 456; *McHugh v. McCole*, 97 Wis. 166; 40 L. R. A. 724.

<sup>194</sup> *Dulany v. Middleton*, 72 Md. 67; *Carter v. Presbyterian Church Board of Education*, 144 N. Y. 621; *In re Allen*, 151 N. Y. 243; *Davis v. Hutchings*, 15 Ohio C. C. 174; 8 Ohio C. D. 52; rev. 4 Ohio N. P. 276; 6 Ohio Dec. 371.

<sup>195</sup> *Giddings v. Giddings*, 65 Conn. 149; *Davis v. Hutchings*, 15 Ohio C. C. 174; 8 Ohio C. D. 52; reversing 4 Ohio N. P. 276; 6 Ohio Dec. 371; *Milwaukee Protestant Home v. Becher*, 87 Wis. 409.

posed of," it does not pass land devised, though the devise is void as in violation of the rule against perpetuities.<sup>196</sup>

The well recognized exception to the rule that void legacies and devises pass under a residuary clause is where the void legacy or devise is itself given by a residuary clause. In such case the property which is the subject of the void gift does not pass to the other residuary legatee, but descends as intestate property.<sup>197</sup> Of course, if there is a specific gift over of the property which was the subject of the void gift, in case of the failure of such gift, effect will be given to this specific provision, and the property given will pass neither under the residuary clause nor as intestate property.<sup>198</sup>

<sup>196</sup> Kelly v. Nichols, 17 R. I. 306; 19 L. R. A. 413.

<sup>197</sup> Powers v. Codwise, 172 Mass. 425; Temple v. Pasquotank County, 111 N. C. 36; Booth v. Baptist Church, 126 N. Y. 215.

<sup>198</sup> Hamlin v. Mansfield, 88 Me. 131; White's Estate, 174 Pa. St. 642.

## CHAPTER XXXV.

### CHARGES OF DEBTS AND LEGACIES UPON SPECIFIC PROPERTY.

#### §747. General rule.—Legacies payable out of personalty.

At common law, and independent of any statute, "the personal estate is the primary fund for the payment of legacies, unless, from the will, it clearly appears that testator's intention was otherwise."<sup>1</sup> In the absence, therefore, of anything in the will to indicate testator's intention that a legacy shall be charged upon the estate, or paid out of the proceeds thereof, the personalty is the fund devoted to the payment of legacies; and, in case of a deficiency in the personalty, the legacy abates in whole or in part.<sup>2</sup>

#### §748. Charging legacies upon realty—in general.

This rule, however, did not prevent testator from charging legacies upon realty, but applied only in the absence of such intention. When testator's intention was clear, legacies could be charged upon realty either by express words or by clear im-

<sup>1</sup> *McQueen v. Lilly*, 131 Mo. 9; *Duncan v. Wallace*, 114 Ind. 169; *Davidson v. Coon*, 125 Ind. 497; *Geiger v. Worth*, 17 O. S. 564. affirming 61 Ill. App. 539; *McQueen v. Lilly*, 131 Mo. 9; *Bevan v. Cooper*, 72 N. Y. 317; *Hogan v. Kavanaugh*, 138 N. Y. 417; *Lee v. Lee*, 88 Va. 805.

<sup>2</sup> *Wentworth v. Read*, 166 Ill. 139,

plication.<sup>3</sup> It need hardly be observed that testator could not, by any wording of his will, give legacies a priority of payment over his debts.<sup>4</sup>

#### §749. Words which charge legacies upon realty.

When, upon consideration of the whole will, it is evident that testator's intention in charging a legacy upon some or all of his realty, the courts will enforce such an intention. Some very close questions of construction are presented, however, in determining when this intention exists, since the litigated cases generally arise where testator has disposed by will of more property than he possesses. A gift of testator's estate, "after" a certain legacy is to be paid, charges such legacy upon the realty thus disposed of.<sup>5</sup> A charge may be created by a specific direction to take a certain sum "out" of the property devised to a named beneficiary.<sup>6</sup> A legacy may be charged upon realty by a will which refers to a certain deed, where testator's intention to charge the legacy is apparent from the two instruments.<sup>7</sup> A provision that certain property, part of which is realty, is "to be used for the payment of my debts," clearly charges the debts upon such realty.<sup>8</sup>

#### §750. Implied charge of legacies upon realty.

Legacies may be charged upon realty without the use of express words where testator's intention so to do is clear from the will as a whole. A charge of a legacy upon real property may be implied from a direction to pay the legacy without sacri-

<sup>3</sup> *Dickerman v. Eddinger*, 168 Pa. St. 240; *Webster v. Wiggin*, 19 R. I. 73; 34 Atl. 990. See cases cited in following sections.

<sup>4</sup> *Webster v. Wiggin*, 19 R. I. 73; 34 Atl. 990.

<sup>5</sup> *Atmore v. Walker* (Del.), 46 Fed. 429; *Cunningham v. Cunningham*, 72 Conn. 253; *Davidson v. Coon*, 125 Ind. 497; 9 L. R. A. 584; *McQueen v. Lilly*, 131 Mo. 9; *Smith v. Cairns*, 92 Tex. 667.

<sup>6</sup> *Robert's Estate*, 163 Pa. St. 408; *Albright v. Albright*, 128 Pa. St. 381.

<sup>7</sup> *Mortgage Trust Company v. Moore*, 150 Ind. 465. (The fact that the deed was never delivered does not prevent the charging of the legacy.)

<sup>8</sup> *Watts v. Watts*, 38 O. S. 480.

ficing the real estate if possible.<sup>9</sup> A charge of a legacy upon real property is created by a power of sale for the purpose of paying such legacy,<sup>10</sup> and a direction to the executors to pay an annuity during the life of the beneficiary impliedly charges such annuity upon testator's entire estate.<sup>11</sup>

Where testator, by will, gives legacies in excess of the amount of his personal property, which fact is at the time known to him, and his will clearly manifests an intention that such legacies shall be paid in full, it is held to manifest an intention to charge the legacies upon the realty.<sup>12</sup> The mere fact that testator's personalty will not be sufficient to pay the legacies in full is said, however, in some cases, not of itself to show an intention to charge the legacies upon the realty.<sup>13</sup> This is especially true where legacies are charged specifically upon personalty;<sup>14</sup> or where, at the execution of the will, testator does not know of the deficiency of personalty.<sup>15</sup>

An intention not to charge the legacy upon the specific realty is also evident where the specific realty is excepted from the general power of sale to raise money for the legacy,<sup>16</sup> or

<sup>9</sup> Price v. Price, 52 N. J. Eq. 326.

<sup>10</sup> Clark v. Marlow, 149 Ind. 41; Stevens v. Flower, 46 N. J. Eq. 340; Dean v. Lowenstein, 6 O. C. C. 587; Blake's Estate, 134 Pa. St. 240.

<sup>11</sup> Hunt v. Hayes, 19 Ohio C. C. 151; 10 Ohio C. D. 388.

<sup>12</sup> Cross v. Kennington, 9 Beav. 150; Elliot v. Hancock, 2 Vern. 143; Miller v. Cooch, 5 Del. Ch. 161; O'Brien v. Dougherty, 1 App. D. C. 148; Duncan v. Wallace, 114 Ind. 169; Hoyt v. Hoyt, 85 N. Y. 142; McCorn v. McCorn, 100 N. Y. 511; Briggs v. Carroll, 117 N. Y. 288, affirming 50 Hun, 586; Townsend v. Townsend, 25 O. S. 477; Dean v. Lowenstein, 6 Ohio C. C. 529; Pryer v. Mark, 129 Pa. St. 529.

<sup>13</sup> Bishop v. Howarth, 59 Conn. 455; Golder v. Chandler, 87 Me. 63; Blouin v. Phaneuf, 81 Me. 176; Lawton v. Fitchburg Savings Bank, 160 Mass. 154; Turner v. Gibb, 48 N. J. Eq. 526.

<sup>14</sup> Hibler v. Hibler, 104 Mich. 274. (In this case other legacies were specifically charged upon realty. The legacy in question was charged specifically upon personalty and was said to be in consideration of what was justly due the legatee. It was held that this did not charge the legacy upon the realty.) Smith v. Mason, 89 Va. 713.

<sup>15</sup> Bishop v. Howarth, 59 Conn. 455.

<sup>16</sup> Johnson v. Home for Aged Men, 152 Mass. 89.



where it appears from the will that any deficiency of legacies is to be divided *pro rata* among the legatees.<sup>17</sup>

### §751. Direction for support and maintenance as a charge.

A devise is often given to one coupled with a direction that he shall support and maintain another. The effect of such a provision is usually very difficult to determine. It may impose a personal charge upon the devisee merely, it may be a charge upon the property devised, it may be both a personal charge and a charge upon the property, it may be so worded as to amount to a trust, or it may be a condition subsequent.<sup>18</sup> Where it appears from the will that testator merely recommends that the devisee named shall support and care for another, no charge is imposed upon the realty thus devised, nor upon the devisee individually.<sup>19</sup> So where testator gave his mother an annuity for life, a direction that she live with his widow was held not to charge her support upon testator's estate.<sup>20</sup> Where the direction to care for the designated person calls for personal care and attention, and can not be complied with by simply paying him a sum sufficient to support him, the support and care of the person named is personal to the devisee, and is not a charge upon the real estate.<sup>21</sup> Where

<sup>17</sup> *Bragaw v. Bolles*, 51 N. J. Eq. 84. (In this case the testator gave certain pecuniary legacies, but died intestate and without heirs as to his realty. Although his personalty was insufficient to pay the legacies, it was held that the legacies could not be charged upon the realty, as his intention was clearly otherwise. The realty, therefore, escheated to the state.)

<sup>18</sup> See Secs. 678, 612.

<sup>19</sup> *Perdue v. Perdue*, 124 N. C. 161; (the expression in this case was, "my will and desire that [the devisee] shall take care of" certain relatives named. The court said of these words, "It is only a recom-

mendation or a request"). *Wellons v. Jordan*, 83 N. C. 371; *Taylor v. Lanier*, 7 N. C. 98; *Arnold v. Arnold*, 41 S. C. 291.

<sup>20</sup> *Martin v. Goode*, 111 N. Car. 288.

<sup>21</sup> *South Mahoning Township v. Marshall*, 138 Pa. St. 570. (A devised a farm to B whom he made C's guardian, C being an imbecile, though strong and active. The will provided that C should live on the farm with B "who should care for him in his actual wants." It was held that this did not charge C's support upon the land, as the care contemplated was entirely personal in its nature.)

the direction that a devisee shall support a named person is imperative, and not precatory, the support of such other is held to be a charge upon the land devised.<sup>22</sup> The courts, however, do not always distinguish carefully between a charge upon the realty for the support of one and a gift in trust. Such a gift is spoken of as "a trust, or a charge in the nature of a trust."<sup>23</sup> For practical purposes, as regards the enforcement of such a claim, there is but little difference between the two. However, where the devisee is given an estate for life if he supports his sister, and is authorized to dispose of the fee, if necessary for her support, it was held that by exercising such power he passed the fee free from the charge for the support of the sister.<sup>24</sup>

<sup>22</sup> Bell v. Watkins, 104 Ga. 345. (The expression in the will was: "I further will that my granddaughter . . . do receive a support during her lifetime or until she should marry." The court said that these words were "neither precatory nor commendatory.") Hunter v. Stembridge, 12 Ga. 192; Clark v. Marlow, 149 Ind. 41; Crossett v. Clements, — (Miss.) (1980), 7 So. 207; Cady v. Cady, 67 Miss. 425; Outland v. Outland, 118 N. C. 138. (A gift to E & C, with a provision "in consideration of the property I have given to E & C, they are to have the care of and support J, and it is my will that he shall have his choice which of them he will live with and the other pay half of the expenses," was held to create a charge upon the land devised to E & C. Citing and following Laxton v. Tilley, 66 N. C. 327; Carter v. Worrell, 96 N. C. 358; Thayer v. Finnegan, 134 Mass. 62; Meisenheimer v. Sifford, 94 N. C. 592. (A devise to A "provided" he would support B was held to create a charge upon the land devised.)

Gray v. West, 93 N. C. 442; (the provision creating the charge was "Arey Gray is to have her support out of the land.") Tope v. Tope, 18 Ohio, 520.

A provision that testator's widow shall have her maintenance from the farm devised to testator's son, and shall have the use of the house upon such farm during her life, does not oblige her to reside upon such farm, but she may receive a sum equal to the value of the use of the house and the cost of her support upon the farm if she resides elsewhere. Tope v. Tope, 18 Ohio, 520; Bank of Florence v. Gregg, 46 S. C. 169. A devise to A of "all the residue of my estate both real and personal and to his care the protection and support of my daughter C during her natural life" was held to create a charge upon the realty which could be enforced in equity, even in the hands of a *bona fide* holder. Rivers v. Rivers, 36 S. C. 302.

<sup>23</sup> Bell v. Watkins, 104 Ga. 345.

<sup>24</sup> Huey v. Thomas, 23 O. S.

45.

**§752. Direction that devisee pay money to another as a charge.**

Devises are often made to one with the direction that he pay a certain sum to another. Whether the sum thus to be paid is made a charge upon the land by such gift is a question involving some difference of judicial opinion; but it can, in general, be determined by the same principles as those which determine whether a direction to support is a charge upon property devised or not. A gift to one, subject to the payment of a specified amount to another, is held to make the payment of such amount a charge upon the land devised.<sup>25</sup> A charge upon the realty of a sum to be paid by the devisee is clearly made by a direction that the sum be paid out of the proceeds of the property devised.<sup>26</sup> The death of the beneficiary after the legacy is payable by the terms of the will does not release the devisee from such payment.<sup>27</sup> But a provision that the devisee, A, shall, on B's arriving at 18, pay B \$1,000 in land situate where A can buy it, does not create a charge upon the land devised to A.<sup>28</sup> In order to constitute a charge upon the land, the devise must be to the person who is to fur-

<sup>25</sup> *In re Williams*, 13 Rep. 316; *Henry v. Griffiths*, 89 Ia. 543. (A legacy was given to the daughter and a devise to sons with a provision that, if the personal property was insufficient to pay the legacy "the boys is to pay enough to make the amount." This was held to create a charge upon the realty.) *Curd v. Field* (Ky.), 45 S. W. 92; *Whitehouse v. Cargill*, 86 Me. 60; *Buchanan v. Lloyd*, 88 Md. 642; *Chase v. Warner*, 106 Mich. 695; 64 N. W. 730; *Tucker v. Moye*, 115 N. C. 71; *Hunt v. Wheeler*, 116 N. C. 422; *Allen v. Allen*, 121 N. C. 328; *Wyckoff v. Wyckoff*, 49 N. J. Eq. 344, affirming 48 N. J. Eq. 113; *McDowell v. Stiger* (N. J.), 42 Atl. 575; *Clyde v. Simpson*, 4 O. S. 445; *Nellons v. Truax*, 6 O. S. 97; *Weiler's Estate*, 169 Pa. St. 66; *Pryer v. Mark*, 129 Pa. St. 529;

*Lloyd's Estate*, 174 Pa. St. 184; *Wise's Estate*, 188 Pa. St. 258. (A charge was created by a gift of a farm to A, and a direction that A "is to pay in consideration for the farm bequeathed to him by me the balance to make the five daughters equal.") *Lefevre's Estate*, 171 Pa. St. 404; *Block v. Mauck* (Tenn. Ch. App.), 52 S. W. 689.

<sup>26</sup> *Hunkypillar v. Harrison*, 59 Ark. 453; *Lloyd's Estate*, 174 Pa. St. 184; *Semple's Estate*, 189 Pa. St. 385.

<sup>27</sup> *McDowell v. Stiger* (N. J.), 42 Atl. 575.

<sup>28</sup> *Coonrad v. Coonrad*, 6 Ohio, 114. Hence a purchaser from A takes the realty free from the charge; and is not bound to see to the application of the purchase money.

nish the support or make the payment. Thus a direction, "the balance, if any, to be paid by my three sons in equal proportions," referring to the payment of the legacy already given, does not charge the legacy upon real estate given to a trustee in trust for one of the sons and his family.<sup>29</sup>

Gifts of this sort are held to impose charges on the land devised, rather than to constitute conditions precedent, when there is no gift over in case of failure to pay the beneficiary designated. In cases of doubt the presence or absence of a gift over is held to determine whether the will creates a charge or imposes a condition precedent.<sup>30</sup> And where it is left to the honor of the devisees to pay or withhold annuities, no intention is manifested to make such annuities a charge upon the realty devised.<sup>31</sup>

### §753. Valuation of property devised.

A devise to one of specified land, for a certain amount, where construed as an option to the devisees named to purchase land at that price, is held, in some cases, to make a charge upon such land of the amount indicated.<sup>32</sup> But the valuation of the property devised, made by the testator in his will, may be simply inserted for the purpose of indicating the proportionate value of the estate which he wishes each devisee to have. Where such a provision is inserted, and it does not amount to an option to devisee to purchase, the sums named are not legacies charged upon the realty.<sup>33</sup>

<sup>29</sup> *Cissell v. Cashell*, 76 Md. 330.

<sup>30</sup> *Allen v. Allen*, 121 N. C. 328; *Whitehead v. Thompson*, 79 N. C. 450; *Patterson v. Patterson*, 63 N. C. 322; *Woods v. Woods*, 2 Jones' Eq. 420; *Erwin v. Erwin*, 115 N. C. 366, is criticized as being a "mere dictum."

<sup>31</sup> *Larkin v. Larkin*, 17 R. I. 461.

<sup>32</sup> *Wyckoff v. Wyckoff*, 49 N. J. Eq. 344, affirming 48 N. J. Eq. 113; *Weiler's Estate*, 169 Pa. St. 66. (In *Allen v. Allen*, 121 N. C. 328, a similar provision was held to cre-

ate a charge upon the real estate devised. In this case, *Erwin v. Erwin*, 115 N. C. 366, in which it was held under a similar provision that, as a payment was a condition precedent, the sum to be paid could not be charged upon the land, was criticized and not followed.)

<sup>33</sup> *Knaub's Estate*, 144 Pa. St. 322. (A devise of a farm to A "at \$5,000, and another tract to B at \$2,650 and \$5 to the daughter," was held not to be a charge, of the sums named, upon the realty devised for

### §754. Personal liability of devisee.

It is sometimes important to determine whether a devisee who accepts a devise given to him upon condition of his paying specified amounts, or his furnishing support and maintenance for certain persons, merely takes subject to a charge upon property devised, or whether a personal liability is imposed upon the devisee. This question becomes of especial importance when it develops after the election of the devisee to take the property, that the amount devised is insufficient to pay the amounts which he agreed to pay. The election of the devisee to take under the will makes, in effect, a contract on his part; and the provisions of the will must, therefore, be looked to, to determine the nature of his liability.

The general rule laid down is that, where the will shows an intention of imposing a personal liability upon the devisee, he becomes personally liable upon accepting the devise.<sup>34</sup>

A direction that the legatee of testator's interest in a certain business should pay testator's debts was held to mean all his debts, and not merely those secured by mortgage on the property invested in the business.<sup>35</sup> So where land was devised to one in fee simple, upon condition of paying certain legacies to certain designated persons, and the devisee accepted the devise and died intestate before paying all the legacies, and his

the benefit of the personal estate of testator which was not disposed of by will.) *Shenk v. Shenk*, 150 Pa. St. 521. (A devise to A of lands "valued and appraised at \$2,000," with a provision that the widow should receive one-third of the yearly interest at the valuation made in the will, and that the brothers and sisters of the testator should have the first option of purchasing at the valuation named should he wish to sell, it was held not to be a charge upon the property devised of the sum of \$2,000 for the benefit of the other children.)

<sup>34</sup> *Williams v. Nichol*, 47 Ark.

254; *Millington v. Hill*, 47 Ark. 301; *Bishop v. Howarth*, 59 Conn. 455; *Porter v. Jackson*, 95 Ind. 210; *Gilbert v. Taylor*, 148 N. Y. 298; *McEwen v. Fuller*, 17 O. S. 288; *Case v. Hall*, 52 O. S. 24; *Sauer v. Mollinger*, 138 Pa. St. 338. ("If the devisee in such case accepts the devise, he becomes personally bound to pay the legacies; and he becomes thus bound, even if the land devised to him proves to be less in value than the amount of the legacy.") *Brown v. Knapp*, 79 N. Y. 136.

<sup>35</sup> *Bishop v. Howarth*, 59 Conn. 455.

real estate descended to the persons to whom the legacies were payable, it was held that the personal estate of such devisee was liable for the legacies as upon a debt which he had assumed and agreed to pay.<sup>36</sup> In no case, of course, does the devisee become personally liable unless he accepts the devise.<sup>37</sup>

But, where the direction either directly or impliedly shows that the devisee is required to pay the legacy out of the proceeds of the property devised to him, he is not held liable in excess of the amount of such property.<sup>38</sup> Where the devise or bequest is merely of the net proceeds of testator's interest in a firm, the beneficiary does not become personally liable for the debts of the firm if they exceed the assets.<sup>39</sup>

After the beneficiary has made his election to take the property devised to him, and to assume the personal liability imposed upon him, he can not repudiate the devise and thereby release himself from the personal liability.<sup>40</sup>

### §755. Effect of residuary clause blending realty and personalty. —Charge of debts and legacies on realty.

In many cases where a testator, after giving certain legacies and making disposition of specific articles, gives the rest, or residuum, or remainder (or employing some expression of similar import), to the residuary legatee, such a form of gift is held, to show testator's intention in case of a deficiency in personalty to charge the unpaid legacies upon the realty devised by such a residuary clause.<sup>41</sup> In order to

<sup>36</sup> Case v. Hall, 52 O. S. 24.

<sup>37</sup> Wyckoff v. Wyckoff, 48 N. J. Eq. 113; also 49 N. J. E. 344.

<sup>38</sup> Hunkypillar v. Harrison, 59 Ark. 453; Pitkin v. Peet, 87 Io. 268. (This is the official opinion on the final hearing. The original opinion was reported in 50 N. W. 282, but was subsequently withdrawn, and was never published officially.) Crawford v. McCarthy, 159 N. Y. 514.

<sup>39</sup> Robertson v. Junkin, 26 Can. S. C. R. 192.

<sup>40</sup> Bird v. Hawkins (N. J.), 42 Atl. 588.

<sup>41</sup> *In re* Boards (1895), 1 Ch. 499; 64 L. J. Ch. N. S. 305; *In re* Bawden (1894), 1 Ch. 693; Cameron v. Harper, 21 Can. S. C. 273; Walker v. Atmore, 50 Fed. 644; Readman v. Ferguson, 13 App. D. C. 60; Brooks v. Brooks, 65 Ill. App. 326; Reid v. Corrigan, 143 Ill. 402, reversing 40 Ill. App. 404; American Cannel Coal Co. v. Clemens, 132 Ind. 163; Newcomb's Will, 98 Ia. 175; 67 N. W. 587; Peebles v. Ack-

charge the general legacies upon the real estate devised by the residuary clause, such residuary clause must blend real and personal property into one general residuum.<sup>42</sup> Where from the context of the whole will the expression "balance of my estate, real, personal and mixed," was so used that the word "balance" referred exclusively to the personal property it was held that general legacies were not charged upon this real estate.<sup>43</sup> So a gift of all testator's real property and all the rest and residue of his personal property does not charge legacies previously given by the will upon the real estate.<sup>44</sup> In some states, however the mere use of the residuary clause blending realty and personalty into one fund does not, of itself, show testator's intention to charge general legacies upon the real estate devised by such a residuary clause.<sup>45</sup> In such jurisdictions additional circumstances are necessary to show testator's intention to charge the legacies upon the realty. Thus a life

er, 70 Miss. 356; *McQueen v. Lilly*, 131 Mo. 9; *Carter v. Gray* (N. J.), 43 Atl. 711;; *Hoboken First Baptist Church v. Syms*, 51 N. J. Eq. 363; *Turner v. Gibb*, 48 N. J. Eq. 526; *Hassel v. Hassel* (2 Dickens), 527; *Townsend v. Townsend*, 25 O. S. 477; *Moore v. Beckwith*, 14 O. S. 129; *Longley v. Stump*, 11 W. L. B. 247; *Markley's Estate*, 148 Pa. St. 538; *Dennis' Estate*, 169 Pa. St. 493; *Collins v. Reid*, — (Pa. St.) —; 23 Atl. 1108; *Bird v. Stout*, 40 W. Va. 43.

This rule applies although the residuary devise may lapse, testator's intention to charge the specific legacies upon the residuary property not being dependent upon a valid devise of such property.

*Bennett's Estate*, 148 Pa. St. 139.

Where the residuary clause failed and the personalty, if properly administered, would be sufficient to pay all legacies, it was held that testator did not intend to charge legacies upon the realty.

*Allen v. Mattison* (R. I.), 39 Atl. 241, 3 Prob. Rep. Ann. 428. [Hence, if the executor wastes the personalty, the realty could not be resorted to.]

<sup>42</sup> See cases cited in preceding note.

<sup>43</sup> *Allen v. Rudell*, 51 S. C. 366 (distinguishing *Moore v. Davidson*, 22 S. C. 92 and *Jaudon v. Ducker*, 27 S. C. 295, a case in which the residuary clause was so worded as to blend realty and personalty). So, *McMahon v. McGuire*, 6 Ohio C. C. 303.

<sup>44</sup> *In re Jamieson*, 18 R. I. 385.

<sup>45</sup> *Stevens v. Gregg*, 10 G. & J. (Md.), 143; *Power v. Jenkins*, 13 Md. 443; *White v. Kaufmann*, 66 Md. 89; *Pearson v. Wartman*, 80 Md. 528; *McCorn v. McCorn*, 100 N. Y. 511; *Brill v. Wright*, 112 N. Y. 129; *Morris v. Sickly*, 133 N. Y. 456.

estate in the first taker, with power to dispose of the personal property absolutely with remainder over to certain designated persons, and a gift of a legacy payable upon the determination of the life estate was held to show testator's intention to charge the legacy upon the realty, since under the power of disposition of personal property in the first taker there might be no personal estate at the termination of the life estate, no matter how large it may have been at testator's death.<sup>46</sup> Extrinsic evidence of surrounding circumstances may be used to show testator's intention to charge the legacies upon the realty.<sup>47</sup> Thus a residuary clause blending realty and personalty together with the fact that the legacies were largely in excess of the personalty at the time of the execution of the will, were held to show testator's intention to charge the legacies upon the realty.<sup>48</sup>

**§756. Effect of blending realty and personalty.—Exoneration of personalty.**

A residuary clause in which realty and personalty are blended shows testator's intention that the legacies should be charged upon the realty if the personal property is insufficient, but it does not, without further evidence of testator's intention, exonerate the personalty from the payment of the legacies and cast their payment upon the realty. The realty should be used only to pay any deficiency remaining after the personalty has been exhausted.<sup>49</sup> So where the residue after the payment of certain legacies is given to testator's heirs or is by any form of words disposed of, as in case of intestacy, the realty is charged with the payment of the legacies whether the heirs are to be considered as taking by descent or by devise.<sup>50</sup>

<sup>46</sup> *Ogle v. Tayloe*, 49 Md. 158.

<sup>47</sup> *Brill v. Wright*, 112 N. Y. 129.

<sup>48</sup> *Briggs v. Carroll*, 117 N. Y. 288; 50 Hun, 586; *Cross v. Kennington*, 9 Beav. 150; *Duncan v. Wallace*, 114 Ind. 169; *Davidson v. Coon*, 125 Ind. 497; 9 L. R. A. 584; *Hoyt v. Hoyt*, 85 N. Y. 142;

*McCorn v. McCorn*, 100 N. Y. 511; *Corwine v. Corwine*, 24 N. J. Eq. 579.

<sup>49</sup> *In re Boards* (1895), 1 Ch. 499; 64 L. J. Ch. N. S. 305; *Miller v. Cooch*, 5 Del. Ch. 161.

<sup>50</sup> *Peebles v. Acker*, 70 Miss. 356; *Root's Will*, 81 Wis. 263.



**§757. What words show testator's intention to blend realty and personalty.**

In most states which recognize the rule already given, the use of the word "residue" or "rest," or some similar expression, is held to be sufficient to show testator's intention to blend real and personal property.<sup>51</sup> So the expression "my real and personal estate not herein disposed of" shows such intention.<sup>52</sup> Where the residuary clause shows testator's intention not to charge previous legacies upon the real estate, such intention will of course be given effect and will prevail over the *prima facie* presumption in the absence of any express intention that the legacies were charged upon the real estate.<sup>53</sup>

**§758. Charging legacies upon realty specifically devised.**

Realty specifically devised can only be charged with legacies either by specific provision in testator's will, or by clear and unmistakable implication from the whole will, read in connection with the surrounding circumstances.<sup>54</sup> "Specific legacies and specific devises are not chargeable with the payment of demonstrative or general legacies unless made so expressly or by clear implication."<sup>55</sup> Thus in some jurisdictions it is held that a legacy greatly in excess of testator's personal estate, together with a specific devise of so much

<sup>51</sup> See cases already cited in Sec. 755, and *Bench v. Biles*, 4 Madd. 187; *Greville v. Browne*, 7 H. L. Cas. 689; *Clarke v. Clarke*, 46 S. C. 230.

<sup>52</sup> *In re Bawden* (1894), 1 Ch. 693; *Hassel v. Hassel*, 2 Dickens, 527.

<sup>53</sup> *Johnson v. Conover*, 54 N. J. Eq. 333. (A direction to convert the real property into personal property for the purpose of distribution among certain designated beneficiaries, and a residuary devise of the proceeds of the real estate and the personal property separately, was held not to be such a blending

as to show an intention to charge the legacies upon the proceeds of the realty.) Distinguishing *Smith v. First Presbyterian Church*, 11 C. E. Green, 132; *Smith v. Mason*, 89 Va. 713 (a residuary devise of realty and personalty, blended expressly for the purpose of selling and vesting, was held not to charge the legacies upon the realty).

<sup>54</sup> *Hibler v. Hibler*, 104 Mich. 274; *Johnson v. Poulson*, 32 N. J. Eq. 390; *Bevan v. Cooper*, 72 N. Y. 317.

<sup>55</sup> *Hibler v. Hibler*, 104 Mich. 274.

of testator's real property to others that the residue is entirely inadequate for the payment of legacies, shows testator's intention to charge the legacy upon the real property specifically devised.<sup>56</sup> A gift of an annuity to testator's widow and a devise of his realty, one-third to widow and two-thirds to others, "saving and excepting" the gifts to the wife, was held to show testator's intention to charge the annuity upon the two-thirds of the realty devised to others.<sup>57</sup> But a residuary clause, blending realty and personalty does not charge specific legacies upon realty specifically devised,<sup>58</sup> nor does a charge of legacies in general terms upon all of testator's real and personal estate show his intention to charge realty specifically devised.<sup>59</sup> Where testator devised certain realty to his widow during widowhood with a gift over if she re-married, the widow to have an annuity, it was held that the annuity was not charged upon the land thus devised over.<sup>60</sup> Where a legacy is specifically devised upon land which is devised to another, the lapse of such devise does not prevent the legacy from being charged upon such land,<sup>61</sup> nor is the lien thus created by will divested by a failure to specify the lien in a deed given pursuant to a sale of the premises in partition proceedings.<sup>62</sup> Where an annuity is charged upon the land devised to two devisees, the charge of such annuity is not modified by subsequent codicil changing the proportions of the devisees of such land;<sup>63</sup> but one of such devisees may by his will, devising his share for the payment of the annuity, the residue to a specified person, charge the annuity primarily upon his

<sup>56</sup> *Bank of Ireland v. McCarthy* (H. L.) (1898), A. C. 181, affirming C. A. 1894, 1 Ir. Rep. 86.

<sup>57</sup> *Kinkele v. Wilson*, 151 N. Y. 269.

<sup>58</sup> *Peet's Estate*, 99 Io. 314; 68 N. W. 705; *Phillips v. Clark*, 18 R. I. 627.

<sup>59</sup> *Conron v. Conron*, 7 H. L. Cas. 168; *Davenport v. Sargeant*, 63 N. H. 538; *Hill v. Toms*, 87 N. C. 492; *Worth v. Worth*, 95 N. C. 239; *Kitchell v. Young*, 46 N. J. Eq. 506; *Phillips v. Clark*, 18 R. I.

627; *Todd v. McFall*, 96 Va. 754 especially where the real estate specifically devised was executed from the operation of a power of sale of realty in order to pay the legacy; *Johnson v. Home for Aged Men*, 152 Mass. 89.

<sup>60</sup> *Iimas v. Neidt*, 101 Ia. 348; 70 N. W. 203.

<sup>61</sup> *Cady v. Cady*, 67 Miss. 425.

<sup>62</sup> *Nesbit v. Wood* (Ky.) (1900), 56 S. W. 714.

<sup>63</sup> *Redfield v. Redfield*, 126 N. Y. 466.

share.<sup>64</sup> A charge upon a specific tract in favor of a beneficiary is not a charge upon the interest of such beneficiary in such tract.<sup>65</sup>

**§759. Charging legacies upon personalty specifically bequeathed.**

Testator may also by will charge a legacy upon personalty which is specifically bequeathed to others.<sup>66</sup> Thus a gift of property invested in a certain business "after payment of my debts which are to be paid from said personal property," was held to charge the payment of all of testator's debts upon such personal property;<sup>67</sup> and a gift to A of a certain portion of testator's estate free of all legacies and a gift to others of the rest of testator's estate after payment of such legacies, charges the legacies upon the property bequeathed to such others.<sup>68</sup> So a gift of the residuum of testator's estate to A, with a provision that A shall pay the general indebtedness of a certain corporation as well as a mortgage owing by it, charges such residuum with the payment of such debts.<sup>69</sup> A charge of any deficiency in one fund at the time of the division upon the other fund does not authorize the appropriation of a part of such other fund after the final division to make up a deficiency in the first fund caused by depreciation in investments,<sup>70</sup> nor can a deficiency in one fund expressly charged

<sup>64</sup> *Brown v. Hord* (Ky.), 15 S. W. 874; 12 Ky. Law Rep. 916.

<sup>65</sup> *Southworth v. Sebree*, — Ky. —, 1897; 41 S. W. 769.

<sup>66</sup> *Wethered v. Safe Deposit and Trust Co.* 79 Md. 421; *Hale v. St. Paul*, 54 Minn. 521; *Coane v. Harned*, 51 N. J. Eq. 554; *Woodward v. James*, 115 N. Y. 346; *Fargo v. Squiers*, 154 N. Y. 250; *Addeman v. Rice*, 19 R. I. 30, 1896; 31 Atl. 429; *Webster v. Wiggin*, 19 R. I. 73; 34 Atl. 990; *Patten v. Herring*, 9 Tex. Cir. App. 640. *Prima facie* rules for determining out of what part of testator's property his debts are payable are, of course, subject to be varied by specific directions in his will. Such directions can not, of course, go to the extent of pre-

venting the payment of his debts. If testator provides for the payment of his debts, he may charge such payment upon property bequeathed or devised to the exoneration of other property at his discretion. *In re Campbell* (1893), 2 Ch. 206; *Parker v. First National Bank*, 12 O. C. C. 287; 1 O. Dec. 549.

<sup>67</sup> *Bishop v. Howarth*, 59 Conn. 455.

<sup>68</sup> *Coane v. Harned*, 51 N. J. Eq. 554; *Woodward v. James*, 115 N. Y. 346.

<sup>69</sup> *Cowherd v. Kitchen*, 57 Neb. 426.

<sup>70</sup> *Weston v. Massachusetts General Hospital*, 169 Mass. 76; 47 N. E. 444.

on a second be taken out of a third.<sup>71</sup> A charge of certain debts and legacies upon an annual income is held to mean that each year's income must be paid as it accrues, less such debts and legacies. Hence the income can not be accumulated to meet future payments, even if in some years the debts and legacies payable will exceed the income.<sup>72</sup>

#### §760. Enforcement of lien of legacy.

Where a legacy is specifically charged upon certain realty this lien may be enforced under some system of settlement of decedent's estate or by sale of realty under proceedings in the Probate Court. Unless the right to enforce such liens is by statute expressly or impliedly taken away from equity courts and vested exclusively in probate courts, equity courts may, in the exercise of their ordinary jurisdiction, enforce such liens at the instance of the legatee.<sup>73</sup> Where a legacy is charged upon land which is described as being the property devised to a given beneficiary, the legacy is held to be charged upon the fee of such land although the first taker received only a life estate.<sup>74</sup> So where a life estate was devised to one upon condition that the income from such estate be applied to pay certain legacies in full and the life tenant died before the legacies were paid it was held that the legacies were charged upon the fee of such property.<sup>75</sup> Where there is no question as to the validity of the lien, the devisee can not object to a decree declaring the legacy a lien on the ground that the court erred in determining the priority of liens, the adversary lien-holder himself making no objection.<sup>76</sup> The question whether a lien imposed by will in favor of a legatee may be subsequently divested by judicial action by which the devisee's interest in the realty is sought to be subjected to the payment of claims against him, and the question whether the lien of the legacy is there-

<sup>71</sup> *Morse v. Macrum*, 22 Oreg. 229;  
237.

<sup>72</sup> *Hale v. St. Paul*, 54 Minn. 421.

<sup>73</sup> *Smith v. Jackman*, 115 Mich.  
102.

<sup>74</sup> *Miller v. Miller*, 100 Ky. 37;

*Breck v. Parkes* (Ky.) (1896), 37  
S. W. 271.

<sup>75</sup> *Pendleton v. Kinney*, 65 Conn.  
222.

<sup>76</sup> *McFarland v. McFarland*, 177  
Ill. 208.

by transferred to such fund, are questions in the law of real property, the discussion of which would carry us far beyond the domains of our subject. Whether the lien is divested or not, it is held that the legatee may, if he choose, follow the fund.<sup>77</sup> If the purchase price is unpaid, the legatee may enforce payment of the legacy out of the unpaid purchase price.\*

In Pennsylvania it has been held that a sale on execution against the devisee cuts off all liens created by devise except (1) liens created for a permanent provision for testator's wife and children, (2) incumbrances which from their nature readily permit of a valuation, (3) liens which testator evidently intended to run with the land.<sup>78</sup>

### §761. Enforcing personal liability of devisee.

Where by accepting the devise, the devisee becomes personally liable for the payment of the legacies and an action may be maintained against him at law.<sup>79</sup> Where the devisee has conveyed his interest in realty which was subject to the lien of a legacy an action at law may be maintained against the grantee of such devisee, who agreed to pay such legacy and retains in his hands sufficient purchase money for that purpose.<sup>80</sup> The right of a beneficiary to be supported by a devisee is not waived by his offer to release his rights for a certain sum if paid within a specified time;<sup>81</sup> it may, however, be waived for the time being where the right is merely a right to support, by accepting support from others.<sup>82</sup>

<sup>77</sup> *Phillips v. Clark*, 18 R. I. 627. (In this case it was held that the lien was not divested.)

\* *Elstner v. Fife*, 32 O. S. 358.

<sup>78</sup> *Stewartson v. Watts*, 8 Watts (Pa.), 392; *Heister v. Green*, 48 Pa. St. 96; *Helfrich v. Weaver*, 61 Pa. St. 385; *Pierce v. Gardner*, 83 Pa. St. 211; *Bryan's App.* 101 Pa. St. 389; *Rohn v. Odenwelder*, 162 Pa. St. 346. Thus a devise of the income of certain realty to a daughter for life, and then a specific legacy to a granddaughter and the residue to a named beneficiary, was held not to be a continuing lien of realty.

It was, therefore, cut off by a sale on execution directed against the last beneficiary. *Washburn's Estate*, 187 Pa. St. 162.

<sup>79</sup> *Miller v. Lake*, 24 W. Va. 545. See Secs. 751, 754.

<sup>80</sup> *Bird v. Stout*, 40 W. Va. 43.

<sup>81</sup> *Hunt v. Wheeler*, 116 N. C. 422.

<sup>82</sup> *Dickson v. Field*, 77 Wis. 439; 9 L. R. A. 537. (A woman's right to receive support from a devisee was held to be waived by her receiving such support from her husband, but was held to revive upon the death of such husband.)

**§762. General rules as to charge of testator's debts.**

The subject of the payment of debts of testator out of his estate involves the whole of the subject of the settlement of decedent's estate, and can be discussed in this work only so far as the specific provisions of testator's will affect the subject.

Originally the common law did not permit lands to be charged with general debts either during the lifetime of the owner or at his death. The debts of the living man might be enforced out of his personal property, or by execution against his person. The debts of the decedent could be enforced only out of his personal estate unless, by his will, he specifically charged debts upon his real estate, and at this time wills of realty existed only by local custom. The necessities of trade and commerce forced a series of statutes provided for taking a part or all of the real property of a debtor for the payment of his debts.\* It became established then, that debts of record and debts upon specialties could be enforced against the heir of the debtor to the extent of the assets received by him from his ancestor. It was possible, however, for the ancestor to defeat the payment of all debts not liens upon his realty by devising it to some one other than the heir.†

These rules of the common law have been swept away by a series of statutory enactments until, with the exception of certain specified exemptions, homestead rights and the like, a debtor's entire estate both real and personal may be taken for his debts while he lives and is charged with them at his death. At his death his debts under modern statutes become a lien upon his realty, which lien can not be divested by devising the realty to one not an heir, nor by sale by the heirs. It is divested either by actual payment of all testator's debts or by sale under authority of the law for the purpose of paying such debts, usually by proceeding brought for that purpose by the executor or administrator in the court of probate powers before which decedent's estate is in process of settlement or in whose jurisdiction the realty to be sold is situate.

\* Blacks. Com., Bk. II, 160-162.

† Blacks. Com., Bk. II, 244.

Under common law rules the question whether a will charged debts upon the realty or not was a very important and vital one to the creditors, since without some such provision the debts could not be collected in case of deficiency in personalty. Under our modern statutes, this subject is usually of no practical importance to creditors, since testator can not so dispose of his property by will as to prevent the payment of his debts out of his estate. In some cases, however, even under modern statutes, the question whether testator charged his real estate specifically with the payment of his debts may be a very important one for the creditors. Thus under our modern statute a time limit is set within which debts must be presented to the executor or administrator. After the expiration of this time the personal representatives may with safety settle the estate and distribute the proceeds, and after such distribution the extent to which the creditors of the testator may follow the proceeds of his estate into the hands of the legatee or devisee depends upon the provisions of the statute. In some cases where the creditors have delayed so long that, under the law, they are unable to enforce their liens upon the estate of the decedent, a specific provision in his will, charging the debts upon the real estate, may still protect their rights.<sup>83</sup>

The usual practical importance of the question whether a will charges debts upon the realty or not remains in determining the respective rights of those who would take personal property of the decedent and those who would take in the real property whether under the law or by the will as between themselves. Under modern statutes they have, apart from certain statutory exemptions, like homestead rights, no rights as against testator's creditors where property devised was necessary for the payment of testator's debts. As between themselves, however, in case the property of testator is insufficient to pay his debts and leave a surplus, it is very important to determine whether the debts are to be paid out of the realty or personalty.

In the absence of any specific provision in the will, testator's debts are payable primarily out of his personal property;

<sup>83</sup> *Clift v. Moses*, 116 N. Y. 144.

his realty may be resorted to only in case of a deficiency in personal property.<sup>84</sup> Where the income of the realty is devised in trust, the income can not be taken for testator's debts until the personalty is exhausted.<sup>85</sup> Testator may, of course, change this order of paying his debts, as long as he does not interfere with the rights of his creditors, and may charge some, or all of his realty with the payment of his debts to the exoneration of his personalty.

### §763. Exoneration of personalty from debts.

If testator leaves sufficient property devoted to the payment of his debts, he may provide that certain personalty shall pass to the legatees free from any charge or contribution for the payment of his debts.<sup>86</sup> Thus a gift of one-third of the residuum of testator's estate "free and clear from the payment of all debts, legacies, expenses of administration and other charges," exonerates such third from the payment of these items and charges them upon the other two-thirds of the residuum.<sup>87</sup>

Testator's intention to exonerate a bequest from his debts may be inferred from the context of the will.

Thus a gift of a certain fund for the support of a designated person has been held to be exonerated from payment of testator's debts, it being testator's evident intention that in all events this support should be furnished.<sup>88</sup>

A bequest to testator's widow in lieu of her dower has been held to be impliedly exonerated from the payment of testator's debts.<sup>89</sup> Where testator attempted to pass his own residuary estate and that over which he had power of appointment by a bequest which was valid as to his own property, but in violation of the rule against perpetuities as to the fund over

<sup>84</sup> *Morse v. Hayden*, 82 Me. 227; *Newport v. Newport*, 5 Wash. 114.

<sup>85</sup> *Newport v. Newport*, 5 Wash. 114.

<sup>86</sup> *Woodward v. James*, 115 N. Y. 346; *Fargo v. Squiers*, 154 N. Y. 250; *Addeman v. Rice*, 19 R. I. 30; 31 Atl. 429; *Patten v. Herring*, 9 Tex. Cir. App. 640.

<sup>87</sup> *Addeman v. Rice*, 19 R. I. 30, 1895; 31 Atl. 429.

<sup>88</sup> *Patten v. Herring*, 9 Tex. Civ. App. 640.

<sup>89</sup> *Calder v. Curry*, 17 R. I. 610. See Sec. 176.



which he had power of appointment, the court will carry his intention into effect as nearly as can be done by applying the fund over which he had the power of appointment to the payment of specific bequests, leaving testator's property for the residuary beneficiaries.<sup>90</sup>

### §764. What words charge debts upon realty.

The question to be determined, therefore, is that of the testator's intention.

One of the clauses presented most frequently for adjudication is a direction to the executor to pay testator's debts out of his estate. This clause is found in most wills, and under our modern statutes is considered as nothing more than a direction to executor to do what the law would compel him to do in any event. It, therefore, does not charge the debts primarily upon the real estate to the exoneration of personalty, though if the personalty is insufficient, it will operate to charge the debts on the realty.<sup>91</sup> A direction to mortgage realty to meet the debts thereon is held to authorize a mortgage only to pay off liens on such realty.<sup>92</sup> Even where testator charges certain realty with the payment of his debts it is held not to make the realty the primary fund for their payment or to exonerate the personalty, unless the will further shows his intention so to do.<sup>93</sup> It is held contrary to this view, that where the debts are

<sup>90</sup> *Fargo v. Squiers*, 154 N. Y. 250.

<sup>91</sup> *Ames v. Holderbaum*, 44 Fed. 224 (Io.); *Iowa Loan & Trust Co. v. Holderbaum*, 86 Io. 1; 52 N. W. 550; *Morse v. Hayden*, 82 Me. 227; *Hamilton v. Smith*, 110 N. Y. 159; *In re Power*, 124 N. Y. 361; *In re Bingham*, 127 N. Y. 296; *In re City of Rochester*, 110 N. Y. 159; *Clift v. Moses*, 116 N. Y. 144; *Brill v. Wright*, 112 N. Y. 129; *Cunningham v. Parker*, 146 N. Y. 29; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226. A somewhat similar view was expressed in the English case,

*In re Bate*, L. R. 43 Ch. Div. 600. This case was disapproved by *In re Salt*, 1895, 2 Ch. 203; 13 Rep. 499, which followed *In re Stokes*, 67 L. T. (N. S.), 223. While these cases are distinguishable on other grounds they seem in conflict upon this particular point.

<sup>92</sup> *Iowa Loan & Trust Company v. Holderbaum*, 86 Io. 1; 52 N. W. 550.

<sup>93</sup> *Suydam v. Voorhees* (N. J.), 43 Atl. 4; *Higbie v. Morris*, 53 N. J. Eq. 173; *Slack v. Emery*, 3 Stew. Eq. (N. J.), 458; *Whitehead v. Gibbens*, 2 Stock, 230 (N. J.).

charged upon the realty, the personalty is exonerated to that extent, and a legatee is entitled to be subrogated to the rights of the creditor against the realty to the extent to which the personalty was used for the debts.<sup>94</sup> A gift of property by a residuary clause, after specific legacies and devises have been given, charges the property thus given with the payment of debts in case the personalty is not sufficient.<sup>95</sup> So where testator gives his interest in a certain business to be determined by winding up the business and ascertaining the proceeds, the debts incurred by testator in such business are to be charged first against the business and deducted from the property thus given, and the beneficiaries can not insist that these debts be paid first out of his general estate.<sup>96</sup> A peremptory direction to executor to pay the debts of testator out of the real or personal estate is regarded as a trust, the execution of which can be specifically enforced at the instance of the creditors.<sup>97</sup> A discretionary power, however, to use the proceeds of real estate,<sup>98</sup> or life insurance,<sup>99</sup> in the payment of such debts as executor might see fit to pay in this way, does not create a trust for the benefit of the creditors and can not be enforced by them.

<sup>94</sup> *In re Salt* (1895), 2 Ch. 203; 13 Rep. 499, following *In re Stokes*, 67 L. T. (N. S.), 223, and refusing to follow *In re Bate*, 43 Ch. Div. 600.

<sup>95</sup> *In re Bawden* (1894), 1 Ch. 693; *Turner v. Laird*, 68 Conn. 198; *Mulligan's Estate*, 157 Pa. St. 98; *Thompson's Estate*, 182 Pa. St. 340. This is especially evident where the testator devised the residue remaining after the payment of his debts and funeral expenses. *Turner v. Laird*, 68 Conn. 198. And this rule has been applied where testator devised to his wife "one-third part of the residue and remainder of all my estate" and gave "the remainder of my estate after of all

my just debts and funeral expenses" to the trustee in trust for testator's children. It was held that the entire residue, including that part given to testator's wife, was equally liable for the debts and expenses of administration. *Stevens v. Underhill*, — (N. H.) (1883); 36 Atl. 370.

<sup>96</sup> *Froelich v. Froelich Trading Co.* 120 N. C. 39.

<sup>97</sup> *Morse v. Hackensack Savings Bank*, 47 N. J. Eq. 279; 12 L. R. A. 62; *Suydam v. Voorhees* (N. J.), 43 Atl. 4.

<sup>98</sup> *In re Head*, L. R. 45 Ch. Div. 310.

<sup>99</sup> *Woods v. Woods*, 99 Tenn. 50.

### §765. Payment of liens out of personalty.

The rule that testator's debts are primarily payable out of his personalty applies not only to his general debts but to such debts as have become liens upon specified property of testator, whether real or personal. Unless the contrary appears in his will these debts are payable primarily out of his personal estate not specifically bequeathed.<sup>100</sup> The omission of mortgagees to present their claims to the executor does not destroy the right of the devisee of mortgaged property to have the debt paid out of the personalty.<sup>101</sup> In some jurisdictions certain judgments are by statute payable primarily out of the realty.<sup>102</sup> Personalty disposed of by residuary clause may be applied to the payment of testator's mortgage indebtedness.<sup>103</sup> The opinion has been expressed in some courts that a pecuniary legacy can not be defeated or abated by the appropriation of the personalty to the payment of the mortgage debt in the absence of any specific direction to that effect.<sup>104</sup> Personalty specifically bequeathed can not be applied to the payment of a mortgage debt, since testator's evident intention is to benefit the legatee by the specific gift at all events.<sup>105</sup>

<sup>100</sup> *Turner v. Laird*, 68 Conn. 198; *Bassett v. Rogers*, 162 Mass. 47; *Hale v. St. Paul*, 54 Minn. 421; *Higbie v. Morris*, 53 N. J. Eq. 173; *Slack v. Emery*, 3 Stew. Eq. 458; *McLenahan v. McLenahan*, 3 C. E. Green, 101; *Keene v. Munn*, 1 C. E. Greene, 398; *In re Riegelman's Estate*, 174 Pa. St. 476; *Gould v. Winthrop*, 5 R. I. 319.

<sup>101</sup> *Turner v. Laird*, 68 Conn. 198.

<sup>102</sup> *In re Anthony* (1892), 1 Ch. 450 (a judgment in elegit).

<sup>103</sup> *Dean v. Rounds*, 18 R. I. 436. And the residuary legatee, whose legacies have been diminished by an appropriation of the personalty to payment of such mortgage debt, can be subrogated to the rights of

the mortgagee. *Dean v. Rounds*, 18 R. I. 436.

<sup>104</sup> *Howel v. Price*, 1 P. Wms. 291; *O'Neil v. Mead*, 1 P. Wms. 693; *Serle v. St. Eloy*, 2 P. Wms. 386; *Bickham v. Cruttwell*, 3 Mylne & Cr. 763; *Hawes v. Warner*, 2 Vern. 477; *Wythe v. Henniker*, 2 Myl. & K. 635; *Selby v. Selby*, 4 Russ. 336; *Harris v. Dodge*, 72 Md. 186; *Gould v. Winthrop*, 5 R. I. 319.

<sup>105</sup> *Johnson v. Child*, 4 Hare, 87; *In re Butler* (1894), 3 Ch. 250; *Cost's Succession*, 43 La. Ann. 144; *Thomas v. Thomas*, 2 C. E. Green, 356; *Tucker v. Lungren*, 12 O. C. C. 622; 1 O. C. C. Dec. 577; *Glass v. Dunn*, 17 O. St. 413.

§766. Where liens are not payable out of personalty.—Gifts cum onere.

Where the property devised was subject to a mortgage, or to other incumbrance, which was not created by testator, and for which he had not become personally liable, and which therefore is not his debt, it is held, in the absence of any express direction in his will, that such debt is not to be paid out of the personalty, but that the devisee takes the property *cum onere*.<sup>106</sup> Where the incumbrance was not created by testator, and he was not originally liable for the debt, the fact that he has covenanted with his vendor at the time he purchased such property, to pay off such incumbrance, does not make such debt payable primarily out of his personal estate in jurisdictions where such a covenant does not make him personally liable to the original mortgagee.<sup>107</sup> Where the incumbrance was not created by testator, a devise of the incumbered property "out-right" does not show testator's intention to devise it free from the mortgage.<sup>108</sup> Where the lien is not created by testator he may, nevertheless, direct its payment out of the personalty. This may be done by express direction, or by a general scheme of disposition inconsistent with the theory that the devisee must discharge the lien.<sup>109</sup>

Where testator expressly devises his property, subject to the incumbrances thereon, such incumbrances are not primarily payable out of the personalty.<sup>110</sup> The intention to devise certain property *cum onere* may be implied from the general pro-

<sup>106</sup> Carlisle v. Green (Ky.), 19 S. W. 925; 14 Ky. Law. R. 373; Hewes v. Dehon, 3 Gray, 205; Andrews v. Bishop, 5 Allen, 490; Cree-sy v. Wills, 159 Mass. 249.

<sup>107</sup> Tweddell v. Tweddell, 2 Bro. C. C. 101; Billingham v. Walker, 2 Bro. C. C. 604; Butler v. Butler, 5 Ves. 534; Creesy v. Willis, 159 Mass. 249; McLenahan v. McLenahan, 3 C. E. Green, 101; Mount v. Van Ness, 6 Stew. — 262; Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 227.

<sup>108</sup> Creesy v. Willis, 159 Mass. 249.

<sup>109</sup> Cumberland v. Codrington, 3 Johns. Cas. 229; Thompson v. Thompson, 4 O. S. 333. A direction in testator's will that his just debts be paid out of his personalty may include liens not created by testator. Thompson v. Thompson, 4 O. S. 333.

<sup>110</sup> Harris v. Dodge, 72 Md. 186.

visions of the will. Thus a gift of certain legacies, followed by a devise of a farm upon which there was a purchase money lien to others, which purchase money lien was so large that its payment would exhaust the personal estate and leave nothing for the legacies, it was held to show testator's intention to devise the land subject to the purchase money lien.<sup>111</sup>

<sup>111</sup> *Hedger v. Judy*, — (Ky.) —; 26 S. W. 586. (While this case might be explained on the theory that pecuniary legacies can not be abated in order to pay mortgage debts, the court decided the case upon the reasoning indicated in the text.)

## CHAPTER XXXVI.

## CLASSES OF DEVISES AND LEGACIES.

## §767. Classes of devises and legacies.—General legacies.

In determining questions as to priority of payment of devises and legacies, three classes of devises and legacies have been established: general, specific and demonstrative. A general legacy or devise is one which may be satisfied by any part of testator's estate, corresponding either in value or general description to the provisions of the will.<sup>1</sup> The characteristic of the general legacy or devise is that it does not attempt to dispose of specific pieces of property. Any pecuniary legacy, which, from the terms of the will, is payable generally from testator's estate, is a general legacy.<sup>2</sup> A bequest of "all moneys or legacies coming to me from any source" is said not to be a specific legacy.<sup>3</sup> A bequest of money due the testatrix from the estate of her deceased husband, subject to payment of certain other legacies, was held to be a general and not a specific legacy.<sup>4</sup> A bequest of all testator's property except certain

<sup>1</sup> Kelly v. Richardson, 100 Ala. 584; Dean v. Rounds, 18 R. I. 436.

<sup>2</sup> Kelly v. Richardson, 100 Ala. 584; Golder v. Chandler, 87 Me. 63; Hughes v. Hughes, 91 Wis. 138.

<sup>3</sup> Dean v. Rounds, 18 R. I. 436. (A gift, however, of the "moneys

coming to me from" A was said to be a specific and not a general legacy.) Derby v. Derby, 4 R. I. 414.

<sup>4</sup> Littig v. Hance, 81 Md. 416. (In this case the court laid down the general proposition that "when a fund is given subject to debts or

specified articles is a general bequest.<sup>5</sup> In case of doubt of testator's intention, the courts always presume that he intended to give a general legacy instead of a specific one.<sup>6</sup> Thus, certain legacies which aggregate in amount the principal of a fund given by testator in trust for other legatees, and which are payable on the decease of such other legatees, are held to be general legacies, there being no direction that they be paid out of such trust fund.<sup>7</sup>

### §768. Specific legacies.

A specific legacy or devise is a gift of a particular, specified, and determined piece of property as distinguished from a general gift.<sup>8</sup> It differs from a general legacy in that it is not intended by testator to be paid out of his estate generally, but is to be paid solely by delivering to the beneficiary the specific thing given by will.<sup>9</sup> A specific legacy is given by words

subject to other legacies, the gift of the residue is not specific," citing *Harley v. Moon*, 1 Dr. Sm. 623; *Baker v. Farmer*, L. Rep. 3 Ch. App. 537. The court further indicated in the following language a distinction which runs through many cases: "There is a broad distinction between the gift of a debt as a debt, and the sum of money produced when the debt has been recovered and has ceased to be a debt. In the one instance the legacy is specific, and the collection of the debt in the testator's lifetime will adeem the legacy. On the other hand, the gift extends to and includes the fund in the altered state, because, being a gift of the fund, the thing given will pass though it be not in the precise state that it was when the will was executed.")

<sup>5</sup> *Kelly v. Richardson*, 100 Ala. 584.

<sup>6</sup> *Dryden v. Owing*, 49 Md. 356; *Littig v. Hance*, 81 Md. 416; *Briggs v. Hosford*, 22 Pick. (Mass.) 288; *Wallace v. Wallace*, 23 N. H. 149; *Gilbreath v. Winter*, 10 Ohio 64; *Dean v. Rounds*, 18 R. I. 436.

<sup>7</sup> *Teel v. Hilton*, 21 R. I. (Part 2) 227.

<sup>8</sup> *In re Nottage* (1895), 2 Ch. 657; *Shaffer's Succession*, 50 La. Ann. 601; *Byrne v. Hume*, 86 Mich. 546; *Wheeler v. Wood*, 104 Mich. 414; *Page v. Eldredge Public Library Association* (N. H.) (1899), 45 Atl. 411; *Moore v. Moore*, 50 N. J. Eq. 554.

<sup>9</sup> "A specific legacy is a particular and specified thing singled out, or a particular fund, and if this fund fail, or the specific thing bequeathed is not in existence to be carried over to the legatee, the legacy can not be paid out of the assets of the estate." *Byrne v. Hume*, 86 Mich. 546.

which particularly describe the property which testator gives to the beneficiary. Thus, a gift of testator's property invested in his mercantile business is a specific gift.<sup>10</sup> So a gift of the horses, farming implements, etc., upon a given plantation, is a specific bequest.<sup>11</sup> So a devise of land owned by testator at the date of the will is a specific devise.<sup>12</sup> Money may be the subject of a specific legacy. A gift of money deposited at a certain named bank is a specific legacy.<sup>13</sup> A gift of a certain sum out of a certain described deposit has been held to be a specific legacy.<sup>14</sup> So a gift to the beneficiary of a debt specifically described by indicating the debtor is a specific bequest.<sup>15</sup> So a gift of a debt, secured by a mortgage, the executor being directed to assign the mortgage to the legatee, is a specific bequest.<sup>16</sup> And a gift of a certain amount to be paid by allowing the legatee to select such amount out of a specified number of bonds and mortgages held by testator's executors was treated as a specific gift.<sup>17</sup> A gift of certain encumbered realty, with a direction that the executors pay off the encumbrances thereon, is a specific devise of such realty free from all encumbrances.<sup>18</sup> A specific legacy may be a gift of property to be afterwards acquired, if described with sufficient particularity.<sup>19</sup>

<sup>10</sup> *Kelly v. Richardson*, 100 Ala. 584.

<sup>11</sup> *McFadden v. Heffley*, 28 S. C. 317; 13 Am. State Rep. 675.

<sup>12</sup> *Kelley v. Richardson*, 100 Ala. 584.

<sup>13</sup> *Barber v. Davidson*, 73 Ill. App. 441; *Prendergast v. Walsh* (N. J.). 42 Atl. 1049; *Towle v. Swasey*, 106 Mass. 100; *Crawford v. McCarthy*, 159 N. Y. 514.

<sup>14</sup> *Crawford v. McCarthy*, 159 N. Y. 514.

<sup>15</sup> *Sinnott v. Kenaday*, 14 App. D. C. 1; *Gelbach v. Shively*, 67 Md. 489; *Tomlinson v. Bury*, 145 Mass. 346; *Gilbreath v. Winter*, 10 Ohio, 64; *Derby v. Derby*, 4 R. I. 414; *Gardner v. Printup*, 2 Barb. (S. C.), 83.

<sup>16</sup> *Wheeler v. Wood*, 104 Mich. 414. (The will provided: "I give and bequeath" to A "the sum of \$400, the said \$400 to be paid by my executor assigning and transferring to the said (A) a certain real estate mortgage," describing it by the amount, the debtor and the land mortgaged.)

<sup>17</sup> *Blundell v. Pope* (N. J.), 21 Atl. 456. (And being a specific gift it carried with it interest from testator's death.)

<sup>18</sup> *Porter v. Howe*, 173 Mass. 521. According such encumbrances must be paid in full even if the general legacies must abate or fail.

<sup>19</sup> *Kelly v. Richardson*, 100 Ala. 584; *Shaffer's Succession*, 50 La. Ann. 601.



### §769. Gifts of stocks, bonds and other securities.

When a testator, by will, disposes of a certain number of bonds and stocks, or bonds and stocks of a certain value, it is often very difficult to determine whether the gift is general or specific; and there is some difference of judicial opinion in particular cases. The general principle which controls in this case is that, if it appears from the entire will that testator intended to pass particular, designated bonds or stocks, that the gift is specific; while, if the will can be complied with by giving any bonds or stocks of the kind, value, and amount named, the gift is a general one. Thus, a gift of a certain amount of money in certain named securities, not identifying them, is a general gift, and not a specific one, though testator had exactly that amount at his death.<sup>20</sup> A gift of a certain value of securities, to be selected by executors from his estate generally, is a general and not a specific gift.<sup>21</sup> A gift of a certain sum, "either in stock or money," is, of course, a general gift.<sup>22</sup> But where testator gives stocks, bonds, or other securities in such way as to show that he gives specific bonds or specific shares of stock or particular securities, the gift is regarded as a specific and not a general one.<sup>23</sup> Thus, where testator gives a specified number of shares of stock of a certain kind to one beneficiary, and another specified number to another, the two together being exactly equal to the amount of stock owned by testator when he made his will, the gift is treated as a specific one especially, as a subsequent clause, he gives "balance of my stock," that is, the rest of his stock of other kinds, to other

<sup>20</sup> *Evans v. Hunter*, 86 Ia. 413.

<sup>21</sup> *Blundell v. Pope* (N. J.), 21 Atl. 456; *Booth v. Baptist Church*, 126 N. Y. 215. But we have seen that where the beneficiary is to select the securities from a specified number, the gift is treated as specific. *Blundell v. Pope*, — (N. J.) —, 21 Atl. 456.

<sup>22</sup> *Graham v. De Yampert*, 106 Ala. 279. (Being a general gift, if beneficiary elects to take the stocks, he can take only the actual value

of the sum named and not the face value where the stocks are above par.)

<sup>23</sup> *In re Nottage* (1895), 2 Ch. 657; *In re Pratt* (1894), 1 Ch. 491; *Douglass v. Douglass*, 13 App. D. C. 21; *Sinnott v. Kenaday*, 14 App. D. C. 1; *Unitarian Society v. Tufts*, 151 Mass. 76; 7 L. R. A. 390; *Yerkes's Estate*, 22 Pa. Co. 263; 8 Pa. Co. 263; 8 Pa. Dist. Rep. 37 & 83; *McFadden v. Heffley*, 28 S. C. 317; 13 Am. St. Rep. 675.

beneficiaries.<sup>24</sup> A gift of the dividends of a specified block of stock, being considered in law as a gift of the stock itself, is a specific bequest.<sup>25</sup>

Where testator's intention to make a specific gift is clear, a slight misdescription of the security to be given does not prevent the gift from being a specific one.<sup>26</sup> In a case which is a departure from the normal, a gift to legatees of certain number of shares of a particular kind of stock "now owned by me and standing in my name" on the corporation stock books, amounted in all to 2200 shares; at the date of the will testator owned over 3000 shares; at the time of his death he owned only 200 shares. The court held that this was a general and not a specific legacy. This result was to some extent aided by a statute providing that a will should be construed as if it had been made immediately prior to testator's death, unless his intention clearly appears otherwise. The legacies were, therefore, treated as general pecuniary legacies.<sup>27</sup> Where testator directs that a certain sum of money derived from his estate generally be invested in a certain manner, this is held to be a general, and not a specific legacy, the fund thus invested being raised from testator's general estate.<sup>28</sup>

### §770. Demonstrative legacies.

A demonstrative legacy is one which is general in its nature, but which is made payable out of certain specified property either real or personal.<sup>29</sup> A gift of a certain amount "to be

<sup>24</sup> *Unitarian Society v. Tufts*, 151 Mass. 76; 7 L. R. A. 390.

<sup>25</sup> *McFadden v. Hefley*, 28 S. C. 317; 13 Am. St. Rep. 675.

<sup>26</sup> *In re Nottage* (1895), 2 Ch. 657 (debentures miscalled debenture stock of shares); *In re Pratt* (1894), 1 Ch. 491 (mistake in describing the rate of interest which the securities bore).

<sup>27</sup> *Mahoney v. Holt*, 19 R. I. 660 (1896); 36 Atl. 1.

<sup>28</sup> *Moore v. Moore*, 50 N. J. Eq. 554; *In re Hodgman*, 140 N. Y. 421;

*McFadden v. Hefley*, 28 S. C. 317; 13 Am. State Rep. 675.

<sup>29</sup> *Ives v. Canby*, 48 Fed. 718; *Hibler v. Hibler*, 104 Mich. 274; *Johnson v. Conover*, 54 N. J. Eq. 333; *In re Hodgman*, 140 N. Y. 421; *Hammer's Estate*, 158 Pa. St. 632; *Glass v. Dunn*, 17 O. S. 413; *Lake v. Copeland*, 82 Tex. 464. In *Byrne v. Hume*, 86 Mich. 546, a demonstrative legacy was said to be "a pecuniary legacy, the particular fund being pointed out from which it is to be paid." This definition

paid out of my personal property on hand after the death of my said wife," is a demonstrative legacy;<sup>30</sup> so is a gift of "the sum of \$8,000 invested in stocks";<sup>31</sup> and a gift of a certain sum "which may be invested in bank stock" has been held demonstrative.<sup>32</sup>

A demonstrative legacy has been held to be created by a gift which, in its terms, is apparently specific where it is evidently given as a means of carrying out testator's intention of dividing his estate equally.<sup>33</sup> Demonstrative legacies thus combine most of the advantages of both general and specific legacies. If the property out of which it is made payable is in existence, the demonstrative legacy is payable out of such fund before other legacies.<sup>34</sup> If the property out of which it is payable is not in existence, the demonstrative legacy is payable out of testator's property generally.<sup>35</sup>

is open to criticism in as much as a demonstrative legacy may be payable out of property other than the fund, and it seems need not necessarily be in the form of a pecuniary legacy.)

Hence, if such gift is paid by delivering part of the stock, it does not carry with it interest or the dividends. *Giddings v. Seward*, 10 N. Y. 365; *Newton v. Stanley*, 29 N. Y. 61. Hence a provision that an annuity should be paid out of certain tolls which were bequeathed in trust is not a demonstrative legacy, but the creation of a trust; and if the proceeds of the tolls are insufficient to pay the annuity, resort can not be had to the general estate of testator. *Morris v. Harris*, 19 O. S. 15.

<sup>30</sup> *Hibler v. Hibler*, 104 Mich. 274.

<sup>31</sup> *Johnson v. Conover*, 54 N. J. Eq. 333.

<sup>32</sup> *In re Hodgman*, 140 N. Y. 421. (This is really a general legacy. The real point at issue was whether the gift was specific on the one hand, in which case it would carry interest, or general or demonstrative on the other, in either of which cases it would not.)

<sup>33</sup> *Hammer's Estate*, 158 Pa. St. 632; *Lake v. Copeland*, 82 Tex. 464. (The result is reached in these cases by holding that from the whole will it is testator's intention that the gift shall be paid, in any event, even if it is necessary to pay it out of the general estate, and that he did not intend that the gift should depend upon continued existence of the property out of which it is to be paid.)

<sup>34</sup> *Dunford v. Jackson*, — Va.— (1896); 22 S. E. 853.

<sup>35</sup> See cases cited in this section.

## CHAPTER XXXVII.

## ABATEMENT, ADEPTION, ADVANCEMENTS AND CONTRIBUTION.

## I—ABATEMENT.

## §771. Where testator directs order of abatement.

The debts of a testator have, of course, a priority of payment over legacies given by him. If, after payment of debts, there is not sufficient property to pay all the legacies which he has given by will, it is evident that some or all must fail in whole or in part by reason of such deficiency in his estate. This failure is known as abatement. The question presented in such cases for determination is whether the legacies shall abate *pro rata*, or whether certain ones shall be paid in full and others either completely defeated or disproportionately reduced in order to pay such others in full.

If testator in his will indicates that certain legacies are to be given priority over others in case of a deficiency in the estate, his wishes will be enforced.<sup>1</sup> Thus, a direction that a cer-

<sup>1</sup> Chester County Hospital v. Hayden, 83 Md. 104; Towle v. Swansea, 106 Mass. 100; Richardson v. Hall, 124 Mass. 228; Weston v. Mass. General Hospital, 169 Mass. 76; McLean v. Robertson, 126 Mass. 537; Heath v. McLaughlin, 115 N. C.

398; Eames v. Protestant Episcopal Church, 68 N. H. 203; Moore v. Moore, 50 N. J. Eq. 554; Bright's Appeal, 100 Pa. St. 602; Spencer, Petitioner, 16 R. I. 25; Lee v. Smith, 84 Va. 289.

tain legacy shall be first paid, and then, after such legacy is paid, another legacy shall be paid out of his estate, such an expression is ordinarily held to give the first legacy a priority of payment over the subsequent ones.<sup>2</sup> So testator may provide in his will that certain specified property shall not be applied to the payment of his debts until the rest of his estate is consumed in their payment.<sup>3</sup>

Where testator's intention is clear in his will, he may even make a legacy, in its nature residuary, a preferred legacy over pecuniary ones. Thus, where testator bequeathed all his property to his wife, directing her to pay certain legacies out of such property, but providing that under no other provisions of the will her share shall be less than \$7,000, which was to include two life insurance policies aggregating \$5,000 and payable to her, it was held that his intention was clear that she should be a preferred legatee out of his general estate to the amount of \$2,000.<sup>4</sup> So where testatrix directed that the sum of \$10,000 be kept as a fund for the use and maintenance of her father for life, and at his death "the whole amount of \$10,000" to go to a designated charity, and gave subsequently two general legacies, it was held to be the intention of testatrix that the fund of \$10,000 for the support of her father should be devoted to that purpose, in any event, and that such legacy was to be preferred to the other two. Hence, upon his death, the fund was to be paid in full to the trust, even though the general legacies might be abated or defeated.<sup>5</sup> Still, expressions in a will which show the order in which the bequests are made, or even the order of time in which they are to be paid, do not of themselves show testator's intention to give certain legacies a priority of payment over others in case of insuffi-

<sup>2</sup> Shaffer's Succession, 50 La. App. 601; *Hammond v. Hammond*, 169 Mass 82 (thus a gift of a certain annuity to A and the balance of the income, if any, to B, gives A's legacy a priority); *Richardson v. Bowen*, 18 R. I. 138. See Sec. 749.

*Contra Lindsay v. Waldbrook*, 24 Ont. App. 604 (a direction to pay a certain legacy for the education

of testator's grandson, and then to pay the "following legacies" was held to give no priority to the legacy to grandson.)

<sup>3</sup> *Hammet v. Hammet*, 38 S. C. 50.

<sup>4</sup> *Phillips's Estate*, 18 Mont. 311.

<sup>5</sup> *Chester County Hospital v. Hayden*, 83 Md. 104.

ciency of assets.<sup>6</sup> A legacy which is charged upon certain property has, as to such property, a priority over general legacies.<sup>7</sup>

**§772. Where no direction in will.—Residuary legacies.**

Testator's will does not, however, often contain provisions directing the course in which the legacies given shall abate, since testator rarely contemplates the possibility of his estate failing to pay his debts and legacies in full.

In the absence of specific provisions in the will, the law must provide in what order the different classes of legacies shall abate. This result is reached by general rules which are intended to express and enforce the probable intention of the average testator. It is another of those difficult cases where courts must determine the intention of testator upon a subject upon which he never had any intention.

If testator's estate is insufficient to pay off all his legacies and devises in full after paying his debts, the legacies given in the residuary clauses abate first. No payment can be made to a residuary legatee until all other legacies have been paid in full.<sup>8</sup> Thus, in a gift of certain sums to legatees named, with a provision in case of a deficiency in the funds available for the payment of such legacies, followed by a residuary clause, it was held that the rents collected from realty pending its sale under a power should be paid to the first legatees rather than to the residuary legatees.<sup>9</sup> A gift, after providing for certain legacies, of "one-sixth of the rest, residue and remainder" of his estate, was held to give only what was left after

<sup>6</sup> *Porter v. Howe*, 173 Mass. 521; *Sumner v. American Home Missionary Society*, 64 N. H. 321.

<sup>7</sup> *Young v. Benton* (N. H.) (1900); 46 Atl. 51.

<sup>8</sup> *In re Bawden* (1894), 1 Ch. 603; *Warren v. Morris*, 4 Del. Ch. 280; *Carper v. Crowl*, 149 Ill. 405; *Porter v. Howe*, 173 Mass. 521; *Tomlinson v. Bury*, 145 Mass. 346; *Sykes v. Van Bibber*, 88 Md. 98;

*Alsop v. Bowers*, 76 N. Car. 169; *Burke v. Stiles*, 65 N. H. 163; *In re Hodgman*, 140 N. Y. 421; *Ferguson's Appeal*, 138 Pa. St. 208; *Vance's Estate*, 141 Pa. St. 201; 12 L. R. A. 227; *Lyon v. Brown University*, 20 R. I. 53; rehearing denied, 20 R. I. 337; *Zentner's Estate*, 90 Wis. 236.

<sup>9</sup> *Lyon v. Brown University*, 20 R. I. 53; rehearing denied, 20 R. I. 337.

payment of the debts and legacies.<sup>10</sup> The reason underlying this rule is that, as testator bequeaths in a residuary clause only that part of his property left after the payment of the bequests and devises previously given, his intention will be best given effect by using the residuum first in paying testator's debts. The purpose of all these rules is to approximate testator's intention as it would probably express itself if he had been aware of the actual relation of the value of his property to the amount of his debts, since it is impossible to give literal effect to testator's intention. Where there is no residuary clause, any property which testator has not disposed of by will is applied to the payment of his debts before any which is specifically bequeathed.

### §773. General legacies.

If, after appropriating the entire residuum, testator's estate is not sufficient to pay the other legacies in full, the general legacies will next abate *pro rata*.<sup>11</sup> "Between specific and general devises or legacies, the loss is to be borne wholly by the latter."<sup>12</sup> Even though it appears quite probable that testator's wishes, if expressed, would have been that one or more of the general legacies should be preferred in payment to others, the rule that the general legacies abate *pro rata* will not be de-

<sup>10</sup> Zentner's Estate, 90 Wis. 236.

<sup>11</sup> *In re Bate*, L. R. 43 Ch. D. 600; Schweder's Estate (1891), 3 Ch. 44; *In re Staebler*, 21 Ont. App. 266; Botsford's Appeal, 33 N. B. 55; Kelly v. Richardson, 100 Ala. 584; Duffield v. Pike, 71 Conn. 521; Nash v. Ober, 2 App. D. C. 304; Showalter v. Showalter, 38 Ill. App. 208; Henry v. Griffis, 89 Io. 543; Murray v. Murray (Ky.), 27 S. W. 977; 16 Ky. L. R. 332; Coste's Succession, 43 La. App. 144; Johnson v. Home for Aged Men, 152 Mass. 89; Richardson v. Hall, 124 Mass. 228; Farnum v. Bascom, 122 Mass. 282; Towle v. Swasey, 106 Mass. 100; Babidge v. Vittum, 156

Mass. 38; Lawton v. Fitchburg Savings Bank, 160 Mass. 154; Phillip's Estate, 18 Mont. 311; Rumsey v. Otis, 133 Mo. 85; Hall v. Smith, 61 N. H. 144; Meis v. Meis, — N. J. Eq. —, 1896; 35 Atl. 369; United States Trust Co. v. Black, 146 N. Y. 1; Ferguson's Appeal, 138 Pa. St. 208; Duval's Estate, 146 Pa. St. 176; Myers v. Myers, 88 Va. 131; Morris v. Garland, 78 Va. 215; Broderick v. Broderick, 35 W. Va. 620; Dunn v. Rennick, 40 W. Va. 349; Bradford v. McConihay, 15 W. Va. 732.

<sup>12</sup> Johnson v. Home for Aged Men, 152 Mass. 89.

parted from, in the absence of any expression in the will showing an intention to give a preference to such legacies.<sup>13</sup> Even where testator directs that certain legacies shall abate last, this direction, while it saves the specified legacies, does not change the rule as to the other legacies given by will.<sup>14</sup> A bequest given by will of five per cent. of so much of testator's estate as should be in existence at the death of his widow was held to have no priority over pecuniary legacies.<sup>15</sup>

In many individual cases, testator would no doubt have provided that certain specific legacies should abate in favor of certain general ones, if his attention had been called to the subject and he had appreciated its practical importance. To determine in what cases his intention existed would require the courts to enter upon the forbidden field of direct extrinsic evidence of testator's intention. In avoiding such extrinsic evidence, the courts are thrown back on the rule that general legacies abate first as the rule most probably conforming to testator's actual intention in the majority of cases.

#### §774. Demonstrative legacies.

A demonstrative legacy is, of course, a first charge upon the fund or property which testator designates as to the source of payment of such legacy.<sup>16</sup> A demonstrative legacy is not defeated, however, by the partial or total failure of the fund out of which such legacy is payable, but in such case the deficiency is to be made up out of testator's personal estate not specifically bequeathed.<sup>17</sup> Thus, where testator directs that certain

<sup>13</sup> Schweder's Estate (1891), 3 Ch. 44. (In this case a legacy to testator's wife for her immediate needs was held to abate *pro rata* with other legacies.) Duffield v. Pike, 71 Conn. 521; Babidge v. Vitum, 156 Mass. 38 (a legacy to testator's children held to abate *pro rata* with legacies to more distant relatives); Porter v. Howe, 173 Mass. 521 (legacies to testator's near relatives held to abate *pro rata* with legacies to charities): Nicker-

son v. Bragg, 21 R. I. 296; 21 R. I. (Part 1), 87.

<sup>14</sup> Heath v. McLaughlin, 115 N. C. 398.

<sup>15</sup> Ferguson's Appeal, 133 Pa. St. 208.

<sup>16</sup> See Chap. XXXVI.

<sup>17</sup> Ives v. Canby, 48 Fed. 718; Golder v. Chandler, 87 Me. 63; Byrne v. Hume, 86 Mich. 546; Rote v. Warner, 17 O. C. C. 342; Lake v. Copeland, 82 Tex. 464.

"The gift is unconditional and



real estate be sold in no event for less than a certain sum, and that out of the proceeds a legacy given to another shall be paid, such legacy was not defeated by sale of the property for less than such sum, under judicial sale instituted by a creditor of the estate.<sup>18</sup>

Where testator makes a gift of certain legacies out of a fund or proceeds of property, and gives the remainder or residuum of the fund or proceeds of such property, after the sale, to a designated beneficiary, the question is often presented for determination whether the gift, which is in form a residuary gift, is really such, or whether it is a specific legacy like the others. The distinction adopted by the courts is as follows:

If the fund out of which the legacies are given is fixed and ascertained in amount, the residuary gift is construed as in effect a gift of a certain part of the original fund. Accordingly, in case of a deficit in such fund, the legacies will abate *pro rata*.<sup>19</sup> On the other hand, if the fund from which the legacies are given is not settled and determined in amount, so that the amount of the residuum can not be determined, it is, of course, impossible to determine what fraction of the whole fund testator intended to give to the residuary beneficiary. In such cases, therefore, a gift of the residuum is treated in the same way as other residuary gifts, and a deficiency in a fund must be borne entirely by the residuary legatee, the other

absolute, although, as is often the case, he overestimates the sources of supply which were to assure its payment. The source indicated turning out to be insufficient, others must be taken to supply the deficiency. It is a demonstrative legacy, not lost because of the non-existence of the property specially pointed out as a means of satisfying it."

Moore v. Alden, 80 Me. 301, citing Smith v. Fellows, 131 Mass. 20; McLean v. Robertson, 126 Mass. 537; Potter v. Brown, 11 R. I. 232; Wells v. Borwick, L. R. 17 Ch. D. 798.

<sup>18</sup> Broderick v. Broderick, 35 W. Va. 620.

<sup>19</sup> Page v. Leapingwell, 18 Ves. Jr. 463; Walpole v. Apthorp, L. R. 4 Eq. 37. (This rule rests upon the fact that the entire fund is fixed, as for instance \$1,000, a fund of a certain amount out of such to one, as, for example, \$500, with a gift of the remainder to another, is exactly, in legal effect and contemplation, the same thing as a gift of one-half of the fund to one and the other half to another; and accordingly it was treated in law in exactly the same manner.)

beneficiaries being paid in full if the fund is sufficient.<sup>20</sup> Thus, a provision that in event of the death of a certain legatee without issue his legacy of \$30,000, and whatever else he might be entitled to under the will, should, in such case, be divided into four bequests of \$5,000 each, and the residue to another beneficiary, shows that testator did not intend to limit his gift to the fixed sum of \$30,000, but that it was an uncertain sum which testator thought would be in excess of that amount. Accordingly, when, after the death of the legatee without issue, it proved that the estate of the testator would not be sufficient to pay the legacy of \$30,000, it was held that the four legacies of \$5,000 each were to be paid in full, and that the deficit was to be borne entirely by the gift of the residue.<sup>21</sup>

### §775. Specific legacies.

Specific legacies do not abate until the entire amount of the general and residuary legacies has been consumed in paying testator's debts; and specific legacies do not abate in favor of general legacies unless the contrary intention is manifested in the will.<sup>22</sup> Thus, where testator by will gives the principal of a designated mortgage to his children equally, it was held that such mortgage can not be applied to the payment of other

<sup>20</sup> *Currie v. Kimberley*, 57 L. J. Ch. N. S. 743; *Elwes v. Causton*, 30 Beav. 554; *Booth v. Alington*, 6 De. G. M. & G. 613; *Wright v. Weston*, 26 Beav. 429; *Haslewood v. Green*, 28 Beav. 1; *Miller v. Huddleston*, L. R. 6 Eq. 65; *Petre v. Petre*, 14 Beav. 197; *Harley v. Moon*, 1 Drew & S. 623; *Wilday v. Barnett*, L. R. 6 Eq. 193; *Re Harries*, Johns Ch. R. 199; *Aston v. Wood*, 43 L. J. Ch. N. S. 715; *Corballis v. Corballis*, 9 L. R. Ir. 309; *In re Tunno*, L. R. 45 Ch. Div. 66; *In re Carbery*, 30 Ont. Rep. 40; *Sykes v. Van Bibber*, 88 Md. 98; *Van Nest v. Van Nest*, 43 N. J. Eq. 126; *Broderick v. Broderick*, 35 W. Va. 620.

<sup>21</sup> *Sykes v. Van Bibber*, 88 Md. 98.

<sup>22</sup> *Kelly v. Richardson*, 100 Ala. 584; *Woodworth's Estate*, 31 Cal. 595; *Hoffecker v. Clark*, 6 Del. Ch. 125; *Johnson v. Home for Aged Men*, 152 Mass. 89; *Meiss v. Meiss*, — N. J. Eq. —; 35 Atl. 369; *Page v. Eldredge Public Library Association* (N. H.) (1899), 45 Atl. 411; *McMahon's Appeal*, 132 Pa. St. 175; *Myers v. Myers*, 88 Va. 131; *Morris v. Garland*, 78 Va. 215; *Dunn v. Renick*, 40 W. Va. 349. (A specific legacy is liable to ademption, but not to abatement.) *Dunn v. Renick*, 40 W. Va. 349; *Bradford v. McConihay*, 15 W. Va. 732.

legacies, or in any way be diverted from the named beneficiaries, except for the payment of testator's debts.<sup>23</sup> Where property specifically devised is necessarily sold to pay testator's debts, the surplus proceeds of the sale of such property, after payment of the debts, go to specific beneficiary, and can not be applied to general bequests and legacies.<sup>24</sup> While specific legacies usually abate *pro rata* if they abate at all, the circumstances of the case and the context of the will may show that testator intended to give one specific gift a preference over the other.<sup>25</sup> Thus, testator provided that his property should be subject to a trust to support certain minors; and, at the time of making his will, testator anticipated that he would die soon. He then had one fund available at once; the other, available on the death of one having a life interest in such fund, who, by the tables of mortality, might live twenty years. It was held that the trust was payable of the first fund, though testator had made specific gifts of each.<sup>26</sup>

#### §776. Legacies given upon valuable consideration.

Where a legacy is given upon a valuable consideration a different rule applies, if abatement of legacies is necessary. The common types of legacy upon consideration are legacies in lieu of dower<sup>27</sup> and legacies in satisfaction of a debt due from testator to legatee.<sup>28</sup> In these cases the legatee, by electing to take under the will, parts with a valuable right. It is

<sup>23</sup> McMahon's Appeal, 132 Pa. St. 175.

<sup>24</sup> Golder v. Chandler, 87 Me. 63.

<sup>25</sup> Emery v. Batchelder, 78 Me. 233; Thurber v. Battey, 105 Mich. 718; Farnum v. Bascom, 122 Mass. 282; Boston Safe Deposit Co. v. Plummer, 142 Mass. 257. See Sec. 771.

<sup>26</sup> Thurber v. Battey, 105 Mich. 718.

<sup>27</sup> Security Company v. Bryant, 52 Conn. 311; Reed v. Corrigan, 143 Ill. 402; Allen v. Pray, 12 Me. 138; Hastings v. Clifford, 32 Me.

132; Moore v. Alden, 80 Me. 301; Towle v. Swasey, 106 Mass. 100; Taylor's Estate, 175 Pa. St. 60. But where the widow claims a homestead by virtue of her husband's will, it has been held in Kentucky that as to his creditors, she is not a purchaser for value. Nichols v. Lancaster (Ky.) (1896), 32 S. W. 676.

<sup>28</sup> McLean v. Robertson, 126 Mass. 537; Richardson v. Hall, 124 Mass. 228; Duncan v. Franklin Township, 43 N. J. Eq. 143.

probably testator's intention that the legacy indicated by will as a suitable recompense for such valuable right should be paid in full, even if other legacies are thereby defeated. Accordingly, it is settled that general legacies given on valuable consideration have a priority over other general legacies.<sup>29</sup> A legacy to obtain masses for testator was held to be upon consideration, and not to abate *pro rata* with other general legacies.<sup>30</sup> On the same principle, specific legacies on consideration should have priority over other specific legacies.<sup>31</sup> Even where the will directed that bequests should abate *pro rata* in case of a deficiency of assets, it was held that such provision did not apply to a legacy given upon consideration.<sup>32</sup>

Whether a general legacy on consideration will have priority over a specific legacy is a question upon which there is a divergence of authority. On principle a general legacy should have priority in such case, at least if the often-repeated statement that such a legatee is a purchaser, for value means what it says; and this position has been taken in some cases.<sup>33</sup> This view does not seem to be uniformly held, however.<sup>34</sup>

### §777. Abatement of devises.

At common law testator's personality was liable for his debts and legacies; and his realty could not be applied to the payment of either debts or legacies unless they were specifically charged upon the realty. This rule has been everywhere changed by statute as to the debts of a decedent; and his

<sup>29</sup> *Burridge v. Bradyl*, 1 P. Wms. 129; *Blower v. Morret*, 2 Ves. Sr. 420; *Davenhill v. Fletcher*, Amb. 244; *Norcott v. Gordon*, 14 Sim. 258; *Warren v. Morris*, 4 Del. Ch. 289; *Moore v. Alden*, 80 Me. 301; *Hastings v. Clifford*, 32 Me. 132; *Allen v. Pray*, 12 Me. 138; *Towle v. Swasey*, 106 Mass. 100; *Farnam v. Bascom*, 122 Mass. 282; *Taylor's Estate*, 175 Pa. St. 60; *Brown v. Brown*, 79 Va. 648.

<sup>30</sup> *Sherman v. Baker*, 20 R. I. 613; 20 R. I. (Part 3), 218.

<sup>31</sup> *Taylor's Estate*, 175 Pa. St. 60 (abatement of devises).

<sup>32</sup> *McLean v. Robertson*, 126 Mass. 537.

<sup>33</sup> *Lord v. Lord*, 23 Conn. 327; *Clayton v. Aikin*, 38 Ga. 320; *Borden v. Jenks*, 140 Mass. 562; 54 Am. Rep. 507; *Loock v. Clarkson*, 1 Desaus Eq. 471; *Stuart v. Carson*, 1 Desaus Eq. 500.

<sup>34</sup> *Warren v. Morris*, 4 Del. Ch. 289; *Hinson v. Ennis*, 81 Ky. 363; *Boykin v. Boykin*, 21 S. Car. 513.

realty may be subjected to his debts if his personalty proves insufficient. The statutes of the different states are by no means uniform upon the question of the extent to which testator's realty can be applied to payment of his debts and legacies in the absence of a specific charge upon the realty. In many states the common law rules apply, and all specific legacies abate entirely before any land specifically devised can be sold for testator's debts.<sup>35</sup> Thus, it is said that in the absence of any provision in the will for testator's debts, they are to be paid first, out of the personalty; second, out of lapsed devises, and other intestate realty; third, out of specific devises.<sup>36</sup> In other states devises abate with legacies, according to the class; that is, general devises will abate *pro rata* with general legacies, contributing ratably to the payment of testator's debts; and specific devises will abate *pro rata* with specific legacies.<sup>37</sup>

#### §778. Legacies given under a power.

A legacy given by virtue of a power of appointment does not abate ratably with legacies payable out of the property of testatrix where her property is insufficient to pay the legacies which she has given.<sup>38</sup>

### II—ADEMPTION.

#### §779. Ademption.—Definition.

Ademption, in its technical signification, is the destruction of a bequest by means of the sale or destruction of the thing specifically bequeathed, or by payment by the testator to the legatee in the lifetime of the testator in the nature of an advancement. Ademption thus includes two separate titles,

<sup>35</sup> *Morse v. Hayden*, 82 Me. 227;  
*McFadden v. Hefley*, 28 S. Car. 317;  
 13 Am. St. Rep. 675; *Warley v.*  
*Warley*, — Bail Eq. 397; *Hull v.*  
*Hull*, 3 Rich. Eq. 65; *Farmer v.*  
*Spell*, 11 Rich. Eq. 541.

<sup>36</sup> *Morse v. Hayden*, 82 Me. 227.  
<sup>37</sup> *Kelly v. Richardson*, 100 Ala.  
 584.

<sup>38</sup> *White v. Massachusetts Institute of Technology*, 171 Mass. 84.

which have in common the extinction of a legacy for some cause other than a general deficiency in the assets of the estate of testator.<sup>39</sup>

### §780. Ademption by change of ownership.

When a chattel, specifically bequeathed by testator, is sold or conveyed by testator in his lifetime, the beneficiary does not take anything under the bequest to him, and the bequest is said to be adeemed.<sup>40</sup> So a gift of the proceeds of certain specific real estate upon the death of the life tenant is adeemed by the sale of such real estate in the lifetime of testator.<sup>41</sup> So a legacy of certain specific notes secured by mortgage is adeemed by the subsequent surrender of these notes by testator in his lifetime, and by his accepting a deed of the mortgaged property,<sup>42</sup> or by testator's collecting such notes.<sup>43</sup>

On the other hand, where testator gave a legacy to a certain named son, to be paid by deducting this legacy from the amount due from such son to testator upon certain notes, it was held that such legacy is adeemed, when the testator gave these notes to such son in his lifetime.<sup>44</sup> A bequest to testator's three sons of his twenty-one shares in a partnership is not adeemed by the subsequent purchase by one of the sons, for value, of two of the shares; but the remaining nineteen are to be divided equally among the three.<sup>45</sup> So a legacy to A to enable him to pay B's debt is adeemed where, after making the will, testator pays B's debt.<sup>46</sup> A devise to the minor children of A is not revoked or adeemed by a finding that testator had

<sup>39</sup> *Fisher v. Keithley*, 142 Mo. 244; 64 Am. St. Rep. 560; *Burnham v. Comfort*, 108 N. Y. 535.

<sup>40</sup> *Tolman v. Tolman*, 85 Me. 317; *Brady v. Brady*, 78 Md. 461; *Unitarian Society v. Tufts*, 151 Mass. 76; 7 L. R. A. 390; *Starbuck v. Starbuck*, 93 N. Car. 183; *Ford v. Ford*, 23 N. H. 212; *Hood v. Haden*, 82 Va. 588.

<sup>41</sup> *Sharp v. McPherson*, 10 O. C. C. 181; *McMurry v. Whitfield* (Tenn. Ch. App.), 52 S. W. 336.

<sup>42</sup> *Tolman v. Tolman*, 85 Me. 317.

<sup>43</sup> *Batchelor's Succession*, 48 La. Ann. 278; *Gilbreath v. Winter*, 10 Ohio, 64.

<sup>44</sup> *Davis v. Close*, 104 Io. 264; *Wheeler v. Wood*, 104 Mich. 414.

<sup>45</sup> *In re Lacon* (C. A.) (1891), 2 Ch. 482.

<sup>46</sup> *Tanton v. Keller*, 61 Ill. App. 625.

contracted to leave to A a share of his estate on an equality with testator's children; and that A can enforce such contract against the estate of testator.<sup>47</sup>

**§781. What changes do not affect ademption.**

Where property specifically bequeathed remains in existence in specie, slight and immaterial changes in its form do not adeem the legacy.<sup>48</sup> Thus, a devise of certain specific notes is not adeemed by a renewal of such notes with sureties;<sup>49</sup> nor is a specific bequest adeemed by a transfer of the personalty bequeathed, in trust for testator, with the understanding that this property was to be retransferred to him;<sup>50</sup> nor is a devise of a ground rent adeemed by a subsequent extension of the time of the original lease.<sup>51</sup> A devise of a specific ground rent is, however, adeemed by the sale and extinguishment thereof by testator in his lifetime; and a ground rent subsequently purchased with the proceeds of the first does not pass under the devise.<sup>52</sup> A change in the form of property made after the insanity of the testator, by the guardian, does not work an ademption where such property can be traced. Thus, a transfer of certain consols, specifically bequeathed, from the name of the testatrix to that of the paymaster general does not adeem such bequest.<sup>53</sup> The doctrine of ademption by sale, destruction or change, applies only to specific bequests. From its nature it can have no application to general legacies.<sup>54</sup>

Where a devise of real property is rendered inoperative by a subsequent sale of such realty, this is technically spoken of as a revocation, and not as an ademption.<sup>55</sup> A sale or destruction of the whole of the property bequeathed effects an ademption,

<sup>47</sup> *Nowack v. Berger*, 133 Mo. 24 (hence the shares devised to A's children can not be applied in part on A's share).

<sup>48</sup> *Brady v. Brady*, 78 Md. 461. So a bequest of "my money not on deposit" in a certain bank is not adeemed by testatrix's withdrawing the money from such bank and depositing it in another bank. *Prendergast v. Walsh* (N. J.) 42 Atl. 1049.

<sup>49</sup> *Shaffer's Succession*, 50 La. Ann. 617.

<sup>50</sup> *Blakemore's Succession*, 43 La. Ann. 845.

<sup>51</sup> *Brady v. Brady*, 78 Md. 461.

<sup>52</sup> *Harshaw v. Harshaw*, 184 Pa. St. 401.

<sup>53</sup> *In re Wood* (1894), 2 Ch. 577.

<sup>54</sup> *Sittig v. Hance*, 81 Md. 416.

<sup>55</sup> See Sec. 278, *et seq.*

as has been said. But a sale or destruction of part of the property bequeathed effects an ademption of that part, but not of the residue undestroyed and belonging to testator at his death.

### §782. Ademption by compensation.—*Realty.*

A legacy may also be adeemed by the delivery by testator to legatee, during the lifetime of testator, of some thing of value, intended as a compensation for such legatee. This branch of the doctrine of ademption is often classed under the head of Satisfaction.<sup>56</sup> Satisfaction has, however, another technical meaning which will be discussed subsequently.<sup>57</sup> This branch of the doctrine of ademption is also sometimes spoken of as Advancements.<sup>58</sup> Technically, however, the doctrine of advancements is applicable only to cases where testator dies intestate, unless where on his will he specifically directs certain gifts already made by him to be counted as advancements in equalizing the distribution of his estate.<sup>59</sup>

In Virginia it has been held that the doctrine of ademption by gift in the lifetime of testator applies to devises of real estate as well as to personal property.<sup>60</sup> In Delaware it has been said that a deed of the same land as that devised adeems the devise.<sup>61</sup> But the great weight of authority is contrary to this view, and in most jurisdictions it is well established that a devise of realty can not be adeemed by a payment of money in the lifetime of testator.<sup>62</sup> A devise of specific realty is not adeemed by deed of other realty.<sup>63</sup> "While no reason, on prin-

<sup>56</sup> *Carmichael v. Lathrop*, 108 Mich. 473. (In this case this doctrine is spoken of as "ademption or satisfaction," and the court, in speaking of such gift, says that the will "is to that extent satisfied.") *Fisher v. Keithley*, 142 Mo. 244; 64 Am. St. Rep. 560.

<sup>57</sup> See Sec. 794.

<sup>58</sup> *Fisher v. Keithley*, 142 Mo. 244; 64 Am. St. Rep. 560.

<sup>59</sup> See Sec. 786.

<sup>60</sup> *Hansbrough v. Hooe*, 12 Leigh. (Va.), 316; 37 Am. Dec. 659. (In this case a devise of 2,000 acres of land to A was held to be adeemed

by conveyance of 400 acres of other land together with certain personal property.)

<sup>61</sup> *Marshall v. Rench*, 3 Del. Ch. 239.

<sup>62</sup> *Marshall v. Rench*, 3 Del. Ch. 239; *Weston v. Johnston*, 48 Ind. 1; *Campbell v. Martin*, 87 Ind. 577; *Burnham v. Comfort*, 108 N. Y. 535; 2 Am. St. Rep. 462; *Allen v. Allen*, 13 S. Car. 512; *Clark v. Jetton*, 5 Sneed (Tenn.), 229.

<sup>63</sup> *Swails v. Swails*, 98 Ind. 511; *Fisher v. Keithley*, 142 Mo. 244; 64 Am. St. Rep. 560. (In this case the court said: "All the authorities



ciples of justice and equity, seems to exist for the distinction made between a bequest of personal property and a devise of real estate, yet the distinction has ever been most uniformly made by the courts, not because the equities are not the same, but because of the safeguards that have ever been thrown around the transfers of realty and contracts by which titles are affected."<sup>64</sup>

**§783. Ademption by compensation.—Personalty.—Where testator in loco parentis.**

The doctrine of ademption by gift in testator's lifetime applies, therefore, only to the ademption of bequests and legacies of personal property by means of a gift made by testator to such legatee as a substitute for such legacy. Where the intention of testator that the gift shall be a substitute for the legacy is clearly established, the legacy is adeemed.<sup>65</sup> Where, on the other hand, testator specifically provides that "advances made, and that may hereafter be made, be treated not as advances, but as gifts, not in any manner to be accounted for," his intention that the advancement shall not adeem the legacy is clear, and must be enforced.<sup>66</sup> Where, however, testator's intention does not appear clearly, the question presented is what presumption arises as to testator's intention? In determining what testator's intention shall be presumed to be, the

so far as we are advised, except one, which we will notice further on, agree that the doctrine of ademption only applies to a bequest of personal property. We find but one case in the absence of statute in which it has been held applicable to the devises of real estate.") The one case referred to is *Hansbrough v. Hooe*, 12 Leigh, 316, already cited.

<sup>64</sup> *Fisher v. Keithley*, 142 Mo. 244; 64 Am. St. Rep. 560.

<sup>65</sup> *Gray v. Bailey*, 42 Ind. 349; *Jaques v. Swasey*, 153 Mass. 596.

A gift before the execution of the will, for which the donee gave a

receipt as part of such amount as testatrix might see fit to give, was held not to be an ademption of a legacy given thereafter by will. *Robbins v. Swain*, 7 Ind. App. 486. In this case the will made no reference to the receipt, and it appeared from the subsequent declarations of testatrix that she intended the legacy to be in addition to the gift *inter vivos*. So *Jones v. Richardson*, 5 Met. 247.

<sup>66</sup> *Adams v. Cowen* (U. S.) (1900), 20 S. Ct. 668, affirming 80 Fed. 448.

first distinction is between the cases in which testator stands *in loco parentis* to the beneficiary, and those in which he does not. Where the testator stands *in loco parentis* to the beneficiary, a gift of an amount equal to or greater than the legacy will be presumed to be an ademption of the legacy, and a gift of a less amount will be presumed to be a *pro tanto* ademption.<sup>67</sup>

At one time it was held that a gift in the nature of an advance of a part of the legacy operated as an ademption of the whole legacy on the theory that testator was presumed to intend the gift as a substitute for the legacy, and he was the best and only judge of how much the legatee ought to receive by way of compensation.<sup>68</sup> This rule is probably not in force now in any jurisdictions and a gift of a part of the legacy is held a *pro tanto* ademption only.<sup>69</sup> At one time it was apparently held that implied ademption did not exist where the original gift by will was of an indefinite amount, impossible of estimation, such as a residuary gift.<sup>70</sup>

In order to operate as an ademption the gift must be an absolute one. A gift to the son for his life with remainder to the parent making the gift is not to be regarded as ademption.<sup>71</sup>

The rule that an ademption is presumed where a gift is made by one *in loco parentis* to the beneficiary, is purely a rule of *prima facie* presumption and is always subject to be rebutted by showing that testator intended such gift as a separate and additional gratuity, and not as a substitute for the legacy.<sup>72</sup>

<sup>67</sup> *Trimmer v. Bayne*, 7 Ves. 508; *Ex parte Pye*, 18 Ves. 140; *Shudall v. Jeykl*, 2 Atk. 518; *Tanton v. Keller*, 167 Ill. 129; 47 N. E. 376; *Weston v. Johnson*, 48 Ind. 1; *Carmichael v. Lathrop*, 108 Mich. 473; *Van Houton v. Post*, 33 N. J. Eq. 344; *Cory v. Lentner*, 10 W. L. J. (Ohio), 246.

<sup>68</sup> *Ex parte Pye*, 18 Ves. 140.

<sup>69</sup> *Pym v. Lockyer*, 5 Myl. & C. 29; *Montague v. Montague*, 15 Beav.

565; *Hopwood v. Hopwood*, 7 H. L. Cas. 728; *Wallace v. Du Bois*, 65 Md. 153; *Carmichael v. Lathrop*, 108 Mich. 473.

<sup>70</sup> *Freemantle v. Banks*, 5 Ves. 79; *Clendening v. Clymer*, 17 Ind. 155.

<sup>71</sup> *Wheeler v. Humphries*, [H. L.]; 67 L. J. Ch. N. S. 499, affirming 66 L. J. Ch. N. S. 236.

<sup>72</sup> *Robbins v. Swain*, 7 Ind. App. 486.

### §784. Where testator not in loco parentis.

Where testator does not occupy the relation of the parent to the beneficiary, a gift made by testator to the beneficiary is not presumed to be an ademption of the legacy.<sup>73</sup> This distinction has often been criticised as harsh and unjust, since it gives an advantage to legatees who are not closely related to testator over those who are, but, even where criticised, has been recognized as too firmly established to be shaken.<sup>74</sup> The reason given for such distinction is that the law must presume that one standing in the relation of a parent intends to depart from equality in the distribution of his estate only in so far as indicated by his will.

The old reasons given by Lord Hardwick are: "This court inclines against double portions. Another good one: the court considers it as a performance of what was intended to be done and paying the debt of nature which he owed to his child."<sup>75</sup> Similar reasons have been repeated in later decisions.<sup>76</sup> But where testator, though not *in loco parentis* to the beneficiary, makes a provision for the beneficiary by will which appears to have been a compensation for services, and thus intended as a satisfaction of the debt, it is held that such legacy is adeemed by giving a subsequent check for the amount of the legacy.<sup>77</sup>

### §785. By what gifts ademption is affected.

The presumption that a gift by testator standing *in loco parentis* to the beneficiary is intended as an ademption of a legacy, applies only where the thing given is of the same kind

<sup>73</sup> *Watson v. Lincoln*, 1 Amb. 325; *Wallace v. Du Bois*, 65 Md. 153; *Carmichael v. Lathrop*, 108 Mich. 473.

<sup>74</sup> *Carmichael v. Lathrop*, 108 Mich. 473.

<sup>75</sup> *Watson v. Lincoln*, 1 Amb. 325.

<sup>76</sup> *Wallace v. Du Bois*, 65 Md. 153; *Fisher v. Keithley*, 142 Mo. 244; 64 Am. St. Rep. 560.

<sup>77</sup> *Turner's Estate*, 167 Pa. St.

609. The doctrine of this case is a combination of the doctrine of satisfaction and ademption. The legacy given is regarded as conditioned upon the existence of the debt which it was to satisfy, and accordingly is adeemed by the payment of such debt, even though the testator did not occupy the parental relation to the beneficiary.

as that bequeathed.<sup>78</sup> Thus, where testator left a certain sum of money for the education of the minor children during their minority, it was held that this legacy was not adeemed by the fact that testator expended some money for educating one of such children and that they had come of age before his death.<sup>79</sup> A legacy may be adeemed, according to modern authority, by a gratuitous conveyance by testator to legatees of certain realty.<sup>80</sup>

### III—ADVANCEMENTS.

#### §786. Advancements.—General rule.

The general rules for the subject of advancements apply, ordinarily, only in case of intestacy and have no application where testator by will disposes of his entire estate, since the will merges all advancements made by testator to the beneficiaries up to the date of the execution of the will.<sup>81</sup> The effect of testator's giving the property to the beneficiaries after making the will comes under the title Ademption and is there discussed.<sup>82</sup> But where testator, by will, specifically provides that in certain contingencies which eventually occur, the residue of his estate shall descend as if he had died intestate, advancements made by him must be taken into account just as in cases of intestacy.<sup>83</sup>

#### §787. Advancements provided for by testator.

A testator, however, may and often does provide expressly in his will that advancements which he has made to his children in his lifetime shall be deducted from the shares given to

<sup>78</sup> *Goodfellow v. Burchett*, 2 Vern. 298; *Saville v. Saville*, 2 Atk. 458; *Ray v. Stanhope*, 2 Ch. Rep. 159.

<sup>79</sup> *Bird's Estate*, 132 Pa. St. 164. For the effect of republication upon ademption, see Sec. 308.

<sup>80</sup> *Carmichael v. Lathrop*, 108 Mich. 473.

<sup>81</sup> *Cowen v. Adams* (U. S.)

(1900), 20 S. Ct. 668, affirming 80 Fed. 448; *Condell v. Glover*, 56 Ill. App. 107; *Lyon's Estate*, 70 Io. 375; *Jones v. Richardson*, 5 Met. 247.

<sup>82</sup> See Secs. 782 to 785.

<sup>83</sup> *Trammel v. Trammel*, 148 Ind. 487.

them by will. Full effect is, of course, given to such directions.<sup>84</sup>

A provision that in case testator's account-books do not show that he has paid a certain amount annually for a certain purpose, his executor shall pay such sum as will make up such amounts, is in legal effect a direction to pay the entire annual sum multiplied by the number of years prescribed, less such amounts as testator had paid and is a valid bequest.<sup>85</sup>

The use of the word "advancements" is not, however, conclusive. Thus, a provision in a codicil modifying the provisions of the will because of "larger advances" made by testator to some of his children than to others, shows that testator does not intend such gifts to be charged as advances under the codicil.<sup>86</sup> A specific direction to charge certain advancements against A's share is not avoided because the will further attempts to limit A's share upon a trust void as against perpetuities.<sup>87</sup> While testator's will is conclusive as to what are to be counted advancements and what are not, the omission to enumerate among the advancements sums loaned to a son for which notes and a mortgage were given by such son does not prevent such notes and mortgage from being a part of testator's estate.<sup>88</sup> Where testator provides in his will that any advancements or loans made by him to certain named legatees shall be treated as gifts and shall not be accounted for, full effect is, of course, given to such provision and the property is distributed in accordance with the provisions of the will, irrespective of advances.<sup>89</sup> The questions presented under this topic for judicial discussion are chiefly those of the construc-

<sup>84</sup> *Stewart v. Stewart*, L. R. 15 Ch. D. 539; *Blackstone's App.* 64 Conn. 414; *Eller v. Lillard*, 107 N. C. 486; *Eickelberger's Estate*, 135 Pa. St. 160; *Snider v. Snider*, 149 Pa. St. 362; *McConomy's Estate*, 170 Pa. St. 140; *Kennedy v. Badgett*, 26 S. C. 591; *Fielden v. Ballanger* (Tenn. Ch. App.), 35 S. W. 758.

<sup>85</sup> *Holmes v. Coates*, 159 Mass. 226.

<sup>86</sup> *Whitman v. White*, 19 R. I. 431.

<sup>87</sup> *Dean v. Mumford*, 102 Mich. 510.

<sup>88</sup> *Eisenbrey's Estate*, 180 Pa. St. 125.

<sup>89</sup> *Cowen v. Adams*, 78 Fed. 536; *Vitt v. Clark*, 66 Mo. App. 214.

tion of such provisions, the usual questions being how the advances are to be estimated, and from what the advances are to be deducted.

### §788. How advances are to be estimated.

Where testator does not indicate any method of ascertaining the value of advancements, but merely directs that the advancements made by him be deducted from the shares of certain legatees, the word "advancements" is construed with its ordinary common law meaning.

Advancement at common law is a gift to a presumptive heir, devisee or legatee by way of anticipation of his share of donor's estate.<sup>90</sup> In the absence of evidence showing testator's intention, property conveyed by him as a permanent provision for donee is regarded as an advancement. But gifts of small sums to donor's children to be used for actual support and maintenance will not be regarded as an advancement in the absence of evidence of testator's intention.<sup>91</sup> If testator in his will states the amount of advances which are to be deducted from the shares given by will, full effect must be given to this provision, even though the advances treated as debts would be barred by limitations, and no other evidence exists as to what amounts are.<sup>92</sup> But a direction in a codicil that \$900 be deducted from the share of A, and the balance paid to A's wife, is not a gift to the six other beneficiaries of \$900, but only six-sevenths of nine hundred dollars, since A's share is charged with an advancement in favor of all the beneficiaries including A. \* So where testator in his will provides a means for estimating the value of real estate conveyed by him as an advancement, this method must be followed.<sup>93</sup>

<sup>90</sup> Millar's App. 31 Pa. St. 337; Farnum's Estate, 176 Pa. St. 366.

<sup>91</sup> Carmichael v. Lathrop, 112 Mich. 301.

<sup>92</sup> Eichelberger's Estate, 135 Pa. St. 160.

\* McConomy's Estate, 170 Pa. St. 140:

<sup>93</sup> Ballinger v. Connable, 100 Io.

600; 69 N. W. 1033 (69 N. W. 438). In this case testator provided that the value of the advancements should be estimated as follows: "The consideration named in the conveyance to be considered for purpose of settlement; the amount of advances or if no sum is named, the actual cash value of the same at

Testator's provisions concerning advancements are construed as far as possible in accordance with the general rules on the subject of advancements. Thus, a direction that testator's son shall, in settling up the estate, charge himself with a bond given to him by testator, is treated as merely a direction that such bond shall be regarded as an advancement and is not a gift of the entire amount of the bond to the other legatees.<sup>94</sup> Where testator makes no provision in the will for determining the amount of advancements it is held that the actual value of advancements made by testator at any time before his death must be taken as the means for determining their value.<sup>95</sup> The value at testator's death is sometimes said to be the value at which such advancements should be charged.<sup>96</sup> As advancements are gifts outright, interest is not to be charged upon such advancements against the legatee or devisee unless testator expressed such an intention clearly in his will.<sup>97</sup> A direction to reduce the shares of income given to certain legatees "by an amount equal to the interest at 6 per cent of said sums . . . advanced" is not a clear expression of testator's intention to charge interest on the advancements.<sup>98</sup> Where testator leaves a fixed amount to certain beneficiary, less the amount of certain notes which testator held against the father of such beneficiary, it was held that only the face of the notes,

the time of the division of the estate, shall be considered its value." In one deed the consideration recited was \$1.00 and natural love and affection. The son, however, at the same time signed an agreement fixing the value of the realty for purposes of charging him as an advancement. It was held that the amount thus agreed upon and not the cash value of the realty should be taken in estimating the value of the advancement. It was also held where testator had allowed a son to take possession of certain realty and make valuable improvements thereon, but had not transferred the title thereto, that the cash value of this property, at the time the executors

distributed the property to this son, including improvements made by the son, must be taken as its value for purposes of advancement.

<sup>94</sup> *Moorman v. Crockett*, 90 Va. 185; so *McConomy's Estate*, 170 Pa. St. 140 (hence the maker of the bond retains his share of the debt in the settlement).

<sup>95</sup> *Vitt v. Clark*, 66 Mo. App. 214.

<sup>96</sup> *Young v. Sadler*, (Ky.), 24 S. W. 877; 15 Ky. L. R. 531.

<sup>97</sup> *Farnum's Estate*, 176 Pa. St. 366; *Porter's Appeal*, 94 Pa. St. 332; *Miller's Appeal*, 31 Pa. St. 337.

<sup>98</sup> *Farnum's Estate*, 176 Pa. St. 366.

without interest, should be deducted from the legacy, where testator evidently intended the amount given to provide for the maintenance and education of beneficiary and leave a residuum, a result which would be impossible if interest were to be charged upon the notes.<sup>99</sup> Where testator specifically directs that interest is to be charged upon advancements, full effect must be given to such provision.<sup>100</sup> Where testator gave to his daughter "the advances she has received as per private account," it was held that it gave to the daughter the balance which she owed testator, as shown by his private account at the time of his death.<sup>101</sup> A direction in testator's will that no deduction should be made "from any share of any of my children by reason of any sums which I have given or advanced to or account of either of them," does not release liability for a loan made by testator to a firm to which one of his children was a member.<sup>102</sup>

#### §789. Legacies from which advancements may be deducted.

Where testator makes specific devises and bequests and disposes of his property by a residuary clause with a direction that advancements be accounted for, it is usually held that advancements are to be deducted only from the residuary gift,<sup>103</sup> and where testator directed that if certain advancements should exceed a certain son's share in the estate, his share should then consist of what he already received and his note should be canceled, it was held that the "share" referred to the distribution in the Probate Court and that the son was not thereby debarred from an interest in an executory contingent bequest which depended upon the death of a brother without issue.<sup>104</sup> Advancements made to one can not be deducted from the legacy

<sup>99</sup> *Garth v. Garth*, 139 Mo. 456; 41 S. W. 238.

<sup>100</sup> *Hays v. Freshwater* (W. Va.) (1899), 34 S. E. 831.

<sup>101</sup> *Vitt v. Clark*, 66 Mo. App. 214.

<sup>102</sup> *Rogers v. Maguire*, 153 N. Y. 343. (The testator in this case had

taken the note of the firm together with collateral security.)

<sup>103</sup> *Eller v. Lillard*, 107 S. C. 486; *Hughes v. Kirkpatrick*, 37 S. C. 161.

<sup>104</sup> *Glover v. Condell*, 163 Ill. 566, reversing 56 App. 107.



to another,<sup>105</sup> unless testator by his will specifically so provides.<sup>106</sup> In the absence of any provision in the will, it is not admissible to show by parol that testator intended that a loan to a son-in-law should be deducted as an advancement from the legacy to testator's daughter, the wife of such son-in-law.<sup>107</sup>

#### §790. Where advances exceed legacy.

It is sometimes impossible to carry testator's intention into effect literally. Thus, where the advances made to certain beneficiaries exceeded the shares from which such advances are to be deducted, the court will apply this legacy to equalizing the shares of those receiving the smallest advancements as far as the legacies available will so do.<sup>108</sup> A direction that the notes held by testator against a certain son are to be treated as advancements and deducted from his share operates as a gift of such indebtedness, although the son received no share of the estate from which the note could be deducted.<sup>109</sup>

### IV—CONTRIBUTION.

#### §791. Property taken for testator's debts in order of priority.

Since the rights of creditors of testator are paramount to those of the devisees and legatees, property either specifically or generally devised or bequeathed is not infrequently sold for

<sup>105</sup> *Erwin v. Smith*, 95 Ga. 699; *Albert v. Albert*, 74 Md. 526 (the amount charged on testator's books against a deceased son can not be charged against the children of such son); *Coyne v. Boyce*, 78 Md. 22. (Thus a direction to pay the debts of a certain son and to charge such debt and advances made to him against his share of the estate, was held to direct that such debt be paid out of the son's share only.)

<sup>106</sup> *Price v. Douglass*, 150 Mass. 96. (In this case testator provided that certain advances made to A

should be set off against a certain legacy. This legacy was payable in equal proportions to A and his children. It was held that in the settlement, the advancements to A were to be deducted from the entire legacy, and not merely from A's share thereof.)

<sup>107</sup> *Erwin v. Smith*, 95 Ga. 699.

<sup>108</sup> *Board v. Love* (Ky.), 42 S. W. 733; 19 Ky. L. Rep. 1121; *Cope v. Farmer*, 8 O. C. C. 145.

<sup>109</sup> *Snider v. Snider*, 149 Pa. St. 362.

the payment of testator's debts. When this is done, the question arises whether the beneficiaries whose interests have been disappointed by such sale have a right to call on other beneficiaries for compensation for the entire amount of the devise or legacy of which they are thus deprived, or for a *pro rata* contribution in order that the burden may be borne equally or whether the loss must lie with such devisee or legatee. The doctrines applicable to this subject are but little more than a re-statement of the doctrine of abatement and charge of legacies.

If the property devoted to the payment of testator's debts has been taken in the order of priority required by the doctrines of abatement and a charge upon legacies, a disappointed legatee can not call upon other beneficiaries whose gifts have a priority over his for either compensation or contribution.<sup>110</sup> Thus, where devised land is encumbered with a lien incurred by testator for which he is personally liable, and the entire personal property of testator has been applied to the payment of such lien, a disappointed legatee can not call upon the devisee of such property for contribution.<sup>111</sup>

### §792. Property taken for testator's debts out of order of priority.

Where property is taken for the payment of testator's debts, which is given by a legacy or devise having priority over gifts of other pieces of property which are not taken for testator's debts, the disappointed beneficiary may have compensation for the loss of his property in full from such beneficiaries, and where several legatees or devisees are on a footing of equality with reference to the payment of their devises or legacies, and property given to one of them is taken for payment of testator's debts, that one may have *pro rata* contribution from the other devisees and legatees for the loss of his gift.<sup>112</sup> Where a fund which should have been taken first for paying debts and

<sup>110</sup> Duffield v. Pike, 71 Conn. 521;  
Todd v. McFall, — Va. — (1899);  
1 Va. S. C. Rep. 166; 32 S. E. 472.

<sup>111</sup> Todd v. McFall, — Va. —  
(1899); 32 S. E. 272.

<sup>112</sup> Coapland v. Lake, 87 Tex. 261;  
9 Tex. Civ. App. 39.

taxes is paid to certain legatees, the amount thus taken may be withheld from other funds payable to them, so that the burden may not be cast upon a preferred beneficiary.<sup>113</sup> Where testator by will specifically provides that certain legatees must contribute for any loss to the estate which the executor may have to pay on account of testator's being a security for others, it is held that such direction does not call for contribution for losses which testator paid before his death.<sup>114</sup>

### §793. Failure of title.

The question of contribution and compensation is sometimes raised where the title to property bequeathed or allotted fails. Ordinarily, where the title to a chattel or piece of realty specifically given by will fails, the specific devisee or legatee has no right of contribution against other beneficiaries; however, where testator's intention is evidently that his estate shall be equally divided, and he allotted specific property merely for the purpose of creating an equal division, it has been held that where title to certain property fails because of facts which were not known to testator, the disappointed beneficiary may have contribution from other beneficiaries.<sup>115</sup> The right of contribution where title fails is specifically given by statute in some jurisdictions. This rule applies, however, only to specific gifts, and does not apply where the property is allotted by decree of distribution and is not specifically given by the will.<sup>116</sup> Where a fund is lost by the conduct of the executors after it has been set apart out of testator's general estate, the beneficiary thus disappointed can not have compensation.<sup>117</sup>

<sup>113</sup> *Nelson v. Worthington*, 3 App. D. C. 503.

<sup>114</sup> *Ahalt v. Hersperger*, 75 Md. 88.

<sup>115</sup> *Lake v. Copeland*, 82 Tex. 464.

<sup>116</sup> *Pusey v. Wathen*, 90 Ky. 473.

<sup>117</sup> *Mills v. Smith*, 141 N. Y. 256;

compare *Henry v. Griffis*, 89 Io. 543, where contribution was had for a pecuniary legacy lost by the wrongful act of the executor. In this case, however, the will provided that if there were not enough personality to pay the legacy, "the boys is to pay enough to make it good."

Where a specific devise fails by the election of the widow to take her dower instead of under the will, the disappointed devisee can not have contribution from the residuary devisee.<sup>118</sup>

<sup>118</sup> Devecmon v. Kuykendall, 89 Md. 25.

## CHAPTER XXXVIII.

## SATISFACTION; AND CUMULATIVE AND SUBSTITUTIONAL LEGACIES.

## §794. By gift to debtor.

In discussing the subject of advancements we have already seen that if testator specifically releases a debt due him from another, full effect is given to such direction if it does not interfere with the rights of testator's creditors.<sup>1</sup> Where testator gives a legacy to one who is indebted to him, without any expression of testator's intention to release such debt, the mere fact of giving such legacy does not of itself operate as a release of the debt.<sup>2</sup> In such case the indebtedness may be deducted from the legacy where the legacy exceeds the indebtedness as a convenient means of adjusting the mutual credits.<sup>3</sup> Where part of the debt due to testator is secured, and part is unsecured, the legacy may be deducted from the secured portion.<sup>4</sup> The right to credit the legacy against the indebtedness exists even where the indebtedness is evidenced by a note which, by

<sup>1</sup> See Sec. 787.

<sup>2</sup> *Hayward v. Loper*, 147 Ill. 41, affirming 49 Ill. App. 53; *Spath v. Ziegler*, 48 La. Ann. 1168; *Sleeper v. Kelley*, 65 N. H. 206; *Bailey's Estate*, 153 Pa. St. 402; *Chaffee v. Maker*, 17 R. I. 739.

<sup>3</sup> *In re Taylor* (1894), 1 Ch. 671; *Hayward v. Loper*, 147 Ill. 41; *Sleeper v. Kelley*, 65 N. H. 206; *Chaffee v. Maker*, 17 R. I. 739.

<sup>4</sup> *Sleeper v. Kelley*, 65 N. H. 206.

mistake, was drawn to run for the life of the maker instead of the life of the testator.<sup>5</sup> Nor is the debt released by the omission to enumerate it among the advances made by testator to his children, where the debtor (testator's son) had given his notes and mortgage for such debt.<sup>6</sup> A gift to a debtor of a certain sum "inclusive of" the note of such debtor, held by testator, does not show an intention to give the legacy and the debt.<sup>7</sup>

**§795. By gift to creditor.—Where satisfaction presumed.**

If testator gives property by will to one to whom he is indebted, it is often difficult to determine whether testator intended this legacy in satisfaction of the debt, or in addition to it. If testator's intention does not appear in the will, the following distinction is generally adopted by the courts:

If the legacy given to the creditor is equal to or greater than the amount of the existing debt, and is of the same nature, is payable in a manner equally advantageous to the creditor, and no specific motive is assigned for the gift, the legacy will be considered as a satisfaction of the debt.<sup>8</sup>

In some jurisdictions it is held that there is never a presumption that a gift is intended as a satisfaction of a debt, but that testator's intention must appear on the will to cause this result.<sup>9</sup>

**§796. By gift to creditor.—Where no satisfaction presumed.**

But, in the absence of any of these elements, the legacy is not considered as a satisfaction of the debt. Thus, where the legacy is less in amount than the debt,<sup>10</sup> or is payable at a longer time than the original debt,<sup>11</sup> or upon terms less ad-

<sup>5</sup> *Hayward v. Loper*, 147 Ill. 41, affirming 49 Ill. App. 53.

<sup>6</sup> *Eisenbrey's Estate*, 180 Pa. St. 125.

<sup>7</sup> *Pepper's Estate*, 154 Pa. St. 340.

<sup>8</sup> *Fetrow v. Krause*, 61 Ill. App. 238; *Adams v. Adams*, 55 N. J. Eq. 42.

<sup>9</sup> *Lisle v. Tribble* (Ky.), 1892;

17 S. W. 742; so by statute, *Jackson's Succession*, 47 La. Ann. 1089.

<sup>10</sup> *In re Horlock* (1895), 1 Ch. 516; *Thompson v. Wilson*, 82 Ill. App. 29; *Stone v. Pennock*, 31 Mo. App. 544.

<sup>11</sup> *In re Horlock* (1895), 1 Ch. 516.

vantageous to the creditor,<sup>12</sup> the legacy is considered as a gift, independent of the debt, and not a satisfaction.

A bequest to a creditor contained in a will, executed after the debt was incurred, but before the exact amount was ascertained, was not considered *prima facie* as a satisfaction of such debt.<sup>13</sup> So where testatrix was indebted to her children in various indefinite amounts, arising out of her guardianship of their estate during minority, and she bequeathed all her estate to them, share and share alike, it was held that this was not intended in satisfaction of the debts due from her to them. Hence, where she subsequently paid one of her children in full, it was held that upon final distribution of her estate the one thus paid was not preferred to the others by the amount of the debt.<sup>14</sup> It is still clearer that where the indebtedness is incurred after the will is executed a legacy given by will can not be considered *prima facie* as a satisfaction of such indebtedness.<sup>15</sup>

#### §797. Where testator directs satisfaction.

Where testator's intention is clearly expressed in the will, either that the legacy is a satisfaction or is not, full effect will be given to this direction; subject, of course, to this condition that, if the legacy is given as a satisfaction of the debt, the creditor has the election whether to adopt the legacy or to collect the debt.<sup>16</sup> Thus, testator provided by will for the payment of a note described as a note of \$12,000 due to A. The only note which testator owed A was one for \$10,000. It was held that testator merely intended a satisfaction of the debt actually due to A; and did not intend to give A a legacy of \$12,000, of which \$10,000 was in satisfaction of the note.<sup>17</sup>

<sup>12</sup> Stone v. Pennock, 31 Mo. App. 544.

<sup>13</sup> Glover v. Patten, 165 U. S. 394; Reynolds v. Robinson, 82 N. Y. 103; Heisler v. Sharp, 44 N. J. Eq. 167; Crouch v. Davis, 23 Gratt. (Va.) 62.

<sup>14</sup> Glover v. Patten, 165 U. S. 394.

<sup>15</sup> Sullivan v. Latimer, 38 S. C. 158.

<sup>16</sup> Jackson's Succession, 47 La. Ann. 1089.

<sup>17</sup> Wildberger v. Cheek, 94 Va. 517.

A general direction by testator that his debts should be paid has been held sufficient to show his intention that a legacy to a creditor should not be treated as a satisfaction of the debt due to such creditor.<sup>18</sup> Where the reference to the creditor as such is intended merely as a description, it will not be held to be a direction for satisfaction.<sup>19</sup>

## II—CUMULATIVE AND SUBSTITUTIONAL LEGACIES.

### §798. Cumulative and substitutional legacies.—Where testator's intention is expressed.

If testator, by will, or by will and codicil or codicils, makes two or more gifts to the same person or persons, the question arises whether the second gift is intended by testator to be in addition to the first, or as a substitute for the first. If the second legacy is intended by testator to be given in addition to the first legacy, the second is commonly spoken of as a "cumulative legacy." If the second legacy is intended by testator to be given in the place of the first, it is commonly spoken of as a "substitutional legacy."

If testator has expressed his intention that the second legacy shall either be a substitute for the first, or in addition to it, the question is a simple one, for testator, of course, has power to give more than one legacy to the same person, or to revoke the first legacy, and, if he pleases, to substitute another therefor. Accordingly, where language is used which shows that testator intended to revoke the first legacy and give the second as a substitute for the first, full effect is given to such intention.<sup>20</sup>

Any form of language which shows the testator's intention to substitute the second gift for the first will be sufficient. The

<sup>18</sup> *In re Huish*, L. R. 43 Ch. Div. 260; *Wade v. Dean* (Ky.), 43 S. W. 441; 19 Ky. L. Rep. 1426.

<sup>19</sup> *Swing v. Gatch*, 7 Am. Law Rec. 5; 3 Weekly Law Bull. 571 (a gift to "my good, kind, attentive physician," held not to be intended

as a satisfaction of his claim of professional services).

<sup>20</sup> *In re Freme's Estate* (1895), 2 Ch. 778; *Hollyday vs. Hollyday*, 74 Md. 458; *Hard v. Ashley*, 117 N. Y. 606; *Whelen's Estate*, 175 Pa. St. 23.



expressions commonly used are "instead thereof,"<sup>21</sup> or, "in lieu thereof,"<sup>22</sup> or, "in place and stead thereof."<sup>23</sup> So, where testator expresses his intention to give a devise or legacy in addition to that given by will, the legacy or devise is unquestionably cumulative. Thus, where testator provided that the second legacy should be "in addition to the same,"<sup>24</sup> or that it should be paid "further,"<sup>25</sup> it was held to be cumulative.

### §799. Presumption where testator's intention is not expressed.

It very frequently happens, however, that testator does not indicate whether his intention was to give a substitutional or a cumulative legacy. In such a case, the courts endeavor to discover the intention of the testator from the whole instrument, and have built up a series of rules as to the presumptions which arise under given states of fact. These presumptions, however, yield very readily to anything in the will which shows testator's intention.<sup>26</sup>

The presumption either way, whether against cumulation because the legacy is repeated in the same instrument, or whether in favor of it because the legacy is by different instruments, is liable to be controlled and repelled by internal evidence and the circumstances of the case.<sup>27</sup>

Where the gift is specific, little question can arise as to whether it was substitutional or cumulative. If the evidence

<sup>21</sup> *Freme's Estate* (1895), 2 Ch. 778; *Hollyday v. Hollyday*, 74 Md. 458.

<sup>22</sup> *Hard v. Ashley*, 117 N. Y. 606.

<sup>23</sup> *Whelen's Estate*, 175 Pa. St. 23.

<sup>24</sup> *Thompson v. Churchill*, 60 Vt. 371; so *Townsend v. Mostyn*, 26 Beav. 72.

<sup>25</sup> *Burkinshaw v. Hodge*, 22 W. R. 484; *Ledger v. Hooker*, 18 Jur. 481.

<sup>26</sup> "After a careful examination of the cases cited on the argument, and of many others, notwithstanding all the nice distinctions that have been taken by courts of law

and courts of equity upon the subject of single or cumulative legacies, we must come down to the plain, common-sense question of, what was the intention of the testator?" *Jones v. Creveling*, 19 N. J. Law, 127. (While this case was reversed in 21 N. J. Law, 573, by a divided court, as to the particular application of the rules of presumption to the particular facts, the general principle stated was recognized.)

<sup>27</sup> *DeWitt v. Yates*, 10 Johnson, 156. These cases are quoted and cited with approval in *Edwards v. Rainier*, 17 O. S. 597.

identifying the language given shows that the same property was disposed of twice by the same person, there can, of course, be no claim that other property was disposed of. The question is purely one of the identification of the property referred to in the will.<sup>28</sup>

The real difficulty arises where the gift is a general legacy—such as the gift of a sum of money. In such case, it is a *prima facie* rule of presumption that if two or more legacies are given to the same person, each by a different instrument—such as by a will and a codicil, or by more than one codicil—the presumption will be that the gifts are intended by the testator as cumulative.<sup>29</sup> If the second gift is different in nature or in amount, the *prima facie* presumption is that it is intended as a cumulative gift, even if given in the same instrument.<sup>30</sup>

Where testator expressed his motive or reason for making the gift, and the motive or reason is the same for the two gifts, it may show that the second gift is substitutional, and not

<sup>28</sup> *Suisse v. Lowther*, 2 Hare, 424.

<sup>29</sup> *Manifold's Appeal*, 126 Pa. St. 508, citing and quoting *Roper on Legacies*, 996: "If the legacies are given by the same instrument, and are of the same nature and amount, the presumption is that the second is a substitutional and not a cumulative legacy," *Creveling v. Jones*, 21 N. J. Law, 573.

In this case the provision of the will was as follows: "I give unto C. J. & D. J. each, four hundred dollars, to be paid to them by my executors; if they are not of age at my decease, I order my executors to pay each of them yearly, and every year, the interest on four hundred dollars until they arrive at age. I further order my executors to pay out of my estate to C. J. four hundred dollars one year after

my decease, and to pay D. J. four hundred dollars two years after my decease, in full of their legacies, bequeathed to them."

The court was urged to consider the word "further," as showing testator's intention to make a cumulative legacy. This view was taken below in *Jones v. Creveling*, 19 N. J. Law, 127, but this decision was finally reversed by a divided court, where it was held that the last clause was merely a direction for the payment of the legacy given in the preceding clause. So *Wray v. Field*, 6 Madd. 300; *Dickinson v. Overton*, 57 N. J. Eq. 26.

<sup>30</sup> *Adnam v. Cole*, 6 Beav. 353; *Curry v. Pile*, 2 Bro. C. C. 225.

*Contra* where given in same instrument, *Dickinson v. Overton*, 57 N. J. Eq. 26.

cumulative, even though it is given by a later instrument,<sup>31</sup> or it is different in amount from the first gift.<sup>32</sup>

A slightly different case involving the same principle is that in which the question for the court to determine is, whether a second provision for payment is intended as an additional gift, or is merely a direction as to the manner of paying the legacy previously given. If any provision is made for the payment of the first legacy, and if the second provision directs the time or means of paying a legacy of the same amount to the same person, the presumption is that the second provision is not an additional gift, but is merely a provision for paying the legacy already given.<sup>33</sup>

If the two legacies are payable at different times and places, the presumption is that they are cumulative, even though they are given in the same instrument.<sup>34</sup> Where the two gifts are given in the same instrument to the same beneficiary, and are of the same amount and value, the *prima facie* rule is that, in the absence of anything showing a contrary intention, the legacies are presumed to be substitutional.<sup>35</sup>

<sup>31</sup> *Hurst v. Beach*, 5 Madd. 358; 21 R. R. 304.

<sup>32</sup> *Sears v. Hardy*, 120 Mass. 524. In this case the provision was that testator's son should receive \$30,000, to be paid to him at the age of 21; and when he should be 21 years old, "I direct that four thousand dollars be paid to him annually; when he shall be twenty-five years old, six thousand dollars per year, and ten thousand dollars per year when he shall be thirty years old." It was held that the annuity of six thousand dollars a year, being for the support of the son, was a substitution for that of four thousand dollars, and the annuity of ten thousand dollars was a substitute for that of six thousand dollars.

<sup>33</sup> *Creveling v. Jones*, 21 N. J. Law, 573. (In this case the second provision fixed the time of payment.) *Powell's Estate*, 138 Pa. St.

322. (In this case, testator devised three thousand dollars to his daughter, one thousand dollars each to two of his sisters, and then by will provided that certain stock should be sold in order to pay "the above funeral expenses, and five thousand dollars to my daughter and sisters.")

It was held that this was a direction for the means of paying a legacy already given, and not an additional legacy. So *Early v. Benbow*, 2 Coll. C. C. 342; 15 L. J. Ch. 169; 10 Jur. 169.

<sup>34</sup> *Ingelfield v. Coghlan*, 2 Coll. C. C. 247; *Thompson v. Teulon*, 22 L. J. Ch. 243; 1 W. R. 97.

<sup>35</sup> *Brennan v. Moran*, 16 Ir. Ch. 126; *Garth v. Meyrick*, 1 Bro. C. C. 30; *Manning v. Thesiger*, 3 Myl. & K. 29; 4 L. J. Ch. 285; *Dickinson v. Overton*, 57 N. J. Eq. 26.

### §800. Incidents of substitutional and cumulative legacies.

Where a testator makes a devise or bequest by a later instrument, such as a codicil which is held to be substitutional in its nature, and in lieu of the legacy or devise previously given by will, it is held that if the original legacy or devise contained any qualifications or limitations of any sort the substitutional legacy or devise is to be considered as given subject to the same qualifications and limitations, unless testator's intention to the contrary clearly appears.<sup>36</sup> Thus, a testator, by a will, devised the proceeds of a certain ranch to A, subject to the payment of certain specified legacies out of such proceeds; and, by a codicil executed after the death of A, he provided that "the amount I did bequest" to A should be paid to B. It was held that B took the proceeds of the ranch subject to the payment of the legacies mentioned in the will.<sup>37</sup>

Where the residuum was to be equally divided among the children, deducting advancements made to them, and a subsequent codicil revoked the gift to one of testator's sons and gave it instead to the wife of such son, it was held that she took subject to advances made to the son.<sup>38</sup>

On the principle already stated in the text, a substitutional gift, or a legacy which was made a charge on a specific fund, was payable out of the same fund as the original gift.<sup>39</sup> Where

<sup>36</sup> *Freme's Estate* (1895), 2 Ch. 778; *Duncan v. Duncan*, 27 Beav. 392; *Bristow v. Bristow*, 5 Beav. 289; *Johnstone v. Harrowly*, 1 De G. F. & J. 183; 29 L. J. Ch. 145; 6 Jur. (N. S.), 153; 1 L. T. 390; 8 W. R. 105; *De Laveaga's Estate*, 119 Cal. 651; *Tilden v. Tilden*, 13 Cray, 103; *Buehler's Appeal*, 100 Pa. St. 385; *Hollyday v. Hollyday*, 74 Md. 458; *Hard v. Ashley*, 117 N. Y. 606; *Fife v. Miller*, 165 Pa. St. 612; *Whelen's Estate*, 175 Pa. St. 23.

"A substitutional or additional legacy is *prima facie* payable out of the same funds, and subject to the same incidents and conditions

as is the original legacy, irrespective of whether the result is advantageous to the legatee." *De Laveaga's Estate*, 119 Cal. 651.

<sup>37</sup> *De Laveaga's Estate*, 119 Cal. 651; *Whelan's Estate*, 175 Pa. St. 23.

<sup>38</sup> *Buehler's Appeal*, 100 Pa. St. 385.

<sup>39</sup> *Hollyday v. Hollyday*, 74 Md. 458. In this case the codicil provided: "I do hereby revoke said legacy, and instead of four thousand dollars I hereby give to my said sister, at my death, three thousand dollars." The claim was made that this was an independent, and not a substitutional, gift; but the court

a bequest is specifically given as additional to one already made, the additional bequest is held to be upon the same contingencies as the original one, if such construction will not cause inconsistencies in the will.<sup>40</sup> Where, however, a subsequent gift is not properly substitutional, but is made by reason of a failure or revocation of a preceding gift, it will not be presumed that the latter gift was upon the same conditions as the earlier one. Thus, where testator bequeathed property to a granddaughter, to be paid upon her arrival at majority, and she subsequently died, and in a codicil executed afterwards testator gave the same amount to another granddaughter, a sister of the deceased, it was held that, not being a case of substitution, it was not presumed to be upon the same conditions.<sup>41</sup>

held it to be a substitutional gift, with all the incidents of the original. A similar view was taken in *Hard v. Ashley*, 117 N. Y. 606, where the will gave A a life estate with remainder to her children, and the codicil revoked the devise, and gave a legacy to "A and her heirs in lieu of the original gift." This was held to be a substitutional legacy, the word "heirs" being, under the circumstances, synonymous with "children," and A taking a life estate only. So, where by will a life estate was given to one in case his wife died without children, and the

codicil provided, "I hereby alter that part of my will . . . so that it shall read that my son-in-law, Samuel Fife, instead of only having a life estate in it, shall possess it as his own, without let or hindrance," it was held that the son-in-law took a fee upon the same contingencies as he would have taken the life estate, namely, upon the death of his wife without children. *Fife v. Miller*, 165 Pa. St. 612.

<sup>40</sup> *Thompson v. Churchill*, 60 Vt. 371.

<sup>41</sup> *Fry's Estate*, 163 Pa. St. 30.

## CHAPTER XXXIX.

### RIGHTS OF DEVISEES AND LEGATEES TO THE ENJOYMENT OF PROPERTY GIVEN BY WILL.

#### §801. Payment of legacies.

The question when a legacy given by will is payable is a topic on the border-line between the law of wills and the settlement of decedent's estate, but, as it is affected by the nature of testator's will, it will be discussed in this connection. That a legatee has no interest in the legacy during the life of the testator is almost too elementary for mention.<sup>1</sup> Under most systems of law for settling decedents' estates, a legatee can not enforce the payment of his legacy out of debts due testator's estate. Payment can be enforced only by means of an executor.<sup>2</sup>

#### §802. Where time is fixed by will.

If testator provides specifically in his will at what time a legacy is to be paid, this direction will be enforced, provided, of course, it is not in violation of the rule against perpetuities. Thus, testator may devote part or all of his property to the support of a designated person for life, and may provide either expressly or impliedly that other legacies given by will shall not

<sup>1</sup> Hart v. West, 16 Tex. Civ. App. 395.

<sup>2</sup> Nicholson v. Commissioners of Dare County, 119 N. Car. 20.

be payable until the death of the life tenant.<sup>3</sup> Thus, where testator devised his estate to his wife for life, subject to the annual support of certain designated grandchildren, and further devised his land to one grandchild and specific legacies to other grandchildren, it was held that, although the time for paying such legacies was not specifically stated, they were clearly not payable until the termination of the life estate.<sup>4</sup> In such case the fund can not be distributed until the death of the life tenant.<sup>5</sup>

Where a legacy is payable after a life estate, it is often difficult to determine what is the effect of the cessation of the life estate before the death of the life tenant. Where the will shows that the payment of the legacy is postponed till the death of the life tenant simply by reason of the creation of the life estate, the legacy is held payable upon the determination of the life estate, before the death of the life tenant.<sup>6</sup> Thus, where a widow refuses to take a life estate, and elects to take under the law, legacies whose payment was postponed merely in order to provide for the life estate become payable at once.<sup>7</sup> But, where testator expressly makes the legacy payable upon the death of the life tenant, the payment of such legacy is not accelerated by the determination of the life estate before the death of the life tenant.<sup>8</sup> Where a legacy is given in such terms, neither the renunciation of the life estate,<sup>9</sup> nor its conveyance to the remainder-man,<sup>10</sup> nor the re-marriage of the widow to

<sup>3</sup> *In re Tredwell* (1891), 2 Ch. 640; *Johnson v. Webber*, 65 Conn. 501; *De Vaughn v. McLeroy*, 82 Ga. 687; *Harvey v. Miller*, 95 Ga. 766; *Bowling v. Miller*, 133 Ind. 602; *McChord v. Caldwell*, 96 Ky. 617; *Southworth v. Seabee*, — Ky. — (1897); 41 S. W. 769; *Lindsay v. Zannoni*, 6 O. C. C. 474; *Hubert's Estate*, 181 Pa. St. 551; *Lazier v. Lazier*, 35 W. Va. 567.

<sup>4</sup> *McChord v. Caldwell*, 96 Ky. 617.

<sup>5</sup> *Johnson v. Webber*, 65 Conn. 501; *Hubert's Estate*, 181 Pa. St. 551.

<sup>6</sup> *Trustees of Church Home, etc., v. Morris*, — Ky. — (1896); 36 S. W. 2; *Hall v. Smith*, 61 N. H. 144.

<sup>7</sup> *Trustees of Church Home, etc., v. Morris*, — Ky. — (1896); 36 S. W. 2; *Hall v. Smith*, 61 N. H. 144.

<sup>8</sup> *In re Tredwell* (1891), 2 Ch. 640; *Ford v. Krambeer*, 92 Io. 521; *Lovell v. Charlestown*, 66 N. H. 584.

<sup>9</sup> *Lovell v. Charlestown*, 66 N. H. 584.

<sup>10</sup> *Ford v. Krambeer*, 92 Io. 521.

whom a life estate had been given, provided she remained testator's widow,<sup>11</sup> will hasten the time for the payment of the legacy.

So, where testator provides that a certain legacy shall be paid to the beneficiary upon his arrival at majority, or some other specified age, the legacy is payable at the time fixed.<sup>12</sup> A provision that certain legacies are to be paid "whenever the youngest child of any daughter in being at my decease shall have reached the age of twenty-one years" was held to be payable when the youngest grandchild of testator reached the age of twenty-one.<sup>13</sup> In case of the death of the beneficiary before reaching such age, the legacy, if vested, is payable at once to his administrator.<sup>14</sup> So the bankruptcy of the legatee may make the legacy payable at once.<sup>15</sup>

Testator may, for purposes of preservation of his estate, provide for keeping it intact for a certain period. Where such a provision is made, legacies are not payable until the expiration of such period.<sup>16</sup> Testator may also make a legacy payable upon demand of the legatee.<sup>17</sup> And, where testator made a legacy payable when legatee was eighteen years of age, or when she was of competent age to choose a guardian, or when she married, it was held to be payable upon demand of the guardian chosen by her upon arriving at the age of fourteen.<sup>18</sup> Where testator provides that a legacy shall be payable at a given time, the payment can not be postponed merely because payment at such time will be inconvenient for the estate.<sup>19</sup> Thus, where an annuity was payable on the first of April of each year, and made a lien upon certain real estate specifically

<sup>11</sup> *In re Tredwell* (1891), 2 Ch. 640.

<sup>12</sup> *Stein v. Gordon*, 92 Ala. 532; *Fair's Estate*, 103 Cal. 342; *Cline v. Scott* (Ky. 1896), 32 S. W. 215; *Kuykendall v. Devecmon*, 78 Md. 537; *In re Beilstein*, 147 Pa. St. 85; *Arnold v. Arnold*, 41 S. Car. 291.

<sup>13</sup> *Robinson v. Greene*, 17 R. I 771. (The words "in being" were held to refer to "child" not "daughter," distribution in case of doubt being made at the earliest date.)

<sup>14</sup> *McReynolds v. Graham*, 43 S. W. 138; (Tenn. Ch. App.).

<sup>15</sup> *Sanford v. Lackland*, 2 Dill. 6.

<sup>16</sup> *Fogarty v. Fogarty*, 22 Can. S. C. 103; *Seawright's Estate*, 163 Pa. St. 218.

<sup>17</sup> *Smith v. Jackman*, 115 Mich. 192; *Martin's Estate*, 178 Pa. St. 416.

<sup>18</sup> *Probate Judge v. Page*, 61 N. H. 500.

<sup>19</sup> *Cray v. Herder*, 46 N. J. Eq. 416.



devised, it was held that the payment of a legacy could not be postponed until the harvesting of the annual crops.<sup>20</sup> But, where the will gives to a legatee a vested and absolute interest in the fund, and the payment of such legacy is postponed for the period beyond his majority, no intermediate estate intervening, it is held by some very eminent authorities that the direction postponing payment is repugnant to the gift of the absolute interest, and, accordingly, such legatee has a right, on reaching majority, to demand and receive the legacy.<sup>21</sup>

A gift may be made payable personally to the legatees even though they are not of age.<sup>22</sup>

Where the will provides that the income of the estate is to be accumulated by the executor until sufficient to pay the debts and legacies, it is held that the legatee has no right to bring suit to collect such legacy until it is evidence that the income will not be sufficient for such purpose in any "reasonable time."<sup>23</sup> While ordinarily a legacy payable to a class, which may include those after born, is not payable until the possibility of such subsequent issue is in law extinct by the death of the parent, it has been held that such legacy may be paid where the woman whose issue are the beneficiaries is past the age of childbearing.<sup>24</sup>

### §803. Rule where the will does not fix the time of payment.

Where the will does not specifically fix the time at which the legacies are to be paid, their payment is not delayed by the creation of trusts or other interests by will except in case where, by the very terms of the will, the legacy can not be paid until the trust determines.<sup>25</sup>

The law fixes a time for the payment of legacies which is presumably sufficient to enable the personal representative to collect the assets of the estate and to determine what legacies,

<sup>20</sup> Cray v. Herder, 46 N. J. Eq. 416.

<sup>21</sup> Locke v. Locke, 9 Beav. 66; Dado's Estate, 71 Mo. App. 641; Randolph v. Randolph, 40 N. J. Eq. 73.

<sup>22</sup> *In re* Deneken, 13 Reports, 294.

<sup>23</sup> Cronan v. Holland, 19 R. I. 368; 36 Atl. 92; 33 Atl. 872.

<sup>24</sup> Male v. Williams, 48 N. J. Eq. 33. Compare Sec. 677.

<sup>25</sup> Thyng v. Moses, 65 N. H. 56. Brown v. Lippincott, 49 N. J. Eq. 44.

if any, must abate. At common law, and by the statutes of many states, the time for payment of legacies, where the will did not provide specifically, is fixed at one year from the death of testator.<sup>26</sup> The statutory rule is so firm in some jurisdictions that even a direction that the executors are not to pay the legacies "until such time as it may be practicable to do so, having regard to the beneficial management of my said estate," does not postpone the time of paying legacies beyond that fixed by statute.<sup>27</sup> In other jurisdictions the time fixed for the payment of legacies by statute is different from that fixed by the common law rules; the same principles, however, apply. It has been held, however, where the will does not fix a time for payment, that the legacy is payable in a reasonable time after testator's death.<sup>28</sup>

Two exceptions, however, are generally recognized to the rule making legacies payable a year after the death of testator. The first exception is that, if the testator by will has given annuities, the time for the payment of these annuities begins at the death of testator.<sup>29</sup> Where testator specifically bequeathed the income of a certain fund to a named legatee, in the absence of anything in the will to show a contrary intent, this passes the income of the fund from the death of the testator.<sup>30</sup> The other exception is, that a legacy for testator's infant children, for whom no other provision is made in the will, bears interest from testator's death, though its payment may necessarily be postponed pending the settle-

<sup>26</sup> *Williams' Estate*, 112 Cal. 521 (1896); 44 Pac. 808; *Kent v. Dunham*, 106 Mass. 586; *Welch v. Adams*, 152 Mass. 74; *Ashton v. Wilkinson*, 53 N. J. Eq. 227; *Tichenor v. Tichenor*, 41 N. J. Eq. 39; *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432; *Thorn v. Garner*, 113 N. Y. 198; *Davis v. Crandell*, 101 N. Y. 311; *Webster v. Bible Society*, 50 O. S. 1; *Gray v. Case School*, 62 O. S. 1; *Eichelberger's Estate*, 170 Pa. St. 242; *Huston's App.* 9 Watts. Pa. St. 472; *Webster v. Wiggin*, 19 R. I. 73; 35 Atl. 961; *Moore v. Davison*.

22 S. C. 92; *Sear's Estate*, 18 Utah, 193.

<sup>27</sup> *Williams' Estate*, 112 Cal. 521; 44 Pac. 808.

<sup>28</sup> *Moore v. Moore* (N. H.) (1899) 45 Atl. 233.

<sup>29</sup> *In re Williams*, 64 L. J. Ch. N. S. 349; *Welch v. Brown*, 14 Vr. (N. J.), 37; *Eichelberger's Estate*, 170 Pa. St. 242; *Eyre v. Golding*, 5 Binn. Pa. 472; *Curran v. Green*, 18 R. I. 329; *Sear's Estate*, 18 Utah, 193.

<sup>30</sup> *McLane v. Cropper*, 5 App. D. C. 276.

ment of the estate.<sup>31</sup> Where the will is ambiguous as to which of two funds is charged with the education of children, it will be held to be the fund available immediately, and not one available only after a life estate of twenty years expectancy.<sup>32</sup>

Even before the time of the payment of the legacy a legatee may have a sum sufficient to pay such legacy set apart for its payment,<sup>33</sup> and so an annuitant is entitled to have a sum retained upon the general distribution sufficient to pay the annuity.<sup>34</sup> But an annuity charged on a particular fund, the deficiency, if any, to be made up out of the residuum, can not operate to postpone the payment of other legacies, even if testator has disposed of his entire estate.<sup>35</sup>

#### §804. Interest upon legacies.

A legacy draws interest as between legatees and the estate of the decedent from the time when it becomes payable, in the absence of anything in the will to show that testator entertained a different intent.<sup>36</sup> But, if testator's intention as to the date from which the legacy is to bear interest can be determined, this is paramount.<sup>37</sup> So a gift to trustees to retain for three years, if they saw fit, and to hold in trust for such persons as testator might appoint by will, carries interest from the death of testator.<sup>38</sup>

<sup>31</sup> *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432; *Marsh v. Taylor*, 16 Stew. Eq. 1; *Stout v. Stout*, 17 Stew. 479; *Davison v. Rake*, 17 Stew. 506.

However, where the legacy is given in pursuance of an ante-nuptial contract by which the widow was to receive \$4,000 in lieu of dower within a reasonable time after testator's death, it was held that such legacy was not payable and did not bear interest until a reasonable time, which by analogy was held to be one year. *Krigbaum v. Southard*, 23 W. L. B. 438.

<sup>32</sup> *Thurber v. Battey*, 105 Mich. 718.

<sup>33</sup> *Leslie v. Moser*, 62 Ill. App. 555.

<sup>34</sup> *In re Bates*, 159 Mass. 252.

<sup>35</sup> *Morse v. Macrum*, 22 Ore. 229.

<sup>36</sup> *Cline v. Scott*, — Ky. — (1896), 32 S. W. 215; *Kent v. Durham*, 106 Mass. 586; *Ashton v. Wilkinson*, 53 N. J. Eq. 227; *Adams v. Adams*, 55 N. J. Eq. 42; 35 Atl. 827; *Webster v. Bible Society*, 50 O. S. 1; *Gray v. Case School*, 62 O. S. 1; *Langhroast v. Ahlers*, 7 Ohio N. P. 40; *Eichelberger's Estate*, 170 Pa. St. 242; *Koon's Estate*, 113 Pa. St. 621; *Webster v. Wiggin*, 19 R. I. 73; 35 Atl. 961.

<sup>37</sup> *Loring v. Massachusetts Horticultural Society*, 171 Mass. 401; *Yost's Estate*, 134 Pa. St. 426.

<sup>38</sup> *Loring v. Massachusetts Horticultural Society*, 171 Mass. 401.

A legacy payable at any time in executor's discretion before the distribution of testator's estate, given to equalize the beneficiaries' share with that of others who had secured advancements from testator, which sum was to equal the advancements without interest, does not bear interest.<sup>39</sup>

While legacies ordinarily become due and bear interest a year after testator's death, they do not bear interest from that date if they are payable subsequently.<sup>40</sup> Accordingly, where testator gave certain conditional legacies, and provided that the legatees should notify the executors of their acceptance within six months after the receipt of notice from the executors, and executors delayed sending the notice for more than a year after testator's death, and the legatee accepted within six months thereafter, it was held that the legacy bore interest from the year after testator's death, and not from the time of the acceptance of the legacy.<sup>41</sup>

Where the property has been surrendered either to the remainder-men, residuary legatees, and the like, it is held, however, that they can not be charged with interest for legacies payable out of the property which they have received, unless demand is made of them for such payment.<sup>42</sup> Where, at the time for paying the legacies, contest proceedings are pending, and on that account the executor withholds payment of legacies, it is often questioned whether the legatee can recover interest upon the legacies thus withheld. On this point there seems to be a decided difference of judicial opinion. In some jurisdictions it is held that no interest can be recovered upon the legacies until the date at which the contest is decided.<sup>43</sup> In other jurisdictions it is held to be the duty of executors to pay the legacies if proper security is given to him for the repayment of the same in case the contest is decided adversely to the will. This question depends largely upon the wording and construction of local statutes for the settlement of decedents' es-

<sup>39</sup> *Brooks v. Hanna*, 19 Ohio C. C. 216.

<sup>40</sup> *Cline v. Scott* (Ky.) (1896), 32 S. W. 215.

<sup>41</sup> *Webster v. Wiggin*, 19 R. I. 73; 35 Atl. 961.

<sup>42</sup> *Adams v. Adams*, 55 N. J. Eq. 42; 35 Atl. 827; *Gilbert v. Taylor*, 148 N. Y. 298.

<sup>43</sup> *Trustees of Church Home, etc. v. Morris*, Ky. (1896), 36 S. W. 2.

tates. An executor is not justified in refusing to pay legacies on account of a rumor that some one in existence claimed to be testator's wife.<sup>44</sup>

### §805. Right of devisees to possession of realty.

The right of a devisee to the possession of the realty devised rests upon principles which have already been discussed. Under modern statutes, in most jurisdictions, a devisee can not assert any title to realty until the will has been admitted to probate.<sup>45</sup> After the will has been admitted to probate, the right of the devisee to the possession of the realty is in the first instance dependent upon whether such realty is necessary for the payment of the debts of testator, taken in the order in which the law or the will directs testator's property to be taken for his debts.<sup>46</sup> If the realty devised is not necessary for the payment of testator's debts, the right of the devisee to the possession of such realty depends upon testator's intention as expressed in the will.<sup>47</sup>

<sup>44</sup> Eichelberger's Estate, 170 Pa. St. 242.

<sup>45</sup> See Sec. 313.

<sup>46</sup> See Sec. 777.

<sup>47</sup> See Chapt. XXXI.

## CHAPTER XL.

### SUITS TO CONSTRUE WILLS.

#### §806. When suits to construe will lie.

In their origin, suits to construe wills were equitable in their nature, and were necessary consequence of the general power of equity to manage and control trusts and to direct the conduct of trusts when such direction was sought. In many jurisdictions this principle is still in force, and a construction of a will can be sought only when necessary in directing the conduct of the trustee or some one acting in a general trust capacity.<sup>1</sup> And where this principle is in force, equity will not construe a will in which no trust is created, simply because of the uncertainty of the devisees.<sup>2</sup>

In some jurisdictions, however, equity will entertain suits to construe wills irrespective of the existence of a trust.<sup>3</sup> In other jurisdictions the right of bringing a suit to construe a will has been extended by statute. Thus it is provided under

<sup>1</sup> *Bonnell v. Bonnell*, 47 N. J. Eq. 540; *Torrey v. Torrey*, 55 N. J. Eq. 410; *Bailey v. Briggs*, 56 N. Y. 407; *Chipman v. Montgomery*, 63 N. Y. 221; *Dill v. Wisner*, 88 N. Y. 153.

<sup>2</sup> *Minkler v. Simons*, 172 Ill. 323, reversing 71 Ill. App. 462; *Torrey*

*v. Torrey*, 55 N. J. Eq. 410; *Edgar v. Edgar*, 26 Ore. 65.

<sup>3</sup> *Becton v. Alexander*, 27 Tex. 659; *Hawes v. Foote*, 64 Tex. 22; *Groesbeck v. Groesbeck*, 78 Tex. 664; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482.

some statutes that a widow, before making her election, may bring suit to have her rights, under the will, determined by a court of equity.

Leaving the subject of the court in which the suit must be brought for the following section, it must be observed that under the general equity rules a bill may be filed to construe an ambiguous or doubtful will under proper circumstances.<sup>4</sup> But where the will is plain and unambiguous upon its face, equity courts will not entertain a suit to construe, and will not charge the costs against the estate, but will dismiss such a bill at the costs of the plaintiff.<sup>5</sup>

Equity will not entertain a suit to construe a will in order to answer merely abstract questions;<sup>6</sup> nor will equity determine questions not then necessary to direct the conduct of the trustee.<sup>7</sup> Thus an administrator with the will annexed can not ask questions as to his power to sell real estate, and appropriate the proceeds to the use of the life tenant, where the life tenant has not asked for the sale;<sup>8</sup> and equity will not instruct a trustee as to a future event which may or may not take place.<sup>9</sup> Thus equity will not construe a will, ordinarily, to determine the nature of a remainder during the life of the life tenant.<sup>10</sup>

<sup>4</sup> *Caroll v. Richardson*, 87 Ala. 605; *Stevens v. Dewey*, 55 N. J. Eq. 232.

<sup>5</sup> *Baxter v. Baxter*, 43 N. J. Eq. 82; *Mellen v. Mellen*, 139 N. Y. 210; *Hollister v. Howe*, 6 O. Dec. 157; 4 O. N. P. 168.

<sup>6</sup> *Siddall v. Harrison*, 73 Cal. 560.

<sup>7</sup> *May v. May*, 5 App. D. C. 552; *Fahy v. Fahy* (N. J.), 42 Atl. 726; *Tyson v. Tyson*, 100 N. C. 360.

<sup>8</sup> *Security Co. v. Pratt*, 65 Conn. 161.

<sup>9</sup> *Bullard v. Att. Gen.*, 153 Mass. 249; *Griggs v. Veghte*, 47 N. J. Eq. 179; *Traphagen v. Levy*, 45 N. J. Eq. 448. It has been said that

even if such decree were rendered, it would not be binding. *Meacham v. Graham*, 98 Tenn. 190.

<sup>10</sup> *Stumpenhousen's Estate*, 108 Ia. 555; *Wethered v. Safe Deposit & Trust Co.* 79 Md. 153; *Minor v. Taylor*, 129 Mass. 160; *Heald v. Heald*, 56 Md. 300; *Devecmon v. Shaw*, 70 Md. 219; *Woods v. Fuller*, 61 Md. 457; *Powell v. Demming*, 22 Hun, 235 (N. Y.); *Hayday v. Hayday* (N. J.), 39 Atl. 373; *Morse v. Lyman*, 64 Vt. 167; *Blair v. Johnson* 64 Vt. 598; *Well's Estate*, 69 Vt. 388; *Schinz v. Schinz*, 90 Wis. 236; 2 Pom. Eq. Jur. (2nd Ed.) 1157.

An additional reason for refusing such construction is that if remainders may pass by purchase to persons not ascertained at the time of the bringing of suit, the rights of such persons can not be determined in the suit.<sup>11</sup>

As a court of equity will only advise a trustee as to his conduct in the immediate future, he ordinarily can not maintain a suit to determine what has been the effect of a distribution made by him.<sup>12</sup> But where the immediate conduct of an executor or a trustee will be determined by the construction of the will, the court will entertain an action to construe. Thus where a will directs that the husband of testator shall not be required to pay more of his debts to her estate than such annual payments as will stop the statute of limitations from running, the legatees may receive instructions from a court of equity as to their conduct with reference to such debts.<sup>13</sup> So where executor has assets in his hands which he is ready to distribute,<sup>14</sup> or where on construction of the will, is bound to sell land at once to pay a legacy,<sup>15</sup> he may file a bill to obtain instruction.

Where the present conduct of the executor or trustee is affected by the nature of the remainder after the life interest, he may have the nature of such remainder construed.<sup>16</sup>

Where questions concerning which construction is sought do not impose any duty upon the executor or trustee, and pertain exclusively to the question of legal title passed by the will as between a devisee and an heir, or as between two or more

<sup>11</sup> *Traphagen v. Levy*, 45 N. J. Eq. 448; *Montignani v. Blade*, 145 N. Y. 111; *Ward v. Ward*, 95 Ala. 331; 10 So. 832.

<sup>12</sup> *Miles v. Strong*, 60 Conn. 393; *Little v. Thorne*, 93 N. C. 69.

<sup>13</sup> *Miller v. Drane*, 100 Wis. 1.

<sup>14</sup> *Balsley v. Balsley*, 116 N. C. 472.

<sup>15</sup> *Van Gieson v. White*, 53 N. J. Eq. 1.

<sup>16</sup> *Meacham v. Graham*, 98 Tenn. 190; 39 S. W. 12.

In this case one legatee claimed

a right to a bequest absolutely, while other legatees claimed they had a contingent remainder in such legacy. The latter claimants contended that the executor was personally responsible for the payments which he had made already to the first taker of the legacy, and that he should make no further payments without taking bond for the repayment of the fund upon the happening of the contingency.



antagonistic devisees, equity will not generally entertain a suit to construe a will, but will leave the adversary parties to their remedies at law.<sup>17</sup> In such case the court will not assume jurisdiction, because the suit was brought by an executor, where he has not been charged with any duties in reference to such estate.<sup>18</sup>

However, where the facts are such that no adequate remedy can be had at law, as where the devisee is in possession under a devise which clearly gives him a life estate, and the dispute is as to the remainder, equity in the exercise of its jurisdiction of entertaining suits to quiet title may, as incidental to such relief, construe the will under which devisee claims.<sup>19</sup>

Whether equity can pass upon the force and effect of instruments executed after the will either by testator or by beneficiaries in an action to construe a will, is a question upon which the authorities are at variance.<sup>20</sup>

<sup>17</sup> *Minkler v. Simons*, 172 Ill. 323, reversing 71 Ill. App. 462; *Peverly v. Peverly*, 173 Mass. 203; *Austin v. Bailey*, 163 Mass. 270; *Torrey v. Torrey*, 55 N. J. Eq. 410; *Kennedy v. Merrick*, 46 Neb. 260; *Kelley v. Kelley*, 80 Wis. 486.

In *Austin v. Bailey*, 163 Mass. 270, which was an action by one who claimed a devise to determine his title to certain real estate as against the heirs, the court expressed its reasons for dismissing the petition without a decision on its merits in the following language: "It is plain that this is not a case in which the petitioner has any duty to perform under the will in which he needs the instructions of the court as to any duties arising in the administration of the estate of Jane Manning. So far as appears, the dispute does not, in any way, concern the administration of the estate. See *Healy v. Reed*, 153 Mass. 197. The whole question in the case relates to the extent of the title of the parties to the real

estate of which respondent is in possession. Both parties receive their titles from Jane Manning, but this does not entitle either to ask this court by petition for instruction upon the proper construction of the will. . . . The true remedy of the petitioner is by right of entry in the trial of which it would be necessary to determine the meaning of this article of the will." In this case, however, while the court refused to render any decision as to the construction since the question was fully argued, and all the parties in interest were before the court, it expressed its opinion in such terms as to obviate the necessity of future litigation.

<sup>18</sup> *Miles v. Strong*, 60 Conn. 393; *Torrey v. Torrey*, 55 N. J. Eq. 410.

<sup>19</sup> *Ewing v. Barnes*, 156 Ill. 61; *Pennington v. Pennington*, 70 Md. 418; 3 L. R. A. 816.

<sup>20</sup> In *Lenz v. Prescott*, 144 Mass. 505, equity took jurisdiction upon the ground that one of the questions involved was an assignment by leg-

### §807. Jurisdiction of courts in actions to construe a will.

State courts of general equity powers are the tribunals before which the construction of the domestic will should be brought.<sup>21</sup>

Courts of probate powers have, ordinarily, jurisdiction to construe wills only so far as is necessary in exercising their jurisdiction over decedent's estate, such as hearing exceptions to accounts and the like.<sup>22</sup>

By statute in some jurisdictions, courts of probate powers are given especial authority to direct the payment of legacies. Where such powers exist, probate courts may construe wills in so far as is necessary to direct the payments of legacies.<sup>23</sup>

The power of a probate court to construe a will in settling the estate does not, however, exclude courts of equity from entertaining suits to construe wills in proper cases.<sup>24</sup> And, on the other hand, a proceeding in a court of equity to obtain a construction of a will and enforce a trust does not deprive a court of probate powers of its jurisdiction in settling the estate.<sup>25</sup>

Where foreign wills provide for separate dispositions of property situated in an American state, the court of that state may, upon the application of the executor of the will for this country, determine whether a given legacy had lapsed; but as

ates of their interest which the probate court had no jurisdiction to determine. In *Jackson v. Thompson*, 84 Me. 44, it was held that equity could not determine the validity of such an assignment. In *Montignani v. Blade*, 145 N. Y. 111, it was held that equity could not, in a suit to construe a will, determine the validity of an assignment made by a beneficiary under the will, the assignee not being a party to the suit.

<sup>21</sup> *Longwith v. Riggs*, 123 Ill. 258; *Minkler v. Simons*, 172 Ill. 323; *Richardson v. Richardson*, 80 Me. 585; *Ladd v. Chase*, 155 Mass. 417.

<sup>22</sup> *Burton's Estate*, 93 Cal. 459; *McIntire v. McIntire*, 14 App. D. C. 337; *Dunham v. Marsh*, 52 N. J. Eq. 256, affirmed 52 N. J. Eq. 831; *Stevens v. Dewey*, 55 N. J. Eq. 232; *Rosborough v. Mills*, 35 S. C. 578.

<sup>23</sup> *Burton's Estate*, 93 Cal. 459; *Rosborough v. Mills*, 35 S. C. 578; *Hudgins v. Leggett*, 84 Tex. 207.

<sup>24</sup> *Stevens v. Dewey*, 55 N. J. Eq. 232; *Davis v. Hutchings*, 15 O. C. C. 174; 8 O. C. Dec. 52, reversing 6 O. Dec. 371, 4 O. N. P. 276. *Burnham v. Norton*, 100 Wis. 8.

<sup>25</sup> *Minkler v. Simons*, 172 Ill. 323, reversing 71 Ill. App. 462;

there was a residuary bequest to the foreign executors, the American court could not determine who would benefit by such lapse.<sup>26</sup>

If the parties adverse in interest are citizens of different states, the United States Courts have jurisdiction to construe and interpret a will.<sup>27</sup> But where the parties really adverse in interest reside in the same state, the fact that upon the record a resident of a different state who had no real interest in the controversy appears as the party adversary to both of the real parties, does not give the United States Courts jurisdiction of the case.<sup>28</sup>

### §808. Parties to suits to construe wills.

The proper plaintiff in a suit to construe a will is usually the executor,<sup>29</sup> or an administrator with the will annexed,<sup>30</sup> or a testamentary trustee<sup>31</sup> upon whom some duty is cast by the will concerning which he needs the instruction and direction of the court for his immediate action.

It is generally held that beneficiaries under the will, whose immediate interests may be affected, may bring suit for construction.<sup>32</sup>

In some jurisdictions the beneficiaries under a will can not bring a suit to construe if their rights can be adjudicated in an action at law.<sup>33</sup>

An administrator of the deceased's next of kin<sup>34</sup> or the guardian of an insane beneficiary *cestui que trust* may sue for construction.

<sup>26</sup> Rockwell v. Bradshaw, 67 Conn. 8.

<sup>27</sup> Wood v. Paine, 66 Fed. 807; Security Co. v. Pratt, 65 Conn. 161.

<sup>28</sup> Patton v. Cilley, 62 Fed. 498.

<sup>29</sup> Belfield v. Booth, 63 Conn. 299; *In re* Batchelder, 147 Mass. 465; Ladd v. Chase, 155 Mass. 417; Kilburn v. Dodd (N. J. Eq.) 30 Atl. 868; Davis v. Hutchings, 15 Ohio C. C. 174, reversing 4 Ohio N. P. 276.

<sup>30</sup> Stoff v. McGinn, 178 Ill. 46;

Stevens v. Dewey, 55 N. J. Eq. 232.

<sup>31</sup> Readman v. Ferguson, 13 App. D. C. 60.

<sup>32</sup> Crerar v. Williams, 145 Ill. 625; Wintermute v. Heinly, 81 Io. 169; Read v. Williams, 125 N. Y. 560. Where their immediate interests are not affected, they can not sue. Well's Estate, 69 Vt. 388.

<sup>33</sup> Torrey v. Torrey, 55 N. J. Eq. 410; Minkler v. Simons, 172 Ill. 323, reversing 71 Ill. App. 462.

<sup>34</sup> Healy v. Reed, 153 Mass. 197.

There is, however, a conflict as to whether the assignee of a beneficiary under a will may sue to obtain instruction.<sup>35</sup>

Even where the facts are not such as to warrant the executor or administrator or trustee in obtaining the direction of the court, an action may be brought by a devisee or heir for that purpose, if necessary to determine his immediate rights.<sup>36</sup> Thus the *cestui que trust* can not maintain an action to construe a will in order to determine who will take a contingent remainder at his death.<sup>37</sup> In such case, of course, the creditor of the life tenant can not bring suit to determine what rights, if any, he would have to the balance after the life estate was exhausted, where under the will the life estate may be sold on execution.<sup>38</sup>

But those who have no interest in the outcome of either construction claimed, can not be heard to raise the question of the correct construction of the will. Thus heirs can not attack the validity of certain devises where the will as a whole is admitted to be valid and it contains a residuary clause, since the heirs can not be benefited by defeating the devise.<sup>39</sup>

Whether the proper party brings the suit or not, if the parties affected by the construction are properly made parties to the suit, and if the executors by their answer submit the question of construction to the court, the court has jurisdiction to construe the will,<sup>40</sup> and when the wrong party sues, it has been

<sup>35</sup> In *Lyon v. Clawson*, 56 N. J. Eq. 642, affirmed 58 (N. J. Eq.), 584, 43 Atl. 1898, it was held that an assignee of an interest in a legacy in remainder might, upon the determination of the precedent estate, sue to obtain a construction of the will and compel the executor to pay over the trust fund to the assignee of such remainder man. In *Mellen v. Mellen*, 139 N. Y. 210, it was held that the grantee of a devisee could not maintain such an action.

<sup>36</sup> *Kennedy v. Merrick*, 46 Neb. 260.

<sup>37</sup> *Horton v. Cantwell*, 108 N. Y. 255.

<sup>38</sup> *Coleman v. Sumrall* (Ky.) (1890), 15 S. W. 667; 12 Ky. L. Rep. 770.

<sup>39</sup> *Crerar v. Williams*, 145 Ill. 625; 34 N. E. 467, affirming 44 Ill. App. 497; *Widdowson's Estate*, 189 Pa. St. 338.

<sup>40</sup> *Dean v. Mumford*, 102 Mich. 510.

held to be only error, provided all the parties affected are made parties to the suit; and, hence, a decree construing the will is a bar if error proceedings are not brought.<sup>41</sup>

All the parties whose interest will be affected by the decree of the construction should be parties to the record;<sup>42</sup> and if the parties whose interests may be affected can not be made parties to the record, as where they are not in being, the court should not entertain a suit for construction.<sup>43</sup>

Where, however, the executors who were plaintiffs in the suit to construe the will did not make themselves defendants in their individual capacities, it was held not such irregularity as would prevent the Supreme Court from deciding law questions reserved to it by the superior court.<sup>44</sup>

### §809. Suit for construction not contest or reformation.

Since a suit for construction is not a contest and assumes the validity of the will, neither the heir nor next of kin can maintain any action to declare certain provisions of the will void where the property given by such provisions will pass under the will to the residuary devisees or legatees and not the heir or next of kin.<sup>45</sup>

It has been held, however, that on filing a cross-petition alleging the necessary facts and on complying with the formalities necessary to contest, a suit to construe may be made the means of contesting the validity of the will before passing on the construction.<sup>46</sup>

It is very generally conceded that in a suit to construe a will equity can not reform the same, as it would a deed or a contract.<sup>47</sup>

<sup>41</sup> *Stoff v. McGinn*, 178 Ill. 46.

<sup>42</sup> *Ward v. Ward*, 95 Ala. 331; 10 So. 832; *Ex parte Whalen*, — Ky. — 1897; 39 S. W. 35; *Montig-nani v. Blade*, 145 N. Y. 111.

<sup>43</sup> *Traphagen v. Levy*, 45 N. J. Eq. 448.

<sup>44</sup> *Cunningham v. Cunningham*, 72 Conn. 253.

<sup>45</sup> *Crerar v. Williams*, 145 Ill.

625; *Mason v. Roll*, 130 Ind. 260; *Barkley v. Donnelly*, 112 Mo. 561; 19 S. W. 305; *Anderson v. Apple-ton*, 112 N. Y. 104; 2 L. R. A. 175; *Onderdonk v. Onderdonk*, 127 N. Y. 196; *Sawtelle v. Ripley*, 85 Wis. 72.

<sup>46</sup> *Mason v. Roll*, 130 Ind. 260.

<sup>47</sup> *Eckford v. Eckford*, 91 Io. 54; *Bingel v. Volz*, 142 Ill. 214; 16 L. R.

### §810. Pleadings.

Written pleadings are necessary in a suit to contest a will.<sup>48</sup> Where a distinction in equity proceedings is made between informal applications by petition and formal application by bill, a suit to construe a will must be by bill.<sup>49</sup>

### §811. Notice.

Notice of a suit to construe a will is usually provided for by statute, in the same manner as notice of any other suit. As the usual rules of the issuing and service of process apply here, this subject will not be entered upon further.

### §812. Decree.

A decree construing the will and determining the rights of the parties to such proceeding, if rendered by a court of competent jurisdiction, is binding upon all parties to the suit to construe until attacked directly by appeal or error.<sup>50</sup> Thus a decree that A had a life estate only, binds A where he was a party to the construction suit, although the remainder-men were not made parties.<sup>51</sup> Such decree can not be attacked collaterally on the ground that the will did not require construction,<sup>52</sup> or that the construction suit was not brought by the proper party plaintiff.<sup>53</sup>

While a decree of construction is binding on the parties thereto, it is not binding upon the descendants of a party, who

A. 322; *Sturgis v. Work*, 122 Ind. 134; *Schlottman v. Hoffman*, 73 Miss. 188.

"The rule is fundamental that there can be no reformation of (a will) on the ground of mistake, accident or surprise as in the case of conveyances of real estate or in other contracts." *Eckford v. Eckford*, 91 Io. 54.

<sup>48</sup> *Smalley v. Smalley*, 54 N. J. Eq. 591.

<sup>49</sup> *Smalley v. Smalley*, 54 N. J. Eq. 591.

<sup>50</sup> *Fayerweather v. Ritch*, 91 Fed. Rep. 721; *Stoff v. McGinn*, 178 Ill. 46; *Coghlan v. Dana*, 173 Mass. 421; *Hershey v. Meeker County Bank*, 71 Minn. 255; *Stevens v. Dewey*, 55 N. J. Eq. 232; *Hawthorn v. Beckwith*, 89 Va. 786; 17 S. E. 241.

<sup>51</sup> *Hawthorn v. Beckwith*, 89 Va. 786; 17 S. E. 241.

<sup>52</sup> *Stoff v. McGinn*, 178 Ill. 46.

<sup>53</sup> *Stoff v. McGinn*, 178 Ill. 46.

claim not by descent from such party but by purchase under the will.<sup>54</sup> But it is binding upon those claiming under such a party by descent.<sup>55</sup>

Where no application is made to the probate court for formal construction, a decree of distribution does not operate as a final adjudication of the ultimate rights of beneficiaries under the will.<sup>56</sup> But where the probate court has full power to construe the will so as to determine the ultimate property rights of the beneficiaries, a decree to that effect rendered by such court<sup>57</sup> or the prior pendency of a suit to construe the will in such probate court<sup>58</sup> is a bar to a subsequent suit to construe.

Where, however, the court of probate powers refers the petition for construction to a commissioner to take testimony and report as to the debts of decedent, the transactions of the executor and the like, such decree is interlocutory merely, and not final.<sup>59</sup>

### §813. Costs and attorney fees.

In suits to construe wills the courts are not in harmony as to their powers and duties in matters of costs and attorney's fees.

In some jurisdictions it is held that in a suit for construction, the defeated claimant who has resisted a certain construction can not have his costs or attorney's fees out of the estate.<sup>60</sup>

In other jurisdictions, the apportionment of costs and attorney's fees is within the sound discretion of the court, and it is held that if the ambiguity of the will caused the difficulty

<sup>54</sup> *Malona v. Schwing*, 101 Ky. 56.

<sup>55</sup> *Lawe v. Holder*, 106 Ga. 879.

<sup>56</sup> *Hershey v. Meeker County Bank*, 71 Minn. 255; *Stevens v. Dewey*, 55 N. J. Eq. 232.

<sup>57</sup> *Goldtree v. Thompson* (Cal.), 20 Pac. 414. (At least where such decree is not set out in full and

may be a complete determination of the rights of the parties.)

<sup>58</sup> *Garlock v. Vandevort*, 128 N. Y. 374; *In re Verplanck*, 91 N. Y. 439; *Riggs v. Cragg*, 89 N. Y. 479.

<sup>59</sup> *Sims v. Sims*, 94 Va. 580.

<sup>60</sup> *Kimball v. New Hampshire Bible Society*, 65 N. H. 139.

in construction, the defeated party, as well as the successful party, is entitled to his costs out of the estate.<sup>61</sup>

Where the apportionment of costs is within the discretion of the court, such costs can not be taxed by the clerk as in ordinary cases.<sup>62</sup>

The allowance of attorney fees to the defeated party is questioned somewhat more than the allowance of costs, but is generally recognized as proper if costs are allowed.<sup>63</sup> Allowance of costs and attorney fees to the defeated party can be justified as follows: The difficulty in construction was created by the testator, not by the defeated party. Hence the costs of obtaining a judicial construction of such a will should be borne by testator's estate.<sup>64</sup>

In accordance with this reasoning, attorney fees are not allowed to one who is really suing, under cover of construction, to have the will declared void.<sup>65</sup>

#### §814. Estoppel.

Where the beneficiaries under a will have themselves placed a practical construction upon such will, and have released their interests as thus construed, for a valuable consideration, they are bound by such construction.<sup>66</sup> But the interests of others not parties to such instrument, can not be affected by estoppel.<sup>67</sup>

The doctrine of estoppel also applies to cases where devisee has an election between taking under the will, and standing on his legal rights outside the will.<sup>68</sup> Thus a widow to whom

<sup>61</sup> *Charter v. Charter*, L. R. 7 H. L. 364; *Ingraham v. Ingraham*, 169 Ill. 432; *Moore v. Alden*, 80 Me. 301; *Morse v. Stearns*, 131 Mass. 389.

<sup>62</sup> *Horton v. Upham*, 72 Conn. 29.

<sup>63</sup> *Donges's Estate*, 103 Wis. 497.

<sup>64</sup> "The difficulty having been created by act of the testatrix, the costs of all parties, taxed as be-

tween solicitor and client, should come out of the general estate." *Charter v. Charter*, L. R. 7 H. L. 364.

<sup>65</sup> *Thornton v. Zea* (Tex. Civ. App.) (1899), 55 S. W. 798.

<sup>66</sup> *Thornton v. Hall*, 111 Ala. 323; *Pate v. French*, 122 Ind. 10.

<sup>67</sup> *Pate v. French*, 122 Ind. 10.

<sup>68</sup> See Sec. 726, *Election. Hodgman's Estate*, 140 N. Y. 421.



property has been given by will in full satisfaction of her dower and distributive share, can not after taking the property thus bequeathed take lapsed legacies.<sup>69</sup>

A devisee or legatee who is not put to an election, is not estopped to claim that certain recitals of fact in the will are erroneous,<sup>70</sup> or that certain items of the will are of no effect in law.<sup>71</sup> Thus a beneficiary under a will is not estopped by a general residuary clause containing no specific description of the property involved, to claim that a deed given by him to testator was understood to be a mortgage in equity, and that the debt secured thereby had been discharged.<sup>72</sup>

A devisee who claimed under a will which forbade the devisees to contest it or to attempt to set aside any of its provisions, is not estopped from a suit to construe the will and to enforce it as construed.<sup>73</sup>

#### §815. Error.

A decree of a court construing a will upon suit brought for that purpose may be reversed, if erroneous, by a petition in error brought as in other cases.<sup>74</sup>

<sup>69</sup> Hodgman's Estate, 140 N. Y. 421.

<sup>70</sup> Hatch v. Ferguson, 68 Fed. 43. Nor is the recipient of a gift *causa mortis* estopped to claim under the will. May v. Jones, 87 Io. 188; 54 N. W. 231.

<sup>71</sup> Schmidt's Estate, — Mont. —; 38 Pac. 547.

<sup>72</sup> Tompkins v. Merriman, 155 Pa. St. 440.

<sup>73</sup> Black v. Herring, 79 Md. 146; 28 Atl. 1063.

<sup>74</sup> Davis v. Coffman, 55 O. S. 556.

## CHAPTER XLI.

### EVIDENCE IN AID OF CONSTRUCTION.

#### **§816. General principles controlling admissibility of evidence in construction.**

As will be seen from an inspection of the cases cited under the heading of Construction, the question of the admissibility of evidence in the construction is not, by any means, limited to suits to construe a will. Almost any litigation which involves the title to property, such as, for example, partition suits or suits in ejectment, may involve the question of the construction of a will under which title to such property is claimed. Questions of admissibility of extrinsic evidence to aid in construction may, therefore, arise in any kind of a suit in which a will is relied upon as a means of tracing title, in addition to suits brought for the sole purpose of construing a will.

The rules controlling the admissibility of evidence in the construction of wills and testaments have developed in parallel lines with the developement of the rules controlling the formality of the execution of such instruments. The rules controlling the admissibility of evidence to determine the meaning of devises of real estate have remained substantially the same, from the first introduction of wills into our system of law; for a will passing real estate has always been required to be in writing. As society has developed, new questions and new combinations have, from time to time, arisen, and the form in

which the general rules of evidence have been stated has varied accordingly. Testaments passing personalty, on the other hand, might at first be nuncupative, and consequently there was little or no restriction on the admissibility of any sort of evidence which would serve to show testator's intention. At modern law, a testament must be in writing and executed with the same formalities in most states as are requisite in the case of a will passing realty. Accordingly, the rules controlling the admissibility of extrinsic evidence to determine testator's intention, in reference to personalty, have gradually been restricted until at present the rules of evidence are substantially the same in cases of wills and testaments. Since both wills and testaments are required to be in writing, no part of either can be created by mere oral statement; as we have seen already,<sup>1</sup> "the intention of the testator is always to be deduced from the words actually written in the will."<sup>2</sup> In determining testator's intention "the true inquiry is not what a testator meant to express, but what the words used do express."<sup>3</sup> Accordingly, the fundamental principle controlling the admissibility of extrinsic evidence is, that extrinsic evidence can not be received as evidence of testator's intention outside of, and independent of, the written words employed by testator.<sup>4</sup>

The only purpose and justification of the admission of extrinsic evidence is to explain testator's meaning which is set forth in the words of the will. Assuming that it is testator's will which is to be construed, it is the place of the court to find the meaning of such will, if there is one, and not under guise of construction or under general powers of equity to assume to correct or redraft the will in which testator has expressed his intentions.<sup>5</sup>

<sup>1</sup> See Sec. 460.

<sup>2</sup> *Sturgis v. Work*, 122 Ind. 134.

<sup>3</sup> *Burke v. Lee*, 76 Va. 386.

<sup>4</sup> *Starkweather v. Society*, 72 Ill. 50; *Decker v. Decker*, 121 Ill. 341; *Bingel v. Volz*, 142 Ill. 214; 31 N. E. 13; 16 L. R. A. 321; *Sturgis v. Work*, 122 Ind. 134; *Huston*

*v. Huston*, 37 Io. 668; *Elliott v. Tapp*, 63 Miss. 139; *Burke v. Lee*, 76 Va. 386; *Couch v. Eastham*, 29 W. Va. 784.

<sup>5</sup> *Bingel v. Volz*, 142 Ill. 214; 31 N. E. 13; 16 L. R. A. 321; *Whitcomb v. Rodman*, 156 Ill. 116; *Sturgis v. Work*, 122 Ind. 134;

# **§817. Evidence admissible to show surrounding circumstances.**

At the outset it may be observed, as a matter of fact rather than of law, that there is but little need of, or little question concerning, extrinsic evidence if the will is plain upon its face, and if the persons and things therein mentioned are shown to exist exactly as they are described in the will, and there is no question as to their identity. Such questions as are raised upon a will of this sort are generally attempts to contradict the instrument and are discussed hereafter.<sup>6</sup>

The question of the admissibility of parol evidence, therefore, is generally raised where the will, either upon its face, or by reason of imperfect description of the subject matter of the gift or the object of testator's bounty, is ambiguous or uncertain. In any case, wherever it is necessary to invoke extrinsic evidence to assist in the construction of a will, it is recognized by the great weight of authority that evidence of the facts and circumstances, existing at the time of the execution of the will, and known to testator, with reference to which he drew the instrument of which the meaning is in question, is necessary, not to contradict the meaning of the will, but to "enable the court to place itself in his situation, to see things as he saw them, and to apply his language as he understood and intended it."<sup>7</sup>

While in some of these cases considerable stress is put on the fact that evidence is admissible because of the ambiguity of the will,<sup>8</sup> this is only because that in such cases extrinsic evidence is necessary; and it seems to be laid down that in any case, whether the will is ambiguous or not, the court

Funk v. Davis, 103 Ind. 281; Fitzpatrick v. Fitzpatrick, 36 Io. 674; Eckford v. Eckford, 91 Io. 54; 26 L. R. A. 370; Sherwood v. Sherwood, 45 Wis. 357; 30 Am. Rep. 757.

<sup>6</sup> See Sec. 820.

<sup>7</sup> Pruden v. Pruden, 14 O. St. 251. To the same effect are, Lee v. Simpson, 134 U. S. 572; Whitcomb v. Rodman, 156 Ill. 116; 28

L. R. A. 149; Ernst v. Foster, 58 Kan. 438; Nichols v. Boswell, 103 Mo. 151; Barnard v. Barlow, 50 N. J. Eq. 131; Morris v. Sickly, 133 N. Y. 456; Jasper v. Jasper, 17 Ore. 590; Bank v. Gregg, 46 S. C. 169.

<sup>8</sup> Whitcomb v. Rodman, 156 Ill. 116; 28 L. R. A. 249; Ernst v. Foster, 58 Kan. 438; Bank v. Gregg, 46 S. C. 169.

is entitled to hear such extrinsic evidence of the surrounding circumstances as will put it in the place of testator.<sup>9</sup>

Among the surrounding facts most frequently admitted in evidence, we naturally find that the most usual is evidence of the condition of testator's property, and the relationship between him and the natural object of his bounty.<sup>10</sup>

### §818. Evidence necessary where there is no ambiguity.

While but few cases arise upon the admissibility of evidence where the will is free from ambiguity, extrinsic evidence is, nevertheless, not only admissible, but necessary for the purpose of identifying the beneficiaries and the property disposed of by will.<sup>11</sup> This arises from the evident fact that no amount of detailed description in a will can show whether there are any extrinsic objects or persons which correspond to such description. This fact underlies the rules concerning the admission of evidence to explain any written instrument, and is made necessary from the very nature of the case. Thus where testator, by will, described certain land as deeded to him by A by deed recorded in a place named in the will, extrinsic evidence was admissible to show that a search of the records at such place disclosed only one deed from A to testator, in order to show what property was devised.<sup>12</sup>

<sup>9</sup> *Hawhe v. Chicago, etc., Railroad Co.* 165 Ill. 561. (On this point this case is a good authority, although the latitude allowed by the court in the evidence admitted is greater than the weight of authority will justify.)

<sup>10</sup> *Smith v. Bell*, 6 Pet. 68; *Ernst v. Foster*, 58 Kan. 438; *Nichols v. Boswell*, 103 Mo. 151.

"In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his leg-

atees, the affection existing between them, the motives which might reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to the consideration in expounding doubtful words and ascertaining the meaning in which testator used them." *Smith v. Bell*, 6 Pet. 68.

<sup>11</sup> *Daugherty v. Rodgers*, 119 Ind. 254; *Ikard v. Thompson*, 81 Tex. 285.

<sup>12</sup> *Ikard v. Thompson*, 81 Tex. 285.

**§819. Admissibility of evidence where description is ambiguous.**

The question of the admissibility of extrinsic evidence is very frequently invoked where the description of either the property is to be disposed of by will, or the beneficiary to whom the property is to be disposed of, is ambiguous. An ambiguous description in this connection is said to be one which is true in part and false in part, the correct part of which, when the false is rejected, applies equally well to two or more things or persons.

This definition is possibly too narrow, since an ambiguous description may not be false in any part, but may simply be so insufficient as to fail to distinguish between two or more things or persons.

Where the description in the will of the property disposed of does not apply completely to any property which testator owned, but does apply in part to property owned by testator, extrinsic evidence is admissible to show the surrounding facts and circumstances in order to aid the court in determining what property testator meant to dispose of.<sup>13</sup>

We have already seen that where testator devises realty by its popular name, considerable latitude is allowed in the construction, in determining what realty was conveyed by such devise.<sup>14</sup> In such cases extrinsic evidence is admissible to show what tract of land was known by such name.<sup>15</sup> Thus where testator devised his "upland," it appearing that he had no upland in the strict sense of the word, evidence was admissible to show that he owned bottom land and what is known as bench land intermediate between bottom land and upland,

<sup>13</sup> *Masters v. Masters*, 1 P. Wms. 425; *Beaumont v. Fell*, 2 P. Wms. 141; *Lee v. Paine*, 4 Hare, 253; *Charter v. Charter*, L. R. 2 P. & D. 315; L. R. 7 H. L. 364; *Gilmer v. Stone*, 120 U. S. 586; *Priest v. Lackey*, 140 Ind. 399; *Black v. Richards*, 95 Ind. 184; *Pocock v. Redinger*, 108 Ind. 573; *Chappell v. Society*, 3 Ind. App. 356; 50 Am.

St. Rep. 276; *Winkley v. Kaime*, 32 N. H. 268.

<sup>14</sup> See Sec. 488; also Sec. 487.

<sup>15</sup> *Vandiver v. Vandiver*, 115 Ala. 328; 22 So. 154; *Flannery v. Hightower*, 97 Ga. 592; *Thomson v. Thomson*, 115 Mo. 56; *McKeough's Estate v. McKeough*, 69 Vt. 34, 41; 37 Atl. 275.

and that he referred to this bench land as upland.<sup>16</sup> So where testator devised his "home place" or "the tract of land on which I now live," it was held that extrinsic evidence was admissible to show what land testator regarded as included within the boundaries of such description.<sup>17</sup> So where testator devised "my two farms," extrinsic evidence is admissible to show in what sense testator used those words, and whether a sixty-acre tract was regarded by him as a part of "the home farm."<sup>18</sup> In such cases, however, extrinsic evidence of what persons residing in the neighborhood meant by the expression "home farm" or other popular name given to that tract of land is inadmissible.<sup>19</sup>

So in determining the meaning of the will, extrinsic evidence is admissible to show the extent of testator's property, and that the property disposed of by him by will was the whole of his real estate.<sup>20</sup> So where testator devises the balance of his estate, extrinsic evidence is not only admissible, but necessary, to show what was included in the term "balance."<sup>21</sup> So where testator devised a "lot," extrinsic evidence is admissible to identify such "lot."<sup>22</sup> So where testator devised the house where he lived "being part of lots numbered 15 & 16" to his wife for life, and further devised on his wife's death the "same lot" to his daughter, and described the lot as "numbered 15," it was held that extrinsic evidence was admissible to show that the property where he resided included parts of lots 15 and 16.<sup>23</sup>

Where testator describes the property devised by township, range, section and quarter section, but does not locate it in the correct section or range or the like, the weight of authority is that extrinsic evidence is admissible to show exactly what real estate testator owned. Under this view if he owns any real estate

<sup>16</sup> *Vandiver v. Vandiver*, 115 Ala. 328; 22 So. 154.

<sup>17</sup> *Thomson v. Thomson*, 115 Mo. 56; *Boggs v. Taylor*, 26 O. S. 604; *McKeough's Estate, v. McKeough*, 69 Vt. 34, 41; 37 Atl. 275.

<sup>18</sup> *Black v. Hill*, 32 O. S. 313.

<sup>19</sup> *Taylor v. Boggs*, 20 O. S. 516.

<sup>20</sup> *Lomax v. Shinn*, 162 Ill. 124.

<sup>21</sup> *Lomax v. Shinn*, 162 Ill. 124, 214; *Frick v. Frick*, 82 Md. 218,

<sup>22</sup> *Warner v. Miltenberger*, 21 Md. 264.

<sup>23</sup> *Groves v. Culph*, 132 Ind. 186.

which corresponds in part to the description in the will, the court will reject the incorrect part of the description and will pass the realty conveyed by the correct description. This subject has already been discussed in detail.<sup>24</sup>

Even greater latitude in the admission of extrinsic evidence is allowed in gifts of personal property, not from any difference at modern law as to the formality of the will passing the two kinds of property, but from the nature of the property itself, and the difficulty of exact description of personalty. Thus where testator, by will, bequeathed "my life insurance policy amounting to \$1000," it was held that extrinsic evidence was admissible to identify such property.<sup>25</sup>

The courts have gone even further than allowing extrinsic evidence of the surrounding facts and circumstances in determining testator's intention in cases of ambiguity. Thus testator provided for a bequest to A of an amount of money which was written in the will by the figure 5, preceded by the dollar sign and followed by two ciphers a little distance from the figure 5, and some distance above the line. There was no decimal mark after the figure 5, and no line drawn under the ciphers; it was, therefore, impossible to tell whether he intended the bequest to be \$5 or \$500; it was held that extrinsic evidence was admissible to show which of these two sums testator meant to give, thus permitting direct evidence of his intention.<sup>26</sup>

Where the description of the beneficiary is ambiguous, the court allows considerable latitude in the admission of extrinsic evidence to identify such beneficiary.<sup>27</sup> Thus where testator devised property to the "sisters of my late friend A," and A, at the time of the execution of the will, was alive, it was held that evidence was admissible to show that in former wills bequests, evidently to the same persons, were made, describing

<sup>24</sup> See Sec. 487.

<sup>25</sup> *Hartwig v. Schiefer*, 147 Ind. 64, affirming 42 N. E. 471.

<sup>26</sup> *Schlottman v. Hoffman*, 73 Miss. 188.

*In re Waller*, 68 L. J. Ch. (N. S.) 107; *Wilson v. Stephens*, 59 Kan. 771.



them as the sisters of A's father.<sup>28</sup> So a bequest was made to certain daughters "of my old friend A B." A B was unmarried, was a Catholic priest and never had any illegitimate children. It was held admissible to show that another friend of testator's had the same family name as A B but a different Christian name, and had daughters.<sup>29</sup>

In another will testator devised property to his "nephew A"; testator had two nephews of that name, one a legitimate child and the other illegitimate. In the same will A had referred to two other illegitimate relatives as his nephew and neice. It was held that extrinsic evidence was admissible to show which of the two nephews of the same name was intended.<sup>30</sup>

The commonest form of misnomer or misdescription of a beneficiary is found where testator attempts to make a devise or bequest in favor of a corporation, generally a church or charitable institution. In such cases, where either the name or the description given in the will corresponds in part to the name or description of any existing corporation, extrinsic evidence of the relation of testator to such corporation is admissible as tending to show his intention to devise or bequeath property to such corporation.<sup>31</sup> Thus where no corporation existed of the name given in the will, but there were two corporations of similar names, evidence was admissible to show testator's knowl-

<sup>28</sup> *In re Waller*, 68 L. J. Ch. (N. S.) 107, affirmed in part and reversed in part, 68 L. J. Ch. (N. S.) 526.

<sup>29</sup> *In re Waller*, 68 L. J. Ch. (N. S.) 526.

<sup>30</sup> *In re Ashton* (1892), P. 83. (In another English case, however, testator devised property to his "niece A." He had no niece, but his wife had a legitimate grand-niece and an illegitimate grand-niece each named A; it was held, that the legal presumption in favor of the legitimate grand-niece could not be contradicted by extrinsic evidence to show that testator intended to devise to the illegitimate grand-niece.

*In re Fish* (C. A.) (1894), 2 Ch. 83. In this case, as distinguished from the preceding, testator had not, in his will, recognized any of his illegitimate relatives as his own relatives in specific terms.)

<sup>31</sup> *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472; *Faulkner v. The National Sailors' Home*, 155 Mass. 458; *Tilley v. Ellis*, 119 N. C. 233; *Keith v. Scales*, 124 N. C. 497; *Smith v. Kimball*, 62 N. H. 606; *Trustees v. Guthrie*, 86 Va. 125; 6 L. R. A. 321; *Fifield v. Van Wyck*, 94 Va. 557; 27 S. E. 446; *Ross v. Kiger*, 42 W. Va. 402.

edge of, and interest in, one of such corporations, which was being organized at the time he made his will, although it was not incorporated.<sup>32</sup>

Where a gift was made to the "New Jerusalem Church (Swedenborgian)" and the evidence disclosed that there was a general corporation known as "The General Convention of the New Jerusalem Church in the United States of America," and a like voluntary association known as the "New Jerusalem Church," it was held admissible to show that testator knew of the voluntary association and had contributed to it, but did not know of the existence of the corporation.<sup>33</sup> So where testator devised to the "Methodist Episcopal Church" and the evidence disclosed that there were two branches under similar names, neither of them bearing the exact name given in the will, it was held admissible as aiding in discovering testator's intention to show that one of these branches had an organization and church building in testator's neighborhood and the other did not.<sup>34</sup> So where testator made a bequest to the "Methodist Episcopal Church School situated in A," and the evidence disclosed that there was no school in that place of that name, it was held admissible to show by extrinsic evidence that there was a school at that place of a different name, but controlled by that church, and that the testator intended such school should be the beneficiary.<sup>35</sup>

It may be laid down as a general proposition, supported by the substantially unanimous opinion of the courts, that where the name of the beneficiary corporation, as given in the will, does not correspond to the name of any corporation in existence, it is always admissible to show testator's acquaintance with,

<sup>32</sup> *Faulkner v. The National Sailors' Home*, 155 Mass. 458.

"Where the name used does not designate with precision any corporation, but when the circumstances come to be proved so many of them concur to indicate that a particular one was intended, and no similar conclusive circumstances appear to distinguish and identify

any other, the one thus shown to be intended will take." *Dunham v. Averill*, 45 Conn. 86, quoted in *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472.

<sup>33</sup> *Fifield v. Van Wyck*, 94 Va. 557; 27 S. E. 446.

<sup>34</sup> *Tilley v. Ellis*, 119 N. C. 233.

<sup>35</sup> *Ross v. Kiger*, 42 W. Va. 492.

and interest in, an existing corporation or institution which corresponds in some respects, either in name or description, to that spoken of in the will.<sup>36</sup>

In some cases the courts have gone even farther than merely admitting evidence of the surrounding circumstances, and have admitted direct evidence of testator's intention to show that a given corporation or institution was intended by him to take under the will where the name of such corporation is given in the will so erroneously as not to apply to any existing institution. While the admission of such evidence goes to the very limit of the rules controlling the admissibility of extrinsic evidence, it still seems to be a well recognized rule.<sup>37</sup> Thus testator made a devise to the "Meredith Institution, located at Meredith New Hampshire," and there was no institution of that name. The devise was claimed by the Kimball Academy, which was situated at Meriden, New Hampshire. It was held that in order to determine testator's intention, evidence might be introduced of his intention direct by showing testator's statement of the motives that induced him to make such a devise on account of his relationship to one of the teachers of that institution, and thus show that claimant was the institution really intended as the beneficiary.<sup>38</sup>

Where testator devised property to his granddaughter "Lucy May Gordon," and the evidence disclosed that he had no granddaughter of that name, but that he had one named Mary Josephine Gordon, it was held admissible to show by extrinsic

<sup>36</sup> *Gilmore v. Stone*, 120 U. S. 586; *Bristol v. Ontario Orphans' Asylum*, 60 Conn. 472; *Brewster v. McCall*, 15 Conn. 274; *Ayers v. Weed*, 16 Conn. 291; *American Bible Society v. Wetmore*, 17 Conn. 181; *King v. Grant*, 55 Conn. 166; *Hinekley v. Thatcher*, 139 Mass. 477; *Keith v. Scales*, 124 N. C. 497; *Hawkins v. Garland*, 76 Va. 149; *Wilson v. Perry*, 29 W. Va. 169; *Ross v. Kiger*, 42 W. Va. 402.

By means of such evidence and the fact that other gifts in the

will were made to different institutions connected with the Presbyterian Church, a gift to "the Board of Foreign and Home Missions" was held to be a gift to such a board of the Presbyterian Church, although the evidence disclosed that similar boards were connected with other Churches; *Gilmore v. Stone*, 120 U. S. 586.

<sup>37</sup> *Smith v. Kimball*, 62 N. H. 606.

<sup>38</sup> *Smith v. Kimball*, 62 N. H. 606.

evidence that he always called this granddaughter May, and, at the time of the execution of the will, he referred clearly to this granddaughter and declared at that time that she was the beneficiary intended, and that her name was Lucy May Gordon.<sup>39</sup>

It has been said that where the evidence is clear, equity may correct a description of land contained in a will.<sup>40</sup> An examination of this case, however, shows that by "correction" the court simply meant that by the admission of extrinsic evidence they would allow the property devised to be identified, and that they expressly repudiated the idea of reframing the will as if it were a deed or a contract.<sup>41</sup>

Where testator devised the southeast quarter of Section 14, Township 98, Range 17, and the evidence disclosed that he did not own that tract of land, it was held admissible to show exactly what land he owned. The evidence in this case disclosed that all the real estate he owned was specifically devised except the southwest quarter of Section 14, Township 98, Range 17; the court held that in view of such evidence they might reject the erroneous part of the description, viz., that the block was the southeast quarter, and might construe in the will as passing the southwest quarter.<sup>42</sup> So testator devised "the tract of land on which I now reside," and gave the boundaries of such tract. The evidence disclosed that the description of the boundaries was erroneous, since it was described as reaching to the public road, which it did not reach by one-fourth of a mile. It was held that extrinsic evidence was admissible to show what testator regarded and treated in his lifetime as being the tract upon which he resided, and by means of such evidence to correct the description by

<sup>39</sup> *Gordon v. Burris*, 141 Mo. 602, citing and following *Riggs v. Myers*, 20 Mo. 239; *Bradley v. Rees*, 113 Ill. 327.

<sup>40</sup> *Thomson v. Thomson*, 115 Mo. 56.

<sup>41</sup> *Thomson v. Thomson*, 115 Mo.

56, citing on this point *Goode v. Goode*, 22 Mo. 518. Extrinsic evidence admitted in this case was of the sort held by the weight of authority to be admissible. See cases cited in this section generally.

<sup>42</sup> *Eckford v. Eckford*, 91 Io. 54.

a boundary so as to insert one more side in the tract, which was irregular in shape, so as to bring the tract to the public road.<sup>43</sup>

**§820. Admissibility of evidence where description is not ambiguous.**

Before it is possible for a court to say that a description either of a beneficiary or of property given by will is not ambiguous, it is necessary to admit evidence to identify such beneficiary or such property.<sup>44</sup> If such evidence discloses that there is such person or such piece of property, as the case may be, which corresponds to the name or description given in the will, the will is said to be not ambiguous. In such cases the attempt is often made, even by evidence of the surrounding facts and circumstances, or by a direct evidence of testator's intention, to show that he did not mean what the words employed in the will mean when tested by the ordinary rules of construction, and when applied to the surrounding facts. To uphold such attempt would be, of course, to recognize a will the most important part of which would be oral. This would not only violate all ordinary rules of evidence, but would also ignore the statute of wills. Accordingly, where the language of the will has a definite meaning, as interpreted by the rules of construction, and applies, without ambiguity, to the beneficiary and property in existence, extrinsic evidence is not admissible to contradict testator's intention. This applies equally to evidence of the surrounding facts and circumstances and to direct evidence of the intention, with this one distinction between them, that evidence of the surrounding facts and circumstances is likely to be introduced of necessity in deter-

<sup>43</sup> Thomson v. Thomson, 115 Mo. 56. (In this case some difficulty was found in identifying the tract, since testator owned a great amount of land immediately adjoining. The evidence relied upon to determine

what tract was intended was chiefly testator's conduct in fencing such tract off from the rest of his land, and in generally recognizing it as the home tract.)

<sup>44</sup> See Sec. 817.

mining whether the language of the will does, in fact, apply to the actual beneficiary and property.<sup>45</sup>

Where the evidence offered is that of testator's intention direct as shown by his declarations, instructions to the scrivener who drew the will, and the like, such evidence is clearly inadmissible to contradict the will.<sup>46</sup> Thus where testator devised property to certain specified nephews and nieces, it was held that his intention to exclude other nephews and nieces from this gift could not be contradicted by testator's written declaration in a letter which tended to show that he meant to provide especially for those nephews and nieces.<sup>47</sup> So where a devise is made to a person who is named and described in the will, and there is a person in existence of such name corresponding to such description, the court can not receive evidence tending to show that testator intended that the gift should pass to a person of a different name or a different description.<sup>48</sup>

<sup>45</sup> *Hatch v. Ferguson*, 57 Fed. 966; *Young's Estate*, 123 Cal. 337; *Bishop v. Howarth*, 59 Conn. 455; *Jackson v. Alsop*, 67 Conn. 249; *Avery v. Chappell*, 6 Conn. 270; *Spencer v. Higgins*, 22 Conn. 521; *Taubenhan v. Dunz*, 125 Ill. 524; *Hayward v. Loper*, 147 Ill. 41, affirming 49 Ill. App. 53; *Frick v. Frick*, 82 Md. 218; *Kimball v. Story*, 108 Mass. 382; *In re Denfield*, 156 Mass. 265; *Forbes v. Darling*, 94 Mich. 621; *Mersman v. Mersman*, 136 Mo. 244; *Chamblee v. Broughton*, 120 N. C. 170; *Willard's Estate*, 68 Pa. St. 327; *Iddings v. Iddings*, 68 Pa. St. 327; *Orr v. Orr*, 7 S. & R. 111; *Clarke v. Clarke*, 46 S. C. 230.

"If the effect or purpose of parol evidence is to introduce into a will matter which it does not contain, so as to constitute it a part of the will, to give to the will in itself considered, operative elements, language or provisions which were not in it before, then such evidence is incompetent in a court whose sole

function is to construe wills. Such evidence is very different from that which is offered for the purpose of affording a light by which what is in the will may be read, understood, and applied, which is proper." *Rosborough v. Hemphill*, 5 Rich. Eq. 95, quoted in *Clarke v. Clarke*, 46 S. Car. 230.

<sup>46</sup> *Young's Estate*, 123 Cal. 337; *Bishop v. Howarth*, 59 Conn. 455; *In re Denfield*, 156 Mass. 265; *Frick v. Frick*, 82 Md. 218; *Forbes v. Darling*, 94 Mich. 621; *Mersman v. Mersman*, 136 Mo. 244; *Best v. Hammond*, 5 P. F. Smith, 409; *Kelley v. Kelley*, 1 Casey, 460; *Asay v. Hoover*, 5 Barr. 21; *Iddings v. Iddings*, 7 S. & R. 111; *Orr v. Orr*, 34 S. C. 275.

<sup>47</sup> *Wildberger v. Cheek*, 94 Va. 517; 27 S. E. 441.

<sup>48</sup> *Rapp v. Reehling*, 122 Ind. 255; *Sauer v. Mollinger*, 138 Pa. St. 338; *Root's Estate*, 187 Pa. St. 118; 40 Atl. 1818.

In *Sauer v. Mollinger*, 138 Pa. St. 338, the court said in speaking

Where testator directed in his will that certain property should be "equally divided between the children of my deceased son J and the children of my daughter E," and the law in that jurisdiction was established that such a gift was a gift *per capita* to all the children, it was held that extrinsic evidence was inadmissible to show that testator intended that the children of J should share one-half of the property devised between them, and the children of E the other half.<sup>49</sup> So where a will is clear upon its face, evidence of unfriendly relations between testator and a beneficiary named by the will is not admissible to show the intention of the testator to exclude such beneficiary.<sup>50</sup> And where, on the other hand, a child is omitted from the will, and the local statute provides that, unless such omission is intentional, such child shall take as if testator had died intestate, extrinsic evidence that such omission was intentional is, ordinarily, inadmissible.<sup>51</sup>

Where property disposed of by will is described with sufficient accuracy and it applies to the property of testator, evidence of testator's intention is inadmissible to contradict the provisions of the will and to show that other property was intended by testator.<sup>52</sup> Thus it was held inadmissible to show

of the proposition to change the name of the beneficiary by direct evidence of testator's instructions to the scrivener, showing that the scrivener had made a mistake in drafting the will, "It would be a heroic mode of construing a will." So in *Root's Estate*, 187 Pa. St. 118; 40 Atl. 1818, the will contained a devise, "to my nephew A." It was held inadmissible to show, by extrinsic evidence, of testator's intention that he meant a nephew of his wife's who had the same name.

<sup>49</sup> *Senger v. Senger*, 81 Va. 687.

<sup>50</sup> *Stratton v. Morgan*, 112 Cal. 513; *McQueen v. Lilly*, 131 Mo. 9.

<sup>51</sup> *Salmon's Estate*, 107 Cal. 614; 48 Am. St. Rep. 164; *In re Stevens*, 83 Cal. 322; 17 Am. St. Rep.

252; *Garraud's Estate*, 35 Cal. 336; *Burns v. Allen*, 93 Tenn. 149.

In some states, however, the relation between the testator and his children, their feeling for each other, relative financial standing, and the like, have been held to be admissible. *Stebbin's Estate*, 94 Mich. 304; 34 Am. St. Rep. 345. See Sec. 292.

Thus a devise to testator's wife was made for life, remainder to her "heirs." It was held inadmissible to show by extrinsic evidence that by the "heirs" of his wife, testator intended his own children. *Bower v. Bower*, 5 Wash. 225.

<sup>52</sup> *Paton v. Ormerod* (1892), P. 247; *Golder v. Chandler*, 87 Me. 63; *Ehrman v. Hoskins*, 67 Miss. 192; 19 Am. St. Rep. 297; *Jones v. Quattlebaum*, 31 S. C. 606.

whether testator's intention was to devise a specific tract of land or a certain number of acres out of such tract, that being a matter to be determined from the face of the will.<sup>53</sup>

Where a devise of land described a specific tract correctly, except the starting point, it was held inadmissible by extrinsic evidence to show that testator intended to devise a different tract of land to which the description did not apply at all.<sup>54</sup> Thus the evidence of the scrivener that testator ordered him to draw the will so as to pass a fee, and that he thought in drafting the will that he was passing a fee, is inadmissible.<sup>55</sup> So it is inadmissible to show by the surrounding facts that testator intended to create a spendthrift trust in property devised instead of the absolute gift which was conveyed by the will.<sup>56</sup>

Where the will as drawn would not convey property over which testator had a power of disposition, extrinsic evidence of the condition of testator's property is inadmissible to show an intention to execute the power.<sup>57</sup> So where a will, as drawn, has the effect, under the law, of passing property over which testator has a power of disposition by will, extrinsic evidence is inadmissible to show the intention of testator not to pass such property.<sup>58</sup> So evidence is inadmissible to show

<sup>53</sup> *Jones v. Quattlebaum*, 31 S. C. 606. (But in this case it was said that if the description had been such as to make it uncertain which tract was referred to, evidence would have been admissible to identify the tract. However, there is no doubt as to the identity of the tract, the only question being whether the devise was of the entire tract or of a certain number of acres out of it.)

<sup>54</sup> *Ehrman v. Hoskins*, 67 Miss. 192, 19 Am. St. Rep. 297.

<sup>55</sup> *Defreese v. Lake*, 109 Mich. 415, citing and following *Fraser v. Chene*, 2 Mich. 81; *Kinney v. Kinney*, 34 Mich. 250; *Waldron v. Waldron*, 45 Mich. 350; *Forbes v. Darling*, 94 Mich. 621.

<sup>56</sup> *Kingman v. Winchell* (Mo.) 20 S. W. 296.

<sup>57</sup> *In re Huddleston* (1894), 3 Ch. 595; 8 Reps. 462; (the gift in this case was not specific but general. This question is largely affected by local statutes which modify common law rules on the subject of what is an execution of a power.) See Sec. 696.

<sup>58</sup> *Emery v. Haven*, 67 N. H. 503; 35 Atl. 940. In this case and after the will was executed, the testatrix requested the legatee to sign a written acknowledgement to the effect that the property included under the power should not pass by the will; it was held that this evidence was inadmissible to effect the legal construction of the will.



the intention of a testatrix to convert all real property into money and remove them to the state of her domicile so that her will may be construed by the law of such state, and in case of intestacy that her property may be distributed in accordance with the law of such state.<sup>59</sup>

Where a testator provided in his will that the beneficiaries should account for advances made to them, extrinsic evidence is inadmissible to show that he intended one of the beneficiaries to account for a loan made by testator to the husband of such beneficiary;<sup>60</sup> and extrinsic evidence is inadmissible to show that testator intended an instrument purporting to be his "last will" to operate only as a codicil, where from its provisions it could operate as a will.<sup>61</sup>

### §821. Admissibility of evidence where description is insufficient.

A difficult question arises where the description of the beneficiary or the property disposed of is not merely ambiguous or incomplete, but is so defective that it is impossible to identify the person or property without direct evidence of testator's intention. In some cases the description is not merely defective but entirely lacking. Under these circumstances the courts are asked to admit extrinsic evidence of testator's intention to show what property he meant to dispose of or to what beneficiary he meant it to pass. The rule established by the weight of authority, however, is that extrinsic evidence in such cases is entirely inadmissible. If it were admissible, the will would not be all in writing, but would be part oral.<sup>62</sup>

In jurisdictions where an intention to charge legacies upon the realty must be expressed in the will, and can not be inferred from the fact that testator knows that unless such charge is made, the legacies must fail, extrinsic evidence is admissible to show the condition of testator's personal estate, at the time of the execution of the will, and to show that he must be aware that such personal estate

will be insufficient to pay the debts and leave sufficient for the legacies. *Wentworth v. Read*, 166 Ill. 139; 61 Ill. App. 539; *McGough v. Hughes*, 18 R. I. 768; 30 Atl. 851.

<sup>59</sup> *Clarke v. Clarke*, 46 S. C. 230.

<sup>60</sup> *Erwin v. Smith*, 95 Ga. 699.

<sup>61</sup> *Mason v. McLean*, 6 Wash. 31.

<sup>62</sup> *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29.

Thus where testator created a trust, but did not name or describe the beneficiary, it was held that extrinsic evidence was inadmissible to show whom he intended the beneficiaries to be.<sup>63</sup>

**§822. Rule where admissible extrinsic evidence does not explain will.**

It sometimes happens that the extrinsic evidence admissible throws no light upon the construction of the will. In this case the question is hardly one of admissibility of the evidence, since it is supposed, by the very statement, to be of itself admissible, and its weight and value can not be determined until it is introduced in evidence. In such a case the courts resort to the only available course, and, while not formally excluding such evidence, since it is immaterial, ignore it and determine the meaning of the will, if possible, from the will itself.<sup>64</sup>

If, after the admission of all evidence which the law allows to be admitted, the court is unable from the face of the will and from the consideration of such evidence to determine testator's intention, the court will be compelled to declare the will, either in whole or in part, as void and unenforceable for uncertainty.

**§823. Patent and latent ambiguities.**

Very ancient and respectable authority has laid down as a proposition controlling the admissibility of extrinsic evidence in aiding the construction of every written instrument, that a distinction is to be made between patent and latent ambiguities.<sup>65</sup> A patent ambiguity is defined as one which is apparent upon the face of the instrument, as where in wills the same tract is disposed of in different clauses to different individuals.<sup>66</sup> A latent ambiguity is defined as one which is not discoverable until extrinsic evidence is introduced to identify the

<sup>63</sup> *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29.

<sup>64</sup> *Leffingwell v. Bently*, 74 Ill. App. 292.

<sup>65</sup> Bacon's Maxims, Rule 23.

<sup>66</sup> Bacon's Maxims, Rule 23.

beneficiaries or the property disposed of by will, when it is developed by such evidence, either that the description in the will is defective, or that it applies equally to two or more persons or things. This distinction has been repeatedly recognized by the courts, and finds expression in the language of many modern decisions.<sup>67</sup>

This form of stating the law of evidence is, to say the least, unfortunate. An examination of the adjudicated cases will show that even the courts which insist most strenuously upon the distinction admit evidence of the surrounding facts and circumstances which tend to put the court in the position of the testator. Indeed, from the nature of the case, no court can be safe, except in the most extreme and glaring cases, in holding that an apparent inconsistency upon the face of the will is really an ambiguity before it has heard extrinsic evidence of these surrounding facts and circumstances. It may easily happen that what appears to be, at first glance, an ambiguity is seen to be a disposition thoroughly consistent and harmonious when the court is once in the position of the testator. On the other hand, the courts, which say in general language that extrinsic evidence is admissible to explain an apparent ambiguity, recognize in actual practice a sharp distinction between the extrinsic evidence of the surrounding facts and circumstances, which they admit very freely, and evidence of testator's intention direct, which they admit very sparingly. Accordingly, while admitting that many excellent authorities have discussed the law of extrinsic evidence in construction upon the basis of the distinction between patent and latent ambiguities, it undoubtedly would be a step in ad-

<sup>67</sup> "Nor is there any principle better settled than that an apparent ambiguity in any written instrument is open to explanation and removable by parol evidence."

Smith v. Kimball, 62 N. H. 606, citing and following Society v. Hatch 48 N. H. 393; Bartlett v. Remington, 59 N. H. 364; Tilton v. Society, 60 N. H. 377.

"At most this was an apparent ambiguity and explainable by parol evidence." Keith v. Scales, 124 N. C. 497; to the same effect are Bristol v. Ontario Orphan Asylum, 60 Conn. 472; Simmons v. Allinson, 118 N. C. 763; Asheville v. Aston, 92 N. C. 578; Ryan v. Martin, 91 N. C. 464; Tilley v. Ellis, 119 N. C. 233.

vance in the development of our law to discard the distinction entirely. No distinction or classification, whether old or new, which cuts across the actual distinctions which courts are forced to make in order to do justice between litigants, should be either accepted or retained. That the distinction is not founded upon sound principle can be seen from the fact that even the courts which have most frequently invoked it, regularly proceed, in deciding cases, to so explain the distinction between the patent and latent ambiguities as to eliminate it practically from the discussion, and instead use the distinction between evidence of testator's intention direct and evidence of the surrounding facts and circumstances as the fundamental distinction to be observed.



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